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Attacks on Public-Sector Bargaining as Attacks on Employee Voice: A (Partial) Defence of the Wagner Act Model

Joseph Slater

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Attacks on Public-Sector Bargaining as Attacks on Employee Voice: A (Partial) Defence of the Wagner Act Model

Abstract

The attacks on public-sector union rights in the United States that began in 2011 are one of the most important developments in labour law in recent memory. These events shed light on employee voice issues, and on the continuing viability of the “Wagner Act” model. While declining union density rates in the private sector have prompted some to question this model, high-density rates in the public sector show that unions can flourish under it. This article gives an overview of public-sector unions in the US and summarizes the recent attacks on their rights. It then addresses rulings in both Missouri and Canada that found constitutional rights to collective bargaining, decisions that leave those rights intriguingly undefined. It concludes that advocates of employee voice should understand that, in the current political climate, those unsympathetic to employee voice will have significant clout in developing alternatives to the Wagner Act model.

Keywords

Labor unions; Public service employment; Collective bargaining; United States

Attacks on Public-Sector Bargaining as Attacks on Employee Voice: A (Partial) Defence of the Wagner Act Model

JOSEPH SLATER*

The attacks on public-sector union rights in the United States that began in 2011 are one of the most important developments in labour law in recent memory. These events shed light on employee voice issues, and on the continuing viability of the “Wagner Act” model. While declining union density rates in the private sector have prompted some to question this model, high-density rates in the public sector show that unions can flourish under it. This article gives an overview of public-sector unions in the US and summarizes the recent attacks on their rights. It then addresses rulings in both Missouri and Canada that found constitutional rights to collective bargaining, decisions that leave those rights intriguingly undefined. It concludes that advocates of employee voice should understand that, in the current political climate, those unsympathetic to employee voice will have significant clout in developing alternatives to the Wagner Act model.

L'érosion des droits syndicaux du secteur public des États-Unis, qui a débuté en 2011, constitue de mémoire récente l'une des principales transformations du droit du travail. Les événements qui en ont découlé ont mis en lumière l'affaiblissement, pour les employés, des moyens de se faire entendre et mis en doute la viabilité du modèle de la « Wagner Act ». Alors que le déclin du taux de syndicalisation du secteur privé en porte plusieurs à douter de ce modèle, la forte syndicalisation du secteur public démontre qu'il permet aux syndicats de s'épanouir. Cet article donne un aperçu de la situation des syndicats du secteur public aux États-Unis et résume les récentes attaques à l'encontre de leurs droits. Il se penche ensuite sur des

* Eugene N Balk Professor of Law and Values, University of Toledo College of Law. An earlier version of this article was originally presented at the Voices At Work North American Workshop (16-17 March 2012), hosted at Osgoode Hall Law School, York University, Toronto and funded by the Leverhulme Trust, the Centre for Labour Management Relations at Ryerson University, and Osgoode Hall Law School. The author would like to thank the organizers of the Voices at Work conference in Toronto for inviting me to be part of a wonderful and informative project, especially Sara Slinn and Eric Tucker for managing the publication process, the outside reviewers who gave me many useful comments, and Chris Sawan for his work as a research assistant.

jugements qui, au Missouri et au Canada, ont conclu qu'il existe un droit constitutionnel à la négociation collective, décisions qui curieusement omettent de définir ces droits. Il conclut que les défenseurs du droit d'expression des employés devraient comprendre que, dans le climat politique actuel, les opposants au droit d'expression des employés disposeront d'une influence considérable pour trouver des solutions de rechange au modèle de la Wagner Act.

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THE ATTACKS ON PUBLIC-SECTOR collective bargaining rights in the United States that began in early 2011 have arguably been some of the most important developments in labour law in recent memory. While the most famous and radical moves took place in Wisconsin and Ohio, over a dozen states have enacted significant restrictions on the rights of government employees and their unions.¹ This is significant both because public-sector workers now comprise more than half the total number of union members in the United States² and because of the broader political implications of “defunding” and otherwise crippling a major

1. See Joseph E Slater, “Public-Sector Labor in the Age of Obama” (2012) 87:1 Ind LJ 189 at 203-12 [Slater, “Public-Sector Labor”]. See Part III, below, for an updated list of recent laws restricting public-sector collective bargaining.

2. In 2011, 7.6 million public employees belonged to a union; the private sector figure was 7.2 million. Bureau of Labor Statistics, News Release, USDL-12-0094, “Union Members Summary” (27 January 2012), online: United States Department of Labor <<http://www.bls.gov/news.release/union2.nr0.htm>> [Union Members Summary].

constituent of the Democratic Party.³ While the attacks have prompted some backlash (notably, Ohio rejected its anti-union bill in a voter referendum⁴), states continue to consider anti-union legislation.⁵

Political debates over these laws have focussed on economic arguments: whether public employees are or are not overpaid compared to comparable private-sector employees; the relationship (if any) between collective bargaining rights and state budgets; and union effects on employer efficiency. I have addressed these issues elsewhere, concluding that these arguments in favour of radically reducing collective bargaining rights of public workers are unconvincing.⁶ For example, a careful review of all the relevant literature reveals that the majority of studies have found that public-sector workers are *not* overpaid compared to comparable private sector workers.⁷

Within academia, arguments have focused on whether the old thesis from Harry Wellington and Ralph Winter's *The Unions and the Cities*⁸ deserves exhuming: that collective bargaining gives public workers too much power through "two bites of the apple" (bargaining and lobbying). Again, I have argued against this position elsewhere.⁹

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3. See Glen M Vogel, "Clinton, Campaigns, and Corporate Expenditures: The Supreme Court's Recent Decision in *Citizen's United* and its Impact on Corporate Political Influence," (2012) 86:1 *St John's L Rev* 183 at 207 ("nine out of ten dollars spent on elections by unions goes to Democrats").
 4. Sabrina Tavernise, "Ohio Turns Back a Law Limiting Unions' Rights" *The New York Times* (9 November 2011) A1, online: <<http://www.nytimes.com/2011/11/09/us/politics/ohio-turns-back-a-law-limiting-unions-rights.html>>.
 5. See Part III, below. For even more recent attempts by state legislatures to limit the ability of unions to collect and use dues money, see Ann C Hodges, "Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment" (2012) 16 *Employee Rts & Employment Pol'y J* 599.
 6. See Joseph E Slater, "The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in Historical and Political Context" (2012) 43:3 *Toledo L Rev* 473 [Slater, "Rise and Fall"]; Slater, "Public-Sector Labor," *supra* note 1; Joseph E Slater, "The Assault on Public-Sector Collective Bargaining: Real Harms and Imaginary Benefits" (2011), online: American Constitutional Society for Law and Policy <http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf>.
 7. For an overview of major pay studies demonstrating this, see Joseph E Slater & Elijah Welenc, "Are Public-Sector Employees 'Overpaid' Relative to Private-Sector Employees? An Overview of the Studies" *Washburn LJ* [forthcoming in 2013].
 8. Harry H Wellington & Ralph K Winter, *The Unions and The Cities* (Washington: Brookings Institution, 1972).
 9. See *e.g.* John O McGinnis & Max Schanzenbach, "The Case Against Public Sector Unions" [2010] *Policy Review* 162, online: Hoover Institution <<http://www.hoover.org/publications/policy-review/article/43266>>. For a rebuttal, see Slater, "Rise and Fall," *supra* note 6.

In these debates, not enough has been said about the importance of employee voice. The public sector can offer interesting insights on this topic.¹⁰ Public-sector labour laws vary widely—notably, but not exclusively, in terms of which types of employees have collective bargaining rights, what subjects unions have a right to negotiate, and how bargaining impasses are resolved.¹¹ Each of these affects the degree to which employees are likely to have effective voice in their work relations. Laws slashing or eliminating collective bargaining rights of public employees will almost certainly diminish such voice significantly. This is an independent reason to oppose such laws.

Additionally, the debate over public-sector unions casts in a different light an issue central to the Voices at Work project¹² and broader debates over the future of labour law: the continuing viability of the “Wagner Act” model, including its use of majority, exclusive representation.¹³ The declining and now shockingly low union density rates in the US private sector have prompted some scholars to question the utility of this model.¹⁴ On the other hand, the successes of public-sector unions—high union density and in some cases political clout—show that unions can flourish under this model. Indeed, it was these very successes that motivated the recent attacks on their rights.

Of course, the private sector and the public sector differ in important ways. In the United States, private-sector labour law is set by two federal statutes, the *National Labor Relations Act* (NLRA)¹⁵ and the *Railway Labor Act*,¹⁶ which

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10. See Joseph E Slater, “Employee Voice: Lessons from the Public Sector” (2011) 94:3 Marq L Rev 917 [Slater, “Employee Voice”].
 11. See generally, Martin H Malin, Ann C Hodges & Joseph E Slater, *Public Sector Employment: Cases and Materials*, 2d ed (St Paul, MN: West, 2011).
 12. For a description of this project, see Alan Bogg & Tonia Novitz, “Investigating ‘Voice’ at Work” (2012) 33:3 Comp Lab LJ 323.
 13. The “Wagner Act” was the original National Labor Relations Act, passed in 1935, before later amendments, now codified at 29 USC §§ 151-69. It was named after its main author and sponsor, Senator Robert Wagner. Under the original Wagner Act and the current NLRA, unions are certified under a “majority, exclusive representative” model: in order to be certified, a union must show that a majority of the relevant group of employees desires the union to represent them, and if certified, the union becomes the exclusive representative for the entire relevant group of employees in matters concerning wages, hours, and working conditions. See *e.g.* NLRA § 9(a).
 14. See *e.g.* Charles J Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, (Ithaca, NY: Cornell University Press, 2005); Catherine Fisk & Xenia Tashlitsky, “Imagine a World Where Employers are Required to Bargain with Minority Unions” (2011) 27 ABA J Lab & Emp L 1.
 15. *National Labor Relations Act*, 29 USC § 151-69 (2012).
 16. *Railway Labor Act*, 45 USC § 151-88 (2012).

permit little local variation.¹⁷ Public-sector law in the United States, on the other hand, is mainly composed of a wide variety of state and local laws. Also, private employers in the United States routinely conduct extensive and aggressive anti-union campaigns that often feature explicitly illegal conduct; this practice is much less common in the public sector.¹⁸ In some cases, the “market” in which public employers and employees function can differ significantly (although with severe public budget cuts, anti-tax movements, and privatization drives, the differences are often not as great as claimed). So, one must be careful in making broad comparisons.

Still, recent events show that rejecting parts of the Wagner Act model does not necessarily improve prospects for unions or worker voice. Indeed, the radical restructuring of many public-sector labour laws was clearly intended to limit worker voice, regardless of how one defines that term.¹⁹ Also, recent events in Canada and Missouri shed light on this issue. In 2007, courts in Canada and the state of Missouri found a constitutional right to some form of collective bargaining.²⁰ As discussed below, in both instances, it remains unclear exactly what type of union rights are guaranteed. Yet in both instances, one can see examples of alternatives to the Wagner Act model that were not designed to facilitate employee voice.

This article first gives an overview of public-sector unions in the United States. It then summarizes the recent wave of attacks on public-sector collective bargaining rights. Next, it discusses these attacks in the context of employee voice. It then addresses developments under the constitutional rulings in Missouri and Canada. It concludes that advocates of employee voice should understand that in the current political climate, those unsympathetic to employee voice will have significant clout in developing alternatives to the Wagner Act model. This understanding should inform legal arguments in actual cases, political activity, and academic theory.

17. The only permitted variation under the NLRA is that states may vote to make union security clauses illegal (the so-called “right-to-work” option) under NLRA §14(b), added by the Taft-Hartley Act of 1947.

18. See Joseph E Slater, “The ‘American Rule’ That Swallows the Exception” (2007) 11 *Employee Rts & Employment Pol’y* J 53 at 90-93 [Slater, “The ‘American Rule’”].

19. For a description of the political context of these laws, see Slater, “Public-Sector Labor,” *supra* note 1 at 192-94. In short, attacks on public workers as over-paid and over-privileged.

20. See Part IV, below.

I. PUBLIC-SECTOR LABOUR UNIONS ARE A CENTRAL PART OF THE US LABOUR MOVEMENT

For decades, public workers in the United States have organized at comparatively high rates: In 2011, 40 per cent of all public employees were unionized.²¹ Combined with declining unionization rates in the private sector, these trends meant that by 2009 public-sector workers had become a majority of all US union members.²²

Notably, this success occurred under laws that, generally speaking, are more restrictive than private-sector labour law. A minority of states do not permit any public employees to bargain, and another minority only permits a few types of public employees to bargain. By the middle of the first decade of the twenty-first century, thirty states and the District of Columbia allowed collective bargaining for all major groups of public employees, twelve states allowed only one to four types of public workers to bargain (most commonly teachers and firefighters), and eight did not allow any public workers to bargain.²³ For public employees who are allowed to bargain, the scope of bargaining is generally narrower—sometimes quite a bit narrower—than in the private sector. The majority of states do not allow any public employee to strike, and while most states that provide collective bargaining rights to public employees allow some form of binding “interest arbitration” to settle contract disputes, some states only allow voluntary arbitration, non-binding arbitration, mediation, or fact-finding.²⁴

Nonetheless, even before the 1960s, when public employees in the United States had no right to bargain collectively, many public employees organized into unions. Some of these unions forged informal agreements with public employers over terms of employment.²⁵ In more recent decades, public employees

21. *Union Members Summary*, *supra* note 2.

22. In 2009, 37.4 per cent of public employees were members of unions, and 41.1 per cent were covered by union contracts. See Bureau of Labor Statistics, News Release “Union Members Summary” (27 January 2012), online: United States Department of Labor <<http://www.bls.gov/news.release/union2.t03.htm>> [*Union Membership Table 3*]. During the same year, 7.9 million public workers and 7.4 million private sector workers were union members. See *Union Members Summary*, *supra* note 2.

23. Richard C Kearney, *Labor Relations in the Public Sector*, 4th ed (Boca Raton, FL: CRC Press, 2009) at 62-64. This counts four states with what is called “meet and confer” provisions as collective bargaining states. “Meet and confer” can be a weaker right than collective bargaining, chiefly in not requiring a duty to bargain in good faith. See Malin, Hodges & Slater, *supra* note 11 at 414-15.

24. Kearney, *supra* note 23 at 233-34, 259-60.

25. See Joseph E Slater, *Public Workers: Government Employee Unions, the Law and the State 1900-1962*, (Ithaca, NY: ILR Press, 2004) [Slater, *Public Workers*].

have continued to unionize in states where they have no statutory right to bargain collectively.²⁶

II. PUBLIC-SECTOR UNIONS AND THE DESIRE FOR EMPLOYEE VOICE

Why this organization when the rights given to unions are comparatively limited? Public employees organize into unions at least in part to exercise employee voice, not merely to bargain wages and job security. Today, for example, federal employees are unionized at a relatively high rate,²⁷ despite the fact that the vast majority of them may not bargain over any part of their compensation (wages or benefits), or a number of other important topics.²⁸ Also, they and other public employees continue to organize even though at least most public workers throughout the country already have “just-cause” discharge protection through civil service statutes.²⁹ Nor do all public-sector unions exercise significant political power; many clearly do not. Thus, it appears that a significant reason that public employees organize into unions is to gain some voice in their day-to-day workplace relations.

The question of what, exactly, “employee voice” means or should mean has been explored in recent years by various scholars. Alan Bogg and Tonia Norvitz gave an excellent overview of the questions and issues involved in defining “employee voice” in their article from the first Voices at Work conference.³⁰ Does, or should, “voice” refer more to economic and related issues at the workplace, or broader social and political objectives? To what extent does the “exclusive representative” model allow effective voice through increased bargaining power, and to what extent does it inhibit competing voices of different workers within a union bargaining unit? If one goal of employee voice is to further democracy and

26. Ann C Hodges, “Lessons From the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum” (2009) 18:3 Cornell J L & Pub Pol 735.

27. In 2011, 31.4 per cent of federal employees were covered by a union contract. *Union Membership Table 3, supra* note 22.

28. Most federal employees are covered by the *Federal Service Labor Management Relations Act* of 1978. See 5 USC § 7101-135 (2012). This statute makes compensation a prohibited topic of bargaining. (*Ibid*), §§ 7102, 7103(14). It also makes security agreements illegal. See SEIU, AFL-CIO, Local 556 & Dep’t of Army, 1 FLRA 562, 564 (2012), which makes the unionization rates in the federal sector even more remarkable.

29. Malin, Hodges & Slater, *supra* note 11 at 134-62.

30. Bogg & Novitz, *supra* note 12.

democratic forms, is it better to encourage employees to act through unions as a constituent group in a system of industrial pluralism, or should we focus instead on internal democracy within unions and the sometimes divergent interests of different groups of workers? Does it matter whether certain types of “voice” are more or less advantageous to employers in bringing efficiency to the enterprise? How do specific legal forms help to further or inhibit employee voice, and how could this, or other aspects of employee voice, be measured?³¹

These are fascinating and important questions, but they need not be resolved in this article. However one defines employee voice, it is clear that the attacks on public-sector collective bargaining rights in the United States were designed to limit it. Proponents of these bills insisted that public-sector unions (and government employees generally) had too much power, both at the workplace and politically. One suspects that the true motivations of many such proponents were largely partisan: Unions tend to support politicians in the Democratic Party, and these laws were promoted almost exclusively by Republican elected officials.³² In any event, the point here is to stress the sad significance of these radical changes designed to gut employee voice, and to sound a warning about adopting new, possibly radical, alternatives in this political climate.

III. ATTACKS ON PUBLIC-SECTOR COLLECTIVE BARGAINING RIGHTS BEGINNING IN 2011

While public-sector labour statutes change much more frequently than do private-sector ones, 2011 was the most significant year in this regard in at least several decades. The changes (or, in the cases of Ohio and Idaho, changes later revoked) that continued into 2012 and beyond are summarized below. In this list, Wisconsin and Ohio are first, because they were the most far-reaching attempts to cripple bargaining rights. The remaining state laws, all still quite significant, are listed in alphabetical order. In all instances, these laws either restricted or eliminated collective bargaining rights of the public employees affected.

The summary is limited to laws on collective bargaining. It does not include laws that cut pension benefits for public workers, although it is worth noting that in 2010 and 2011, forty-one states enacted significant changes to their public-sector pension statutes. The changes in pension laws all resulted in

31. *Ibid.*

32. See *e.g.* Paul M Secunda, “The Wisconsin Public-Sector Labor Dispute of 2011” (2012) 27 ABA J Lab & Emp L 293; Slater, “Rise and Fall,” *supra* note 6; Slater, “Public-Sector Labor,” *supra* note 1 at 192-215.

reduced benefits, reduced coverage, or both. It is also worth noting that in almost all jurisdictions, pension benefits and formulas for public employees are set by a separate statute and are not subject to union negotiations.³³ Also excluded from the summary are laws, passed recently in states that do not permit collective bargaining, limiting or barring payroll deductions for organizations that engage in political activity (a move clearly aimed at unions).³⁴

A. WISCONSIN

Before 2011, Wisconsin had two similar public-sector labour statutes, one covering local and county government employees³⁵ and the other state employees.³⁶ The former was initially enacted in 1959. It was, perhaps ironically, the first state law in the United States permitting public-sector collective bargaining.

The *Budget Repair Bill*, Act 10, signed by Governor Scott Walker in 2011, made huge changes to these laws, although it exempted employees in “protective occupations” (mainly police and fire).³⁷ First, Act 10 eliminates collective bargaining rights entirely for some employees: University of Wisconsin (UW) system employees, employees of the UW Hospitals and Clinics Authority, and certain home care and childcare providers.³⁸ Second, the Act limits the scope of bargaining (what unions are legally entitled to negotiate) to a percentage of total “base wages.”³⁹ Even this sole permissible topic is limited to an increase no greater than the percentage change in the consumer price index. The Act expressly excludes other topics from bargaining, including overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions. No other issues may be negotiated. The Act prohibits collective bargaining on any other topic even if the employer is willing to bargain.⁴⁰

Third, the Act bars interest arbitration for all public employees (again, except for the public safety employees who are generally excluded from the Act’s provisions).⁴¹ Interest arbitration is a method for resolving bargaining impasses and is frequently used in US public-sector labour law. It is meant to substitute for

33. Slater, “Public-Sector Labor,” *supra* note 1 at 194, 197-98.

34. See e.g. 2010 Alabama Act 761; *The Protect Arizona Employees’ Paychecks from Politics Act*, c 251, 2011 Arizona Sessions Laws 251; 2012 North Carolina Session Law 1, c 1.

35. Wis Stat Ann, § 111.70 (2013) [Wis Stat Ann].

36. *Ibid*, § 111.81.

37. Wis Act 10, § 216 (2011) (codified at Wis Stat § 111.70(1)(mm)).

38. *Ibid*, §§ 265, 279, 280.

39. *Ibid*, § 315.

40. *Ibid*, § 169.

41. *Ibid*, § 234.

strikes, which are barred for many government employees, even in the majority of states that permit public-sector collective bargaining. Interest arbitration is usually the final step in a series of statutorily mandated impasse processes (often including mediation and fact-finding). Interest arbitration involves an arbitrator (or sometimes an arbitration panel) issuing a decision that resolves all the issues in a labour contract that were at impasse. The arbitrator uses criteria set out by the relevant public-sector labour statute.⁴² Although the new Wisconsin law does away with interest arbitration, it does not provide a specific replacement procedure to resolve bargaining impasses.

Act 10 also imposes an unprecedented mandatory recertification system that requires every public sector union to face a recertification election every year, whether or not any employee requests one. Under this system, a union is only recertified if 51 per cent of the employees in the collective bargaining unit—not merely those voting—vote for recertification.⁴³ So, for example, if a bargaining unit has 400 members, and the recertification vote is 201 favouring union representation and 100 opposing it, the union will be de-certified (because 201 is less than 51 per cent of 400). The bill also limits the duration of collective bargaining agreements to one year.⁴⁴

The law also makes Wisconsin a “right to work” jurisdiction by making union security clauses in collective bargaining agreements illegal.⁴⁵ Further, the law makes it illegal for an employer to agree to automatic dues deductions, even for employees who wish to pay dues.⁴⁶

Unions have challenged Act 10 in court. While a federal district court held that the recertification and dues check-off provisions were unconstitutional under a combination of the Equal Protection Clause and the Fourteenth Amendment,⁴⁷ the US Court of Appeals for the Seventh Circuit reversed and upheld Act 10 in full.⁴⁸

Still, the Seventh Circuit’s description of the motivations of proponents of Act 10 is noteworthy here. Although not sufficient, in the court’s view, to invalidate the bill on constitutional grounds, the court did note the motive of limiting the voice of unions who supported the Democratic Party. The Court explained:

42. Malin, Hodges & Slater, *supra* note 11 at 615-74.

43. Wis Stat Ann, *supra* note 35, § 111.70(4)(d)(2)(a).

44. *Ibid.*, § 111.70(4)(cm)(8m).

45. See *The Budget Repair Bill*, Wis Act 10, § 219 (2011).

46. *Ibid.*, § 227.

47. *Wisconsin Educ Ass’n Council v Walker*, 824 F Supp (2d) 856, 192 LRRM 3299 (WD Wisc 2012).

48. *Wisconsin Educ Ass’n Council v Walker*, 705 F (3d) 640, 194 LRRM 3110 (7th Cir 2013).

Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions' fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald's statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law. Consequently, Act 10's prohibition on payroll dues deduction does not violate the First Amendment.⁴⁹

B. OHIO

In the early 1980s, Ohio enacted a public-sector labour law applicable to most public employees, which even allows most public workers to strike.⁵⁰ In 2011, Governor John Kasich signed SB-5, a bill designed to alter this law profoundly.⁵¹ But SB-5 never went into effect. Ohio law permits recently enacted legislation to be "put on hold" pending a voter referendum on whether to reject the law, if enough signatures are gathered requesting this. Pursuant to this procedure, SB-5 was put on hold pending a voter referendum in November 2011 and was rejected soundly in that referendum (the vote was approximately 61 per cent to 39 per cent).⁵²

Notably, SB-5 was nearly as radical as Act 10 in Wisconsin. Among other things, SB-5 would have eliminated collective bargaining rights for certain employees, including at least most college and university faculty, lower level supervisors in police and fire departments, and employees of charter schools.⁵³ SB-5 also would have imposed "right to work" rules and barred public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee.⁵⁴ It would also have greatly restricted the scope of bargaining, and made a number of other changes restricting or eliminating union rights.⁵⁵

For employees who were permitted to bargain, SB-5 would have eliminated both the right to strike for those who had that right (all covered employees with the exception of police, fire, and a few other small categories), and the right to binding interest arbitration at impasse for employees who had no right to strike.

49. *Ibid* at para 1.

50. Ohio Rev Code, c 4117.1-4117.24.

51. Am Sub SB 5 (2011), §§ 1-6, 2011 Ohio Laws 1 (repealed 2011) [SB-5].

52. For a more detailed explanation of the provisions of SB-5 and the politics surrounding it, see Slater, "Rise and Fall," *supra* note 6.

53. SB-5, *supra* note 51. See also *ibid*.

54. SB-5, *supra* note 51, § 1.

55. *Ibid*, §§ 1-6.

Instead, the parties would have been left to mediation and fact-finding. If the non-binding mediation and fact-finding did not produce an agreement—and either the employer or a majority of the union could have rejected the fact-finder’s report—then the governing legislative body (often the employer itself), could have chosen the employer’s final offer.⁵⁶

SB-5 added various additional restrictions to the impasse procedure, all favouring the employer. Even within the negotiating and fact-finding process, SB-5 would have required that, in determining the employer’s “ability to pay” (a statutory factor that fact-finders already had to consider under existing law), only the financial status of the public employer at the time of negotiations could be considered; future potential revenue increases from levies and bonds could not.⁵⁷ Also, under SB-5, for certain employers (not the state or state universities), if the legislative body selected the last best offer that cost more, and the Chief Financial Officer of the legislative body did not determine whether sufficient funds existed to cover the contract, the last best offers could have been submitted to the voters.⁵⁸

C. IDAHO

Idaho enacted SB-1108, which limited collective bargaining by teachers to “compensation” (defined, essentially, as wages and benefits, including insurance, leave time, and sick leave).⁵⁹ The law eliminated mandatory fact-finding.⁶⁰ Fact-finding is another process commonly used in US public-sector labour laws to help resolve bargaining impasses, typically after mediation and before interest arbitration. In fact-finding, an individual “fact-finder” (or sometimes a panel) investigates and makes findings regarding facts relevant to the issues at impasse (*e.g.*, regarding the public employer’s budget and resources, and how much comparable public employees are paid in comparable jurisdictions).⁶¹ Under this law, only mediation remained, and even this was limited: If the parties did not reach an agreement, they were permitted, but not required, to enter into mediation.⁶² The law also limited collective bargaining agreements to one year and prohibited “evergreen” clauses.⁶³ Finally, the bill provided that if

56. *Ibid.*, §1.

57. *Ibid.*

58. *Ibid.*

59. Idaho SB 1108 (2011), §17 [Idaho SB-1108].

60. *Ibid.*, § 22.

61. Malin, Hodges & Slater, *supra* note 11 at 614-15.

62. Idaho SB-1108, *supra* note 59, § 20.

63. *Ibid.*, § 22. An “evergreen clause” is a term in a collective bargaining agreement providing

the parties did not reach an agreement by 10 June of each year, the school board would unilaterally set the terms of employment for the coming school year.⁶⁴

Subsequently, though, this law was reversed by a voter referendum, similar to what took place in Ohio. In the November 2012 elections, Idaho voters rejected the changes made by SB-1108 in three ballot proposals.⁶⁵

D. ILLINOIS

In SB-7, Illinois amended its *Educational Labor Relations Act* such that, in the Chicago Public Schools, the length of the school day and school year are permissive, not mandatory, subjects of bargaining.⁶⁶ In other words, public employers need only negotiate about such issues if they wish. They are not obligated to do so, and the union may not strike or invoke any impasse resolution procedures (mediation, fact-finding, or interest arbitration) over such issues.

This law also made minor adjustments to the right to strike for most public education employees, and imposed significant restrictions on Chicago Public Schools employees' right to strike. For schools other than Chicago schools, if the parties have not reached an agreement within forty-five days of the start of the school year, the Illinois Educational Labor Relations Board must invoke mediation.⁶⁷ After fifteen days of mediation, either party is allowed to declare an impasse. Seven days after that, each party must submit its final offer. Seven days later, the offers are made public. No strike is allowed until at least fourteen days after publication of the final offer.

For Chicago schools, if mediation fails to produce an agreement after a reasonable period, either party has a right to fact-finding.⁶⁸ If this does not produce a settlement within seventy-five days, the fact-finder will issue a private report with recommendations. The parties have up to fifteen days to accept or reject the recommendations. If the recommendations are rejected, they are made public. The union may not strike until thirty days after the publication of the recommendations, and even then may strike only if at least 75 per cent of the bargaining unit authorizes the strike.

that when the agreement expires, the terms of the agreement remain in effect until it is renegotiated.

64. *Ibid.*, § 20.

65. See Amy Linn, "Idaho Voters Say No to GOP-Backed School Overhaul, Anti-Union Measures," (2012) 50 GERR 1402 (BNA).

66. Ill SB 7 (2011), § 7.

67. *Ibid.*, § 13(b)(2).

68. *Ibid.*, § 13(b)(2.10).

E. INDIANA

Indiana Senate enrolled Act 575 limits the scope of bargaining for teachers to salary, wages, and certain fringe benefits.⁶⁹ The law explicitly bars negotiation over practically all other subjects, including the school calendar and criteria for teacher evaluation and dismissal.⁷⁰ Even as to wages and benefits, the law forbids contracts that would put a school district in a deficit.⁷¹ While the Act does state that the parties shall discuss issues such as curriculum, textbooks, evaluations, promotions, demotions, student discipline, and class size, it adds explicitly that collective bargaining agreements may not contain any agreements on any of these topics.⁷²

Further, while the statute allows union contracts to have grievance procedures, it eliminates the previous law's authorization of binding arbitration as part of the grievance procedure⁷³ and repeals the provision in the previous law that authorized unions and employers to arbitrate teacher dismissals.⁷⁴ In addition, in 2012, Indiana enacted a "right to work law" (barring all forms of union security clauses) that applies to the public sector.⁷⁵

F. MASSACHUSETTS

Chapter 69 of the Massachusetts *Acts of 2011*⁷⁶ makes it easier for local government employers in Massachusetts to make changes in health insurance. Under the new law, the governing body will list its proposed changes along with estimated cost savings and proof of the savings. It will then notify each bargaining unit and a retiree representative. The retiree representative and the bargaining unit representatives form a public employee committee that will bargain with the employer for up to thirty days. After thirty days, the matter is submitted to a tripartite committee, which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.

69. Ind SB 575 (2011), § 14.

70. *Ibid.*, § 15.

71. *Ibid.*, § 13.

72. *Ibid.*, § 18.

73. *Ibid.*, § 17.

74. *Ibid.*, § 6.

75. Mary Beth Schneider & Chris Sikich, "Indiana Becomes Rust Belt's First Right to Work State" *USA Today* (20 February 2012), online: <<http://www.usatoday.com/news/nation/story/2012-02-01/indiana-right-to-work-bill/52916356/1>>.

76. *An Act Relative to Municipal Health Insurance*, Mass Acts, c 69 (2011).

G. MICHIGAN

Michigan enacted the *Local Government and School District Fiscal Accountability Act, 2011*,⁷⁷ which allows the governor to appoint an “emergency manager” for local governments experiencing a “financial emergency.” The manager can reject, modify, or terminate any terms of contracts with public-sector unions. This law has proven very controversial. Local governments controlled by Democrats protest that the Republican governor, Rick Snyder, is essentially taking over what should rightfully be locally controlled decisions—or extorting concessions by threatening to do so.⁷⁸ In May 2012, a court of appeals in Michigan upheld this Act against a challenge that it violated Michigan’s “open meetings” law.⁷⁹

A separate Michigan law⁸⁰ limited the scope of bargaining for public school employees. Among other things, under this law, educational employers and employees may not bargain over placement of teachers, reductions in force and recalls, performance evaluation systems, the content and implementation of policies regarding employee discharge or discipline, or how performance evaluation is used to determine employee compensation.

In March 2012, Michigan enacted a law providing that union dues for teachers and other public school employees in Michigan may no longer be collected through payroll deductions. The law also requires unions to file independent audits of expenditures for collective bargaining, contract administration, and grievance adjustment with the Michigan Employment Relations Commission, which must publish the audits on its website.⁸¹

Also in March 2012, in a separate bill, Michigan barred organizing by Graduate Assistants at Michigan public universities.⁸² This law passed both Houses of the Michigan legislature on party lines but was challenged in court. In April 2012, a judge in Michigan issued a temporary injunction against this bill (and several others) on grounds relating to the procedure used in the Michigan

77. Mich HB 4214, Mich Act 4 (2011).

78. See *e.g.* Huff Post Emergency Manager (10 June 2012), online: <<http://www.huffingtonpost.com/news/detroit-emergency-manager>>.

79. Rick Pluta, “Court of Appeals Rules that Emergency Manager Process Doesn’t Violate Open Meetings Law” Michigan Radio (22 May 2012), online: <<http://michiganradio.org/post/court-appeals-rules-michigans-emergency-manager-process-doesnt-violate-open-meetings-law>>.

80. Mich HB 4628, Mich Act 103 (2011).

81. Mich HB 4929, Mich Act 53 (2011).

82. Mich HB 4246, Mich Act 45 (2011).

legislature to pass it.⁸³ A week later, a court of appeals stayed the injunction pending an appeal.⁸⁴ The appeal was still pending as of this writing.

Also in April 2012, Michigan passed a law, SB-1018 (PA 76), that blocks home-based caregivers from representation by public-sector unions.⁸⁵ Specifically, the law changes the definition of a public employee to exclude anyone who receives a government subsidy for private employment. It was designed to end dues collection by the Service Employees International Union (SEIU), which since 2006 had been acting as the bargaining representative for home health aides who care for people receiving Medicaid benefits. The Michigan Department of Community Health pays these workers.⁸⁶

Further, in 2012, Michigan passed a “right to work” law, barring the use of union security agreements in both the public and private sectors.⁸⁷

H. NEBRASKA

*Legislative Bill 397*⁸⁸ changed Nebraska’s interest arbitration rules to be more favourable to public employers. In Nebraska, the Commission of Industrial Relations (CIR), not private arbitrators, performs interest arbitration. The new Nebraska law provides detailed criteria for selecting the group of “comparable” communities for interest arbitrations. It also mandates that if the employer

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83. The court objected to a procedural legislative manoeuvre that Michigan House Republicans used to pass over five hundred bills, including the bar on graduate assistant organizing. The bills all provide that they take effect as soon as the governor signs them. State House Democrats sued, claiming that the Republican leadership ignored their requests for votes to delay implementation of the bills, and that this improperly cut off the right of the people to petition for a referendum to stop the law from taking effect. Also, the state constitution states that a roll call “shall” be conducted whenever requested by one-fifth of the House members, but Republicans have repeatedly not recognized roll call motions from the Democrats. Ingham County Circuit Court Judge Clinton Canady granted a temporary injunction blocking implementation of three bills, including GA law. See Chad Livengood & Kim Kozlowski, “Ruling Halts Unionizing Ban for Grad Student Lab Aides” *Detroit News* (3 April 2012), online: <<http://www.detroitnews.com/article/201204402/POLITICS02/204030357>>.
84. Associated Press, “State House Republicans Win Round in Court Over Their Use of ‘Immediate Effect’” *Michigan Radio* (9 April 2012), online: <<http://michiganradio.org/post/state-house-republicans-win-round-court-over-their-use-immediate-effect>>.
85. Mich SB 1018, Mich Act 76 (2012).
86. Nora Macaluso, “Michigan Governor Signs Bill Ending Union Representation for Home Care Givers” (2012) 69 DLR A-10 (BNA).
87. Nora Macaluso, “Bills Speed Through Legislature to Make Michigan a ‘Right-to-Work’ State,” (2012) 50 GERR 1485 (BNA).
88. Neb LB 397 (2011).

pays compensation between 98 per cent and 102 per cent of the average of the comparable communities, then the CIR must leave compensation as it is. If the compensation is below 98 per cent of the average, then the CIR must order it raised to 98 per cent; if it is above 102 per cent, the CIR must order it lowered to 102 per cent. The targets are reduced to 95-100 per cent during periods of recession (defined as two consecutive quarters in which the state's net sales and use taxes, and individual and corporate income tax receipts, are below those of the prior year).

I. NEVADA

Nevada enacted SB-98.⁸⁹ This law reduces the number of public employee supervisors eligible for collective bargaining and eliminates collective bargaining rights for doctors and lawyers.⁹⁰ The law also mandates that labour contracts contain clauses⁹¹ that reopen such contracts during fiscal emergencies. This law applies only to local governments, as state employees in Nevada do not have collective bargaining rights.

J. NEW HAMPSHIRE

New Hampshire enacted SB-1, which eliminates the requirement that the terms of a collective bargaining agreement automatically continue if an impasse is not resolved at time the agreement expires.⁹² It also enacted HB-589,⁹³ which repealed a 2007 state law that provided for mandatory card check recognition (*i.e.*, mandatory union certification when a majority of the employees in a bargaining unit sign cards indicating they want a specific union to represent them). Such a provision was very controversial when the *Employee Free Choice Act* (EFCA) was being debated in Congress; EFCA would have applied mandatory card check recognition to private-sector unions under the NLRA. Less well-known is the fact that a number of states had already adopted mandatory card-check recognition in their public-sector laws (California, Illinois, New Hampshire, New Jersey, New York, Massachusetts, and Oregon).⁹⁴ New Hampshire, however, has now repealed this rule.

89. Nev SB 98 (2011).

90. *Ibid.*, §§ 5-6.

91. *Ibid.*, § 7(2)(w).

92. NH SB 1 (2011).

93. NH HB 589 (2011).

94. Malin, Hodges & Slater, *supra* note 11 at 412.

K. NEW JERSEY

In 2010, New Jersey adopted chapter 105 of the *New Jersey Laws 2010*.⁹⁵ This law capped wage increases at 2 per cent for New Jersey police and firefighter arbitration awards for contracts expiring between 1 January 2011 and 1 April 2014. This cap on base salaries expires on 1 April 2014. Arguably, more importantly, this law placed serious restrictions on interest arbitrators. Arbitrators will now be randomly selected (as opposed to the previous process of mutual selection); arbitrator compensation is limited to \$1,000 per day and \$7,500 per case; arbitrators must issue awards within forty-five days of a request for interest arbitration (the prior law allowed 120 days); and, quite significantly, arbitrators will be penalized \$1,000 per day for failing to issue an award. Also, the arbitrator's award may be appealed to the Public Employment Relations Commission, which must decide the appeal within thirty days.

In 2011, the state suspended bargaining over health care benefits for four years while a new statute, which will control the issue, is phased in.⁹⁶ The new law sets a sliding scale of mandatory employee contributions to health care plans, and it calls for a state committee to design two public-sector health care plans: one for education employees and one for other public employees.

L. OKLAHOMA

In HB-1593,⁹⁷ Oklahoma repealed the *Oklahoma Municipal Employee Collective Bargaining Act*, a 2004 law that had required cities with populations of at least 35,000 to bargain collectively with unions. The repeal leaves the decision of whether or not to bargain with a union to discretion of individual cities. As in Wisconsin, however, this change does not affect police and firefighters, who are covered by a separate statute.

M. TENNESSEE

In the *Professional Educators Collaborative Conferencing Act of 2011*,⁹⁸ Tennessee repealed the *Educational Professional Negotiations Act*, a 1974 law that had authorized collective bargaining for public school teachers. Under the new Act, teachers are permitted only "collaborative conferencing." Teachers will be represented by groups that receive 15 per cent or more of the votes in a confidential poll

95. NJ PL, c 85, § 3 (1977).

96. NJ SB 2937, c 78 (2011).

97. Okla HB 1593 (2011).

98. Tenn Code Ann, c 378, § 49-5-601.

rather than by one particular union.⁹⁹ This is an especially intriguing provision, in that it rejects the exclusive, majority representative Wagner Act model ubiquitous in public- and private-sector labour law in the United States.

Crucially, the bill does not provide for collective bargaining rights, as that term has been traditionally understood. Specifically the law mandates “collaborative conferencing” on issues including salaries, benefits other than retirement benefits, working conditions, grievance procedures, leave, and payroll deductions.¹⁰⁰ However, it also states that the parties are not required to reach an agreement on any of these issues, and adds that if no agreement is reached, the school board will set terms and conditions of employment through school board policy.¹⁰¹ Furthermore, the law specifically prohibits collaborative conferencing on a number of issues including differential pay plans, incentive compensation, expenditure of grants or awards, evaluations, staffing and assignment decisions, and payroll deductions for political activities.¹⁰²

IV. ATTACKS ON PUBLIC-SECTOR EMPLOYEE VOICE AND THE WAGNER ACT MODEL

A. ALTERNATIVES THAT LIMIT EMPLOYEE VOICE

These attacks on public-sector bargaining rights are attempts to cripple employee voice. Such attempts are most obvious when they involve eliminating the right altogether. But employee voice at the workplace is also diminished by drastically limiting the scope of bargaining or permitting the employer to choose its own proposal at impasse. Further, efforts to cripple unions economically through “right to work” laws and bans on dues check-off not only encourage freeriding but are openly and explicitly intended to weaken union voice in the political sphere. These and the other restrictions described above (*e.g.*, the absurd recertification system in Wisconsin) are designed to limit employee voice. Public-sector unions fought long and hard for formal collective bargaining rights precisely because they understood that absent such rights, their posture could be reduced to “collective begging,” as the old, derogatory term put it.¹⁰³

99. *Ibid*, §§ 49-5-605(b)(1), (2), (4).

100. *Ibid*, § 49-5-608(a).

101. *Ibid*, § 49-5-609(d).

102. *Ibid*, § 49-5-608(b).

103. Slater, *Public Workers*, *supra* note 25.

When exploring alternatives to the Wagner Act model, details and specific legal rights matter greatly. For example, in urging a “new governance” approach to workplace law, Cynthia Estlund has stressed that workers need “an effective collective voice in a system of self-regulation—that is, enough power to monitor compliance and to counter firms’ opportunistic impulses.”¹⁰⁴ This voice, I have argued elsewhere, is best expressed by union collective bargaining.¹⁰⁵

Thus, for example, limiting the scope of bargaining to wages only or to wages and some benefits takes away employees’ voice in key aspects of their working lives. Not only do workers have invaluable knowledge about their jobs and how to do them that can benefit the employer, but it also is a basic democratic practice to provide people with some form of control, as a group, over at least some of the rules and conditions of the place where they spend a significant portion of their lives. Reasonable minds may differ on how exactly to provide effective employee input on such issues, but greatly limiting topics of discussion (*e.g.*, in Wisconsin, to wages within a certain range only) does precisely the opposite.

Limiting impasse procedures also limits voice, because it detracts from effective collective bargaining. For example, in Ohio, SB-5 would have taken away the right to strike for those public employees who had it and removed binding interest arbitration for those who could not strike. These procedures would have been replaced by a system that allowed only non-binding mediation and fact-finding, and permitted the employer to select its own proposals unilaterally. Such a system gives the employer little incentive to come to an agreement in the negotiating process. Rather than a vehicle for effective voice, this system more closely resembles the kind of “bargaining” a parent does with a child. Unions would have had no leverage in negotiations, effectively ending their right to engage in meaningful and productive bargaining.¹⁰⁶

104. Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation*, (New Haven: Yale University Press, 2010) at 23.

105. Slate, *Employee Voice*, *supra* note 10.

106. Also, it is not as if interest arbitration generally favours unions over employers. For example, historically, for firefighter and police union negotiations in Ohio that have reached an impasse and required arbitration, arbitrators have sided with employers about half the time and unions the other half. Further, the system works by encouraging the parties to resolve their differences short of arbitration. Only about 2 per cent of all negotiations have gone to arbitration since 1983, the year this law went into effect, because the existence of this mechanism makes both sides take negotiations seriously. Philip Stevens “Benefits of Bargaining: How Public Sector Negotiations Improve Ohio Communities” *Policy Matters Ohio* (15 October 2011), online: <<http://www.policymattersohio.org/BenefitsofBargaining.htm>>.

Those interested in unions and collective bargaining as vehicles for employee voice in the broader society should be especially alarmed at the bans on union security clauses and on dues check-off. Again, these rules were passed explicitly to limit union voice in the political sphere, with proponents claiming that unions are too powerful, both within the workplace and politically.¹⁰⁷ Again, I have responded to these arguments elsewhere.¹⁰⁸ The broader point is that when academics imagine alternatives to the Wagner Act model, we should take into account the very real alternatives that have been created to limit, not enhance, employee voice, in every way.

B. LESSONS ABOUT THE WAGNER ACT MODEL?

As noted above, the Wagner Act model of exclusive majority representation has faced increasing scrutiny and scepticism in recent years as the level of private-sector union density in the United States continued to drop. Granted, focusing on the public sector may risk giving insufficient attention to the dire straits in which private-sector unions have found themselves, thus possibly leading to complacency about the basic structures of US labour law.

Nevertheless, two cautions may still be in order. First, public-sector unions in the United States have flourished using the Wagner Act model. While this does not prove that all unions could, should, or would flourish, it shows that the model is not inconsistent with vibrant, active unions. Second, to the extent that alternatives to this model may arise, those sympathetic to employee voice and robust collective bargaining may well not be the ones designing such alternatives. Thus, as with the recent public-sector laws described above, the alternatives for private-sector unions might well be significantly worse than the status quo. In short, if changes come when unions are relatively weak, it is likely that the goal of the changes will be to weaken unions further, not to revive them.

Take, for example, the Tennessee law for teachers described above. As noted, it does away with exclusive, majority representation, replacing it with a system in which any organization that obtains support of at least 15 per cent of eligible employees will become a representative of those employees. In and of itself, this could be considered an intriguing departure from the Wagner Act model of a collective bargaining representative (and, arguably, a dip into forms of representation featured in some European countries). A further glance at the law shows that it is not collective bargaining designed to facilitate employee voice at all. Rather, it

107. See *e.g.* McGinnis & Schanzenbach, *supra* note 9; Daniel Disalvo, "The Problem with Public Sector Unions" (2010) 5 Nat'l Affairs; Slater, "Public-Sector Labor," *supra* note 1 at 192-93.

108. See generally the sources cited *supra* note 6. See also Slater & Welenc *supra* note 7.

is “collaborative conferencing” about a very narrowly prescribed set of topics on which the employer has full, final, and unilateral authority.

In a coincidence that is serendipitous for the purposes of this article, both Canadian law and a US public-sector law have recently offered cautionary tales along these lines. In 2007, courts in both Missouri and Canada found that employees who did not have a statutory right to engage in collective bargaining nonetheless had a constitutional right to bargain collectively. But what “collective bargaining” means has been contested in both jurisdictions and the promise of these holdings has been undermined by parties who do not wish to promote effective employee voice through collective bargaining.

C. THE MISSOURI CONSTITUTIONAL RIGHT TO COLLECTIVE BARGAINING

In 2007, the Missouri Supreme Court held that public employees have a right under the Missouri state *Constitution* to bargain collectively. Specifically, the court held that a clause added to the state *Constitution* in 1945 stating that, “employees shall have the right to organize and to bargain collectively through representatives of their own choosing” applies to public employees.¹⁰⁹ This reversed a 1947 decision by the Missouri Supreme Court, which had held that this clause did *not* apply to public employees.¹¹⁰ Because Missouri’s state public-sector labour statute excludes significant categories of public employees (*e.g.*, police and teachers), the 2007 decision means that large swaths of public workers in Missouri have a right to bargain collectively only by virtue of the state *Constitution*. The precise nature of that right remains unclear, however. The Court did not explain what exactly this right means, and the state has not passed a statute attempting to enact the right. I have discussed these cases and related issues in greater detail elsewhere.¹¹¹

What is relevant here is that, in the wake of this decision, some Missouri public employers, claiming they are complying with the mandate to permit collective bargaining, have enacted systems that are far removed from traditional understandings of collective bargaining in the United States. These systems do not seem conducive to employee voice. I was involved as a witness in two cases in which unions challenged such systems.

First, in *Springfield Nat’l Educ Ass’n v Sch Dist Of Springfield*,¹¹² the local school board created a system for union recognition that allowed multiple unions

109. *Independence-Nat’l Educ Ass’n v Independence Sch Dist*, 223 SW 3d 131, 181 LRRM 3224 (Mo 2007).

110. *City of Springfield v Clouse*, 356 Mo 1239, 206 SW 2d 539 (Mo 1947).

111. Slater, “Public-Sector Labor,” *supra* note 1 at 225-28.

112. No 0931-CV08322 (Cir Ct Greene County, 2009) [*Springfield*].

to represent the same group of teachers. Under this system, union representation elections would be held in two stages. In the first stage, teachers in a bargaining unit would vote on whether they wished to be represented by a single union, multiple unions, or no unions.¹¹³ The “multiple union” option obviously was contrary to the Wagner Act model, but it also was not what union-friendly advocates of alternatives to this model envision. Unlike the minority union bargaining that Charlie Morris describes in his book *The Blue Eagle*,¹¹⁴ the Springfield system did not just attack the *majority* union requirement. Rather, the Springfield system permitted *non-exclusive* representation. Multiple unions could represent the same employees at the same time, with no explanation of how this would work if the different unions had competing or inconsistent goals or strategies.

The judge in the *Springfield* case permitted this system to go forward. He relied heavily on a dictionary definition of “collective bargaining” that defined that term as “negotiation... between an employer or group of employers on one side and a union or number of unions on the other.”¹¹⁵ I have criticized the legal reasoning in this case elsewhere, and noted that it was not appealed because the affected teachers voted for the “one union representative” model after this decision.¹¹⁶

Most relevant here is that again, this alternative to the Wagner Act model was not designed to facilitate employee voice. Indeed, it seemed fairly clear to me, while watching the testimony at trial, that the employer’s goal in creating this system was to undermine the independent teachers’ union (a union supported by a majority of teachers) by creating a system that could allow a different, minority group (one that was conservative and allied with the employer) an equal claim to representation.

The second Missouri case was *Bayless Educ Ass’n v Bayless Sch Dist*.¹¹⁷ In *Bayless*, the employer—another public school system—attempted to impose a different type of alternative to the Wagner Act model. Specifically, the employees in each school in the district were instructed to select two individual representatives and two alternates from that school. These representatives, plus an additional representative to be selected by the union with the largest employee membership in

113. *Ibid*, slip op at 12.

114. Morris, *supra* note 14.

115. *Springfield*, *supra* note 112, slip op at 12-13.

116. Slater, “Public-Sector Labor,” *supra* note 1 at 226-27.

117. No 09SL-CC01481 (Cir Ct St Louis County, 2010).

the district would then bargain, as a group, with the employer. Again, there was no requirement that the individual members of this group have any particular goals in common, and no explanation of how differences among group members should or could be resolved.¹¹⁸

In *Bayless*, the judge held that this system did not satisfy the constitutional right to bargain collectively, explaining that this system “mandates collaborative bargaining, not collective bargaining” but failing to define either term.¹¹⁹ Again, the relevant point here is that it seems unlikely that the employer created this system to maximize employee voice. Litigation is likely to continue in Missouri, with employers and unions having very different goals when contemplating alternatives to the Wagner Act model and in defining “collective bargaining” generally.

D. THE CANADIAN CONSTITUTIONAL RIGHT TO COLLECTIVE BARGAINING

In 2007, in the *Health Services* case, the Supreme Court of Canada held that the right to freedom of association in the *Canadian Charter of Rights and Freedoms*¹²⁰ “protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.”¹²¹ This case, like the Missouri Supreme Court decision discussed above, extended largely undefined “collective bargaining” rights to workers who previously did not enjoy such rights under existing statutes. Then, in 2011, the highly fractured *Fraser* opinion at least arguably undercut some of the protections *Health Services* seemed to promise.¹²² Experts in Canadian law have discussed both *Health Services* and *Fraser* in detail elsewhere.¹²³ The point here, again, is that alternatives to the Wagner Act model in the real world are being influenced by those not sympathetic to the goal of increasing effective employee voice.

Fraser involved agricultural workers in Ontario, who are excluded from that province’s general labour relations statute. In the Court of Appeal’s decision in *Fraser*, the judge (a former employer-side labour lawyer), explained that:

118. *Ibid.*, slip op at 5.

119. *Ibid.*, slip op at 8.

120. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11 [*Charter*].

121. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at para 35 [*Health Services*].

122. *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser* SCC].

123. See e.g. Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case” (2012) 41 *Indus LJ*; Eric Tucker, “Labour’s Many Constitutions (and Capital’s Too)” (2012) 33 *Comp Lab LJ* 355.

At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) a statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.¹²⁴

However, at least most of the opinions in the Supreme Court *Fraser* decision do not fully embrace the principle that the *Charter* requires all of these features (which are at least key components of the Wagner Act model). The opinion of Chief Justice McLachlin and Justice LeBel stresses, “bargaining activities protected by section 2(d) in the labour relations context include good faith bargaining on important workplace issues.”¹²⁵ But this opinion also rejects the Court of Appeal’s opinion to the extent that it “constitutionalizes a full-blown Wagner system of collective bargaining.”¹²⁶

Meanwhile, Justice Rothstein would have overruled *Health Services*, thus mooted the question of what model of collective bargaining should be used.¹²⁷ Like some critics of public-sector bargaining in the United States, he argued that collective bargaining rights unjustifiably privilege certain organizations (*i.e.*, unions) over others.¹²⁸ Justice Deschamps would not have overturned *Health Services*, but also would not have found a duty to bargain in good faith.¹²⁹ On the other hand, Justice Abella held that the *Charter’s* guarantees encompass not only the duty to bargain in good faith, but also the principle of exclusive, majority representation.¹³⁰

The future contours of the constitutional right to collective bargaining in Canada thus remain somewhat unclear, but advocates for unions have generally not been celebrating *Fraser*. Judy Fudge concludes that the decision “is not surprising, but it is disappointing.”¹³¹ Eric Tucker writes that *Fraser* “seemingly signals a retreat.”¹³² It is beyond the scope of this article (and this author’s expertise) to make specific predictions in this area. Again, though, the point is that the alternatives to the Wagner Act model that are being developed may not lead to greater worker voice,

124. *Fraser v Ontario (Attorney General)*, 2008 ONCA 760, [2008] 92 OR (3d) 481. See also Fudge, *supra* note 123.

125. *Fraser* SCC, *supra* note 122 at 34.

126. *Ibid* at 44-45; Fudge, *supra* note 123 at 19.

127. *Fraser* SCC, *supra* note 122 at 149, 159-65.

128. *Ibid* at 203-18. See also, Fudge, *supra* note 123 at 19.

129. *Fraser* SCC, *supra* note 122, at 300-01; Fudge, *supra* note 123 at 20.

130. *Fraser* SCC, *supra* note 122 at 327, 335; Fudge, *supra* note 123 at 21.

131. Fudge, *supra* note 123 at 27.

132. Tucker, *supra* note 123 at 361.

however that may be defined. Employers, judges, politicians, and others not sympathetic to unions will inevitably have a role in crafting these alternatives.

V. CONCLUSION

All this does not mean that any alternative to the Wagner Act model in the United States (or Canada) is doomed to fail, or even that alternatives are not worth trying. Certainly, not all lessons from the public sector can be mechanically mapped onto the private sector, or vice-versa. But these experiences do provide a caution to those (understandably) searching for alternatives.

The relative success of public-sector unions in the United States is undoubtedly due partly to the relative lack of the aggressive anti-union tactics that have long been a feature of private-sector labour law. Perhaps it is true that the Wagner Act model works well only in the absence of such tactics. But this does not show that alternative models will work in the face of such attacks, or that choosing alternative models will stop such attacks.

Instead, it shows that attempts to reinvent US labour law in a paradigm outside the Wagner Act model should think about what has made public-sector unions in the United States more successful than private-sector unions in recent decades. As to legal rules, I have argued elsewhere that the general default rule of “at-will” employment (under which employees may be fired for any reason not made specifically illegal, or for no reason at all), hurts private-sector unionization attempts in the United States because employees have the burden of proof of showing anti-union motivation in discharges. This burden is often not easy to carry. In contrast, most public employees covered by collective-bargaining laws in the United States are also covered by civil service laws that provide “just-cause” discharge protection, shifting the burden to the employer to show cause for dismissal. This makes it more difficult for an employer to discharge an employee for union-related reasons.¹³³ Also, remedies for employer violations of the NLRA (reinstatement and back pay minus what the employee earned or should have earned) have proven inadequate to deter employer violations of employee and union rights in the private sector.¹³⁴ It is likely that increasing these penalties significantly would help deter such acts.¹³⁵ In short, before giving up on the

133. Slater, “The ‘American Rule,’” *supra* note 18 at 88-93.

134. *Ibid* at 79-82.

135. This was the premise of one of the provisions in US, Bill HR 1409, *Employee Free Choice Act*, 111th Cong, 2009, which Democrats had hopes for early in President Obama’s first term but has thus far failed to pass.

Wagner Act model, advocates might consider simply trying to make the Wagner Act model function as it was designed to function, by reforming private sector labour laws to prevent routine, intentional violation of the NLRA's core provisions by employers. These reforms could include a general just-cause protection rule or significantly stiffer remedies for certain unfair labour practices.

One might object that such reforms are not likely, at least in the short-term. But the *realpolitik* reason this is true should give reformers caution about abandoning the Wagner Act model. Recent experiences in the public sector show that in a time of relative union weakness—and the related ascendancy of an ideology that rejects even basic industrial relations theories of union utility—alternatives may be thrust upon the labour movement that are obviously worse than the Wagner Act model from the perspective of workers and unions. Indeed, in many cases, they are intended to be worse. We are in an era, as Tucker puts it, of “a neoliberal agenda, which sees labour rights as market impeding, that has motivated efforts to put labour rights beyond the reach of ordinary government action.”¹³⁶ Advocates of worker voice, in considering the feasibility of developing new models of employee representation, should take seriously the strength of the opposition.

136. Tucker, *supra* note 123 at 355.

