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American Labor Law as a Model for Australia? Or, Can You Get Here From There?

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This is a commentary on a longer talk, of the same title, that I gave two weeks to the labor historians at Perth. The title itself need defending, on two counts. First, it betrays the typical American hubris—that we should presume to be a model for others, a hubris compounded by the fact that, when it comes to labor law, the U.S. pays no attention to other countries, not even the international conventions to which it is signatory. Moreover, why put forth the U.S. as a model when its legal regime is the most hostile to organized labor of any in the democratic world? The numbers speak for themselves; currently 7.5% of the American private But, of course, in this free-market age, that's one of its charms. It turns out, however, that when other Anglophone countries embrace America's labor-market practices, they don't copy its labor law. The centerpiece of Work Choices, for example—the legislatively-mandated individual employment agreement—is unknown in America. The individual agreement is, of course, our default condition, but it arises strictly from the common law, and the notion that the state might feel compelled, as the Howard government was prior to Work Choices, to assure that workers not be disadvantaged as a result, has no American counterpart. The borrowing comes afterward, when labor parties return to power and try to pick up the pieces, by some variant of enterprise bargaining as a middle way between the bad old ways and the bad new ways. This is true of the UK and New Zealand, and, in its own way, Fair Work

Australia, because two attending concepts of enterprise bargaining—majority rule and bargaining in good faith—come directly from the American law. The question is, do the borrowers know what they're getting? And my answer is, no.

To show you what I mean—how things get lost in translation—let's consider the question of arbitration in enterprise bargaining. In the final negotiations leading up to the Fair Work bill, the Rudd government opposed arbitration, while the Labor's Right faction favored it. And where did they turn for support? You guessed it. So let me explain why the Employee Free Choice Act calls for arbitration. It's there to deal with a pervasive problem when American unions win representation elections and are certified as bargaining agents. Employers then have a duty to bargain—that's where "good faith" comes in—but if they're practitioners of union avoidance—a good American term—they don't go in looking toward an agreement; they go in intending to sabotage the proceedings. They want to force a strike, in which case they bring in replacements and break the union, or drag things out until the workers lose heart and the union dissolves. They succeed nearly half of the time. The arbitration provision is intended to remedy this particular circumstance; it applies only to the first contract.

In the Australian case, I suspect it was a foregone conclusion, given the country's history, that if a fight was made for it, arbitration would be in the final Fair Work bill, although it's now called a "workplace determination," and that it would be a resource generally available, although (so the Rudd government hopes) infrequently used, for the enforcement of good faith bargaining. In the U.S. case, even though applying only to first contracts, arbitration has provoked furious employer opposition, and in the unlikely chance that it actually survives, is certain to be challenged in the courts. Maybe invoking

first-contract arbitration helped, but the Labor faction that invoked it really wasn't talking about the same thing.

So about my title: The answer is no, you can't get here from there. I knew that from the start, of course, and my title was intended really as a kind of provocation. But I did have something in mind. At the time I began thinking about this paper, in late August 2008, the American labor movement was pushing for major labor law reform--the Employee Free Choice Act. Its chances looked pretty good. It had been endorsed by the Democrats, and they were almost certainly soon going to be in charge—White House, both Houses of Congress, the whole works. In Australia, the Rudd government was still formulating the Fair Work bill. So, on labor law reform, both countries seemed more or less in the same place. It seemed an opportune moment to engage in some comparative history, tilted toward the American side, but with reference to Australia, sometimes explicitly, but mostly left to you. I'll break things down into four heads: foundations; modern regimes; the erosion of those regimes; and outcomes.

One couldn't hope for a better example of foundations in play than the experience Australia has just undergone. Work Choices went too far. It insulted cherished values going back to the original Conciliation and Arbitration Act, and turned the country against a Coalition government that it had just re-elected, and at last given control of both Houses of Parliament—too much power, it turned out, for John Howard's own good. There aren't good American words to describe his transgression, so I'm appropriating the words that Julia Gillard used when she introduced the Fair Work bill last November: that Australia was a place that believed in the fair go, in mateship at work, and, ever since the Harvester decision of a century ago, in a living wage—a country like other great capitalistic democracies, "but without their wide social inequalities." I know that some of

you are smiling at my naivete, but everything is relative, and notwithstanding shortcomings you're encountering with Fair Work Australia, I'm willing to take Gillard at her word.

In the U.S., these foundations cannot be traced to a single event like the Arbitration Act, but to the common-law tradition. All Anglo-Saxon countries of course share this legal tradition, including Australia, and at some points, you'll think: we do that here too. But, as with everything else, the common law evolved in different ways, and in America it produced a system of labor law uniquely the creation of the courts, even more so than our common parent Britain, where periodically Parliament intervened to rein in a reactionary bench. In America, unlike any country I am aware of, the state never felt called upon to treat trade unionism as a political issue. The question was whether, as possible conspiracies under common law, they harmed other citizens, and from the very first case in 1806, it was private citizens who were the protagonists, bringing suits into the courts, and through the case law that resulted, by the accretion of precedent upon precedent, making an the American law of trade unionism. It is a remarkable fact that collective bargaining was not subject to legislation in the U.S., with a couple of partial exceptions, until the 1930s

The core principle shaping its development has been best explored by Robert Seinfeld in *The Invention of Free Labor* (1991). By free labor, Seinfeld means specifically the absolute control of a worker over her person. I say "her" because the originating case he cites is *Mary Clark, Woman of Color* (1821), declaring her right to walk away notwithstanding the 20-year indenture she had signed. The break with the past can hardly be overemphasized, not only because of the huge role of indentured servitude in the peopling of America, but also because, even aside from bound labor, employment had

always and everywhere involved some degree of un-freedom. Only much later, did other countries abandon the practice of imprisoning workers for nonperformance of service. So important was the free-labor principle to Americans, that they enshrined the abolition of involuntary servitude, along with slavery, in the 13th Amendment after the Civil War. The 13th amendment is the only place in the U.S. Constitution that bears directly on labor and, as a starting point for shaping a labor regime, stands in stark contrast to the labor power in the Australian Constitution that authorizes Parliament to arbitrate industrial disputes.

Free labor—an unqualified right to walk away--is a wonderful thing, of course, but paradoxical in its effect. As the jurist A.V. Dicey pointed out a century ago, workers have to be free before they can have unions, but unions then impinge on their personal liberty. Dicey called this an insoluble problem, for which every liberty-loving country had to find its own “rough compromise.” In America, just because it was the inventor of free labor, that rough compromise fell at one extreme, heavily privileging individual as against collective rights.

The direct legal effects were actually quite limited because few workers ever sued unions, although employers commonly cited the closed shop when they brought suit against unions. The impact was primarily ideological, giving employers a justification for refusing to engage in collective bargaining: they were protecting the liberty of their workers. This is a powerful, powerful argument in America, and when we get to the final act of this drama, you’ll see how it plays out in today’s battle over the Employee Free Choice Act. The one direct legal effect that free labor did have was via a kind of quid pro quo: if workers had an absolute right to leave, the courts reasoned, the employer had an absolute right to fire them—for any reason, or no reason at all, what became known in America as “at will” employment.

It was not as if Americans couldn't imagine that things might be otherwise. Recent scholarship emphasizes the flow of reform ideas, not only trans-Atlantic, but trans-Pacific. The secret ballot—a thorn, I have to say, in labor's side in the current debate—came from Australia and for a considerable time was known in America as the Australian ballot. In the Progressive era, the pre-World War I years, some reformers advocated the New Zealand/Australian system as a solution to America's industrial conflicts, which were far worse, I dare say, than Australia's. The idea, however, never made much headway, not least because compulsory arbitration was anathema to the labor movement, whose ideological grounding was in voluntary association. Still, great and terrible strikes, when they broke out, created a dynamic very like Australia's, only with a kind of state intervention, more in keeping with the legal foundations I've described. Progressives concluded that the cause of industrial violence was employer anti-unionism. So that's the first thing about our modern labor law. It's aimed at the behavior of employers. Second, the objective to be achieved--what was to be protected--was defined in terms of workers' associational rights. The American Bill of Rights protects freedom of association, of course, but it's a right protected against violation by the state, not against interference by other citizens. The legislation that resulted, the National Labor Relations Act of 1935, in effect expanded this existing right—and the linked right to bargain collectively—against actions by employers and lodges enforcement in a new quasi-judicial agency, the National Labor Relations Board. I want to skip over the complex political process by which this came about and go at once to its essential elements--four in number—and show how, in their pristine 1935 form, they stack up against Fair Work Australia, which of course, since it's only begun to be implemented, also is pristine

First: It became an unfair labor practice—the term for violations of the American law—for an employer to dismiss, discriminate against, or coerce workers for exercising their associational rights. Fair Work Australia has a similar provision, (as indeed did Work Choices), but whereas this Australian protection is embedded in a web of unlawful and unfair provisions, in the American law it stands alone, applying solely to associational activity. In upholding the law, the Supreme Court explicitly stated that in no other respect did the law impinge on at-will employment. It's true that there has recently emerged a case law of implied contracts, but this is easily remedied by having the employee sign a statement acknowledging that employment is on an at-will basis and—I'm quoting this from advice on a employment law firm's website—"that his or her duties, promotion or demotion, salary, relocation and all items regarding work are at the discretion of the employer." The other constraint on at-will employment, of course, comes from the anti-discrimination laws, beginning with the Civil Rights Act of 1964. But unlike Australia, this is not incorporated into and offers far more robust remedies than the labor law. One aim of the Employee Free Choice Act is to align the enforcement of labor rights more closely with the enforcement of civil rights.

Second: Duty to bargain. This provision was in some ways a bigger deal than the right to organize. For one thing, it dealt with the principal cause of industrial conflict in America, which was the refusal of employers to deal with unions, no matter how many members they represented. Duty to bargain was a daring intrusion on the employer's liberty of contract, hence the insistence on all sides that collective bargaining itself remained unchanged, including the right to strike and lockout and additionally, on the employer's part, the right to bring in strike-breakers. This obeisance to liberty of contract helps

explain why American employers feel so empowered to fight first-contract arbitration in the Employee Free Choice Act.

It's true that liberty of contract has narrowed somewhat as the law evolved--for example, the NLRB distinguishes mandatory/non-mandatory bargaining issues, and the right to strike is reduced by the President's power to halt national disputes for 80-day cooling-off periods—but the idea of collective bargaining as a free, voluntary process still exerts a powerful hold in America.

And, like the worker's right to organize, in America law collective bargaining stands alone. There is no modern award underlying it, no requirement about what should be in it, no agency where it is registered and approved. And, at the time the collective-bargaining law was adopted in 1935, virtually no state-provided safety net for workers. So that, far beyond the Australian concept of enterprise agreements, the union contract did—and to a large extent still does--the work of social justice for American workers.

The union contract bears so much weight because, historically, it is a product of labor voluntarism. American unions have always been very aggressive about what goes into the contract because it is the cement that holds the union, as a voluntary association, together. And it's, in part, because the contract bears so much weight that American employers are so resistant to collective bargaining. This is the American context of bargaining in good faith and it bears a far larger load than those words in Fair Work Australia.

The third distinctive feature of the American law could well be bypassed, since it is not at issue in our current debate. But it is pertinent here in Australia, where, as unions lost ground in recent years, scholars began to talk about works councils and shop committees. And Australia has had some experience with nonunion forms of representation ever since the Keating law of 1993. It's an open question how such

nonunion forms of representation will fare under Fair Work Australia. In my opinion, not very well, since Australian unions would have to be very sluggish indeed if they did not become the dominant agency for negotiating enterprise agreements.

In American law, by contrast, there's no open question. Workplace forms of employee representation not created under collective bargaining—another demonstration of its singularity—are unlawful because, in order to function, they require sufficient employer assistance to make them company-dominated under the law's definition. This concept—company domination of a labor organization—has now been appropriated by the UK and New Zealand and probably, by inference in the general no-coercion provision, by Fair Work Australia, but it has a very different resonance in America, because the company-domination prohibition arose out of America's anti-union history.

In itself, this history might be little interest here, except that it explains the final—the fourth--distinguishing feature of the American labor law, which is the process by which it determines whether or not workers want union representation. In the run-up to the 1935 law, before they decided simply to bar company-dominated labor organizations, advocates of the law sought a middle ground with employers, which was to let the employees choose between independent or company unions, really varieties of workers councils being pushed by the employers. That's where the idea of majority rule in the labor law came from, although I doubt that Julia Gillard knows this. So for her and her fellow negotiators, adapting majority rule to Australia's needs seemed easy enough, because the idea itself, once presented, is naturally attractive in a democracy like Australia's.

What Gillard intended was a way of determining whether workers wanted enterprise agreements. But in America, workers are choosing something different--a bargaining

agent. Moreover, once it's the bargaining agent, the union also acquires exclusive rights—it represents every employee in the bargaining unit—and, to take the next step, it's to that union that the employer owes a duty to bargain. The intent was to tame the unionization struggle by substituting state-mandated majority rule—the rule of law if you will--for the raw tests of power that defined America's labor history up to that time.

That completes my survey—the four points of comparison—between the original American law of 1935 and the new Australian law of 2008. Up to this point, I've been engaged in a static comparison—one law set against another. Now, in my concluding comments, I'd like to set things in motion, with this question in mind: how different are the processes of policy change in our two countries? That's a trickier proposition, inherently so, but also because it puts me at a disadvantage, as a novice in all matters Australian. It's much harder to understand how a law came about than to read the law itself. Yet this much I do know. Change in Australia's labor policy takes place in the public realm, accessible to the ordinary citizen and subject to political debate. I daresay any member of this audience could provide me with a pretty coherent narrative of how the country moved from the awards system to the first Accord in 1983, to the Keating government and enterprise bargaining in the early 1990s, to the Coalition victory and the start of individual contracts in 1996, down to the nadir, Work Choices in 2005. If a comparable American audience were given the same task, they couldn't do it because, aside from one moment over half a century ago, there is no political narrative to describe. That's the difference I mean to emphasize, that while one might say that both countries ended up more or less at the same place—the current parlous state of American law as equivalent to Work Choices—the United States got there via a sub-political path, or, to put it more crudely, via policy-making by stealth.

The National Labor Relations Act might be likened to a mini-constitution, which lays out broad principles and procedures—the original law was scarcely ten pages long—and leaves it to the NLRB, subject to review by the federal appellate courts and ultimately the Supreme Court—to fill in the blanks. An enormous case law, starting almost from Day 1, has built up. My out-of-date copy of the handbook that labor lawyers use to keep up on ruling precedents runs to 535 pages and lists 1675 cited or footnoted cases in the index. Let me offer a few examples. In Fair Work Australia there is a provision, like in its predecessor, governing entry of union representatives to company property. The American law makes no such provision, but there is case law, originally giving organizers access as needed, then limiting it on an equal-time basis, and finally denying it except where the labor force was so isolated—say, at a mining facility in Alaska—that an organizer would have no way of reaching to employees than on company property. Or consider what we Americans call "captive audience" meetings—in which employee attendance is required to hear the employer argue against unionization. Originally, captive audience meetings were unfair labor practices; then they were permitted if the union got equal time (the other side of the access issue); and finally, accepted as an absolute employer right. The same goes for individual interrogations. If this strikes you as familiar, of course it is, because it replicates, with the very same dynamics, how trade-union law had been made by judges for a century prior to the New Deal. The essence of that process is a balancing of one person's right against another's, and since on all the issues I've cited, the employer's right is a property right, that's the one that ultimately prevails.

This line of case law best reveals the underlying—one might say, undermining—processes at work, but two others are in fact more important. One involves employer

speech. The authors of the law believed that employer speech was inherently coercive and, knowing that, the NLRB in the early years required that employers be silent during union campaigns. In 1941, however, the Supreme Court found that the Board was violating the employer's freedom of speech and laid down this ruling: employers can speak, but their speech can't be coercive. I can't pause to talk about the implications of this distinction, except to say that it is entirely characteristic of how American courts interpret the labor law—they always say they are striking a balance between employee and employer rights--and profoundly wrong. Employer speech is inherently coercive and, despite an immense case law, impossible to police. The second development, intertwined with employer speech, concerns the procedures for establishing majority rule. Originally, the American law was quite like Fair Work Australia's regarding whether employees want an enterprise agreement, open-ended and allowing for informal and varied methods for determining majorities. But then the NLRB ruled that, if an employer requested it, there had to be an election. That was crucial, because the election gave employers the platform they needed for exercising their speech rights.

At this point, with the case law in place, politics intervened. In the post-World War II reaction, following a wave of strikes, the Republicans pushed through the Taft-Hartley amendments, which made elections mandatory for NLRB certification, affirmed employer free-speech rights, and, for good measure, made unions subject to unfair labor practices. The idea was to re-orient the representation process so that, instead of being expressive of self-organization, it became a competition between labor and management, with the worker as voter. Taft-Hartley was an opportunistic political event, never to be repeated, and it rested, as I've indicated, on case law already in place. What was accomplished, as the law tilted ever more to one side, was a stranglehold by American

employers on the unionizing process. On this most fundamental problem, the Employee Free Choice Act proposes that workers be enabled to demonstrate majorities by the signing of authorization cards—what's known in America as card check—as a way, hopefully, of insulating them from the workplace coercion that occurs during election campaigns.

The American problem is how to translate the need for reform—for which is no accessible political narrative—into the kind of political action that has just resulted in Fair Work Australia.

Just consider how differently things have played out. Obama won as resoundingly as did Rudd, but from there on nothing matches. Although committed to the Employee Free Choice Act, the Democrats never made it a campaign issue. In the Australian election, of course, Work Choices was the whole ball game. That's one difference. The Democrats evaded it in part because, in any public debate, the Employee Free Choice Act—in particular card check--can be toxic. The employer side, not labor, holds the ideological edge. Here's what they say: Card check would expose workers to union coercion—there's a t.v. ad they've run showing the actor who played a hit man on the *Sopranos* asking a worker to sign an authorization card—and deprive workers of the sacred American right to the secret ballot. That's a second difference from Australia, where, ideologically, Labor hit the Howard government so hard that it ended up cowering in the corner, even distancing itself, so I've read, from the very words Work Choices. Yet in the U.S. the Republicans didn't push the issue during the campaign either—to the frustration of the employer side—because the labor law actually doesn't resonate much with the general public. That's a third difference.

Now that the Democrats are in power, the battle has shifted to Washington, inside the Beltway, as it's said. It seems unthinkable there even to consider the kind of overhaul that Julia Gillard undertook. The Employee Free Choice is just three amendments to the existing law. That's a fourth difference. Yet the opposition—the lobbying--by the employer side is both furious and unanimous. Even liberal business interests—the Pritzker family of Chicago, big in hotels, for example, that helped launch Obama financially—are opposed to the bill. Industry's united front is a fifth difference.

And the final difference is that, although things are still unresolved, the Employee Free Choice Act will not pass, not in its current form—this despite a President who would sign it, a House of Representatives that would pass it, and a Senate with a big Democratic majority. The Senate is the rub, as it always has been. Under its arcane rules, it takes sixty vote—out of hundred—to end debate. The Democrats have sixty votes, but intense business lobbying has pealed off at least six, including the two from Arkansas, where Wal-Mart resides.

An Australian audience might find it strange that a party could sweep an election and yet not deliver on the major demand of its most important constituency, yet that is the case with the Employee Free Choice Act. And while there are lots of loose ends, the explanation is the one I've offered, that American labor law is a sub-political issue, resolved not by elections—at least not by normal elections--but by lobbying in Washington, and there, when the corporate side is really determined and united—as it is on the Employee Free Choice Act—it's tough to beat.

On reflection, I should have asked not how to get to here from there, but how to get to there from here, because if it's a question of a fair go for workers, we Americans have a

lot to learn from Australia. But of course that's wishful thinking, and that's the whole point of my talk.