GS Law 6805: Issues in Work Law Scholarship

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GS Law 6805: Issues in Work Law Scholarship

The Line Up for the Weekend:

Introductions

The Turn Towards "Human Rights" in Work Law

- ☐ **Pod 1**: Are Labour Rights Human Rights?

Hot Topics in Collective Labour Law

- ☐ **Pod 2**: Minority Unionism & Nonunion Employee Representation
- ☐ **Pod 3**: Union Security Debates

Hot Topics in the Regulatory Theory of Work Law

- ☐ **Pod 4**: New Governance in Work Law

Hot Topics in Work Law: The Many Futures of the Law of Work (Student Led Discussion)

Pod 1: Are Labour Rights Human Rights?

Thursday Evening Session

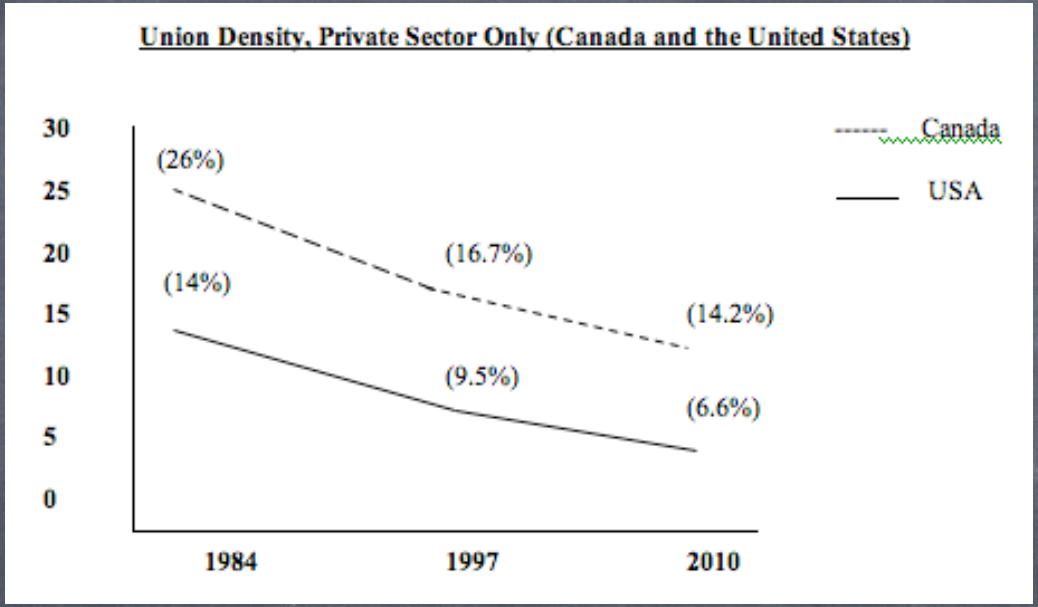
- Why is this a hot topic?
- Origins and development of the debate
- The debate in Canadian law
- The academic debates

Pod 1: Are Labour Rights Human Rights?

"We need to change the public discourse on labour rights by elevating them beyond being just statutory rights. We must reinforce that *labour rights are indeed human rights.*"

(Canadian Foundation for Labour Rights)

ARE LABOUR RIGHTS HUMAN RIGHTS?



What is the Objective of Situating Labour Rights as Human Rights?

- Virginia Mantouvalau (added reading):

"By accepting that certain labour rights are human rights, we endorse the view that labour law is governed by various human rights principles that by definition are immune from arguments of economic efficiency" (p. 25)

KEY HR/LR INSTRUMENTS

- UNIVERSAL DECLARATION OF HUMAN RIGHTS (UN, 1948), ESPECIALLY S. 23, 24
- INTERNATIONAL COVENANT ON CIVIL, POLITICAL RIGHTS (1966)
- INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, CULTURAL RIGHTS (1966)
- ILO, CONVENTION 87 (1948)
- ILO CONVENTION 98 (1949)
- ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998)

INTERNATIONAL HUMAN RIGHTS AS LABOUR RIGHTS IN CANADIAN CASE LAW

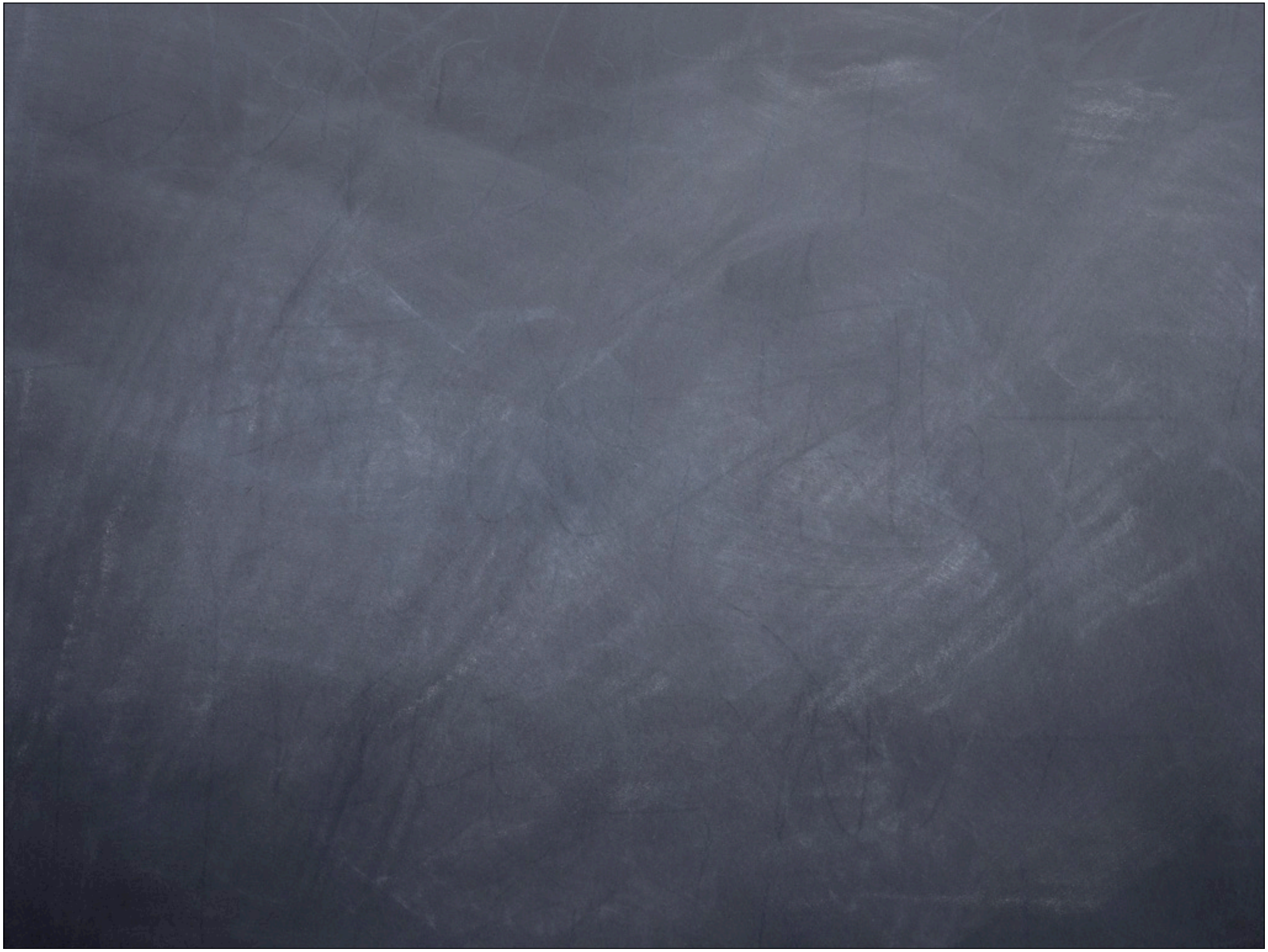
- **STAGE ONE**: CHIEF JUSTICE DICKSON'S FAMOUS DISSENT, ALBERTA REFERENCE (1987)

- **STAGE TWO**: McLachlin C.J./LeBel J., B.C. Health Services (2007)

The Academic Debates

1. Is it proper to describe labour rights as human rights? Is there something fundamentally different about them?

2. Is arguing that labour rights are human rights actually a good strategy for worker advocates and unions?



GS Law 6805: Pod 2 (Friday A.M.)

Minority Unionism and Nonunion Employee Representation

Why It's a Hot Topic

- **The story always begin the same way:**
  - US/Canada adopted Wagner model in 1930s-40s to channel conflict, facilitate bargaining in large industrial workplaces
  - Based on twin principles: (1) Majoritism; and (2) Exclusivity
  - Led to boom in collective bargaining:
    - About 33% in U.S. in 1950s; 40% in Canada in 1980s
  - Downward trajectory in collective bargaining ever since
    - Private Sector: 6% in U.S.; Canada: 15%
- **Non-majority, Non-union forms of collective voice are debated as ways to replace, or supplement the Wagner Model**

Recognizing Normative Claims

- A "**Normative**" argument in legal scholarship argues that the law or situation **should be** this way or that way. A '**descriptive**' argument purports only to describe the way law is.
- Pay attention to the normative claims in the papers you read in this program
- On this topic, there are some common normative claims made by authors.
  - What are they?

Challenging Normative Claims

- Common Normative Claims:
  - Workers Should have free access to collective voice mechanisms
  - Collective voice is good
  - It's Law's job to ensure Collective Voice is possible for EEs who desire it, even in face of employer resistance
  - Current Law failing
  - Some other model would work better
- All of these Claims are challengeable
  - Good law papers enter a dialogue, contribute to the debate
  - One way to do this is to challenge (or buttress) normative claims made by others
  - How would you challenge the normative claims above?

Legal Basis for Non-Majority Collective Bargaining

- **In U.S**., NLRA broad enough to recognize minority collective bargaining, but NLRB ruled DBGF applies only to majority trade unions:
  - Section 7, NLRA (US): **"[e]mployees shall have *the right to self-organization*, to form, join or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection*"**
- **ILO Committee of Experts on Freedom of Association**: In systems that make majority support test for unionization, law must facilitate minority collective bargaining when majority threshold is not reached
- **In Canada,** collective bargaining laws envision only majority, exclusive union collective bargaining. Supreme Court says that s 2(d) guarantees workers right to come together in an organization of their choosing and to make collective representations to their employer,

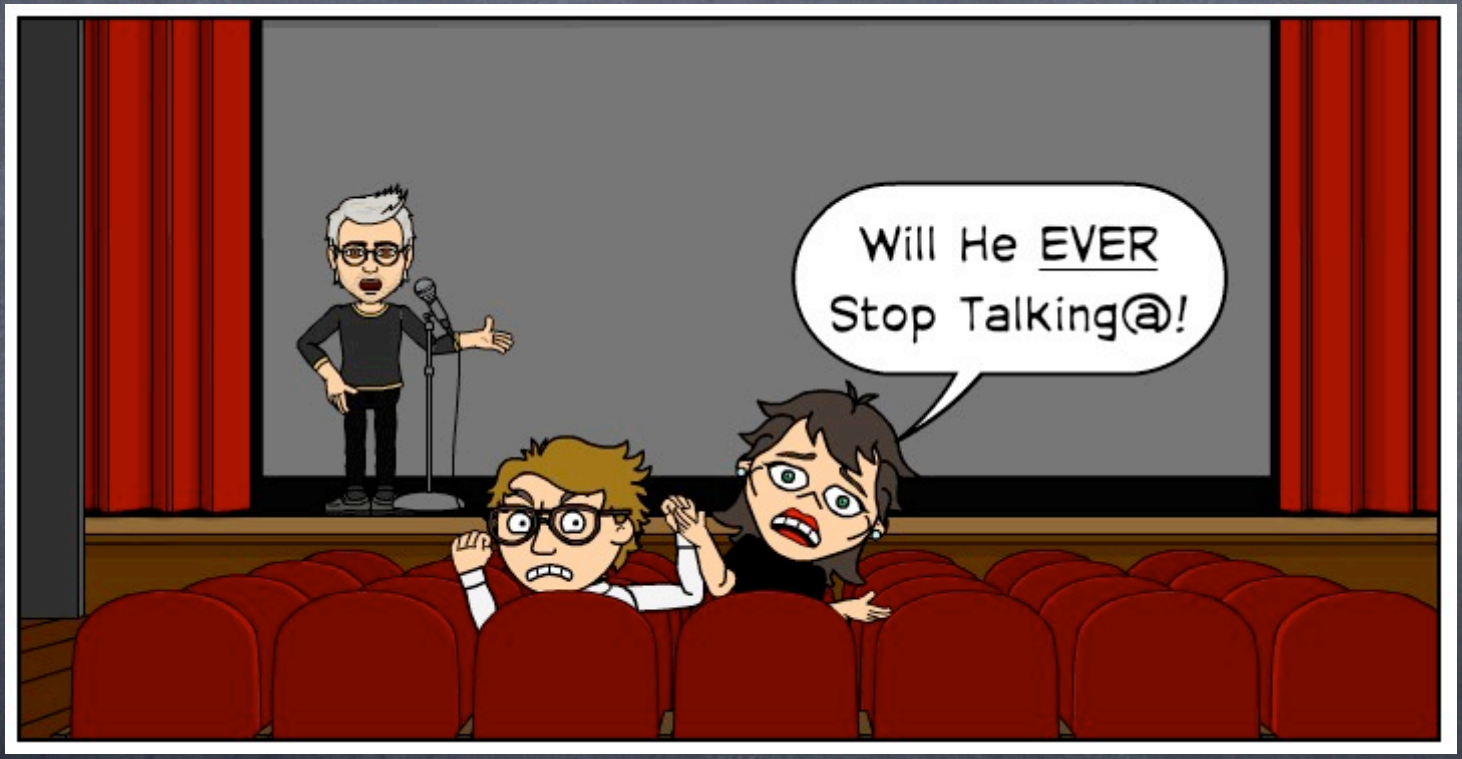
WHAT ARE THE PROS/CONS/ISSUES WITH MINORITY UNIONISM UNDER WAGNER MODEL?

WHAT WAS/IS JUSTIFICATION FOR MAJORITY / EXCLUSIVE UNION MODEL?

Would Recognizing Minority Unions Increase Collective Voice in North America?

- **Harcourt & Lam**: "Allowing minority unionism in US could increase union membership by 30%, raising union density to about 16 or 17%"
- **Policy Options**:
  - Minority Unionism should complement Majority, Exclusive union model
  - Abolish Wagner Model, Replace with "New Zealand" model
  - Compulsory Collective Representation

GRADUATED FREEDOM OF ASSOCIATION



GRADUATED FREEDOM OF ASSOCIATION

- Similar Normative Foundation as other papers in the genre
  - **New Normative Claim**: Law should ensure workers are able to exercise at least the minimum level of collective rights SCC says are guaranteed by the Charter
- **Thick & Thin Versions** of FA together
  - **ThicK**: Existing Wagner Model
  - **Thin**: Right to form, join an association … Free from Employer Interference … To make collective representations to the employer … duty on employer to engage in 'good faith' , 'meaningful dialogue' with association about those representations
  - **No** statutory to bargain in good faith; no right to strike/lockout in Thin Model

GRADUATED FREEDOM OF ASSOCIATION

Discussion Points

- What are possible benefits of the GFA model?
- Could worker advocates make any use of the thin model in advocating for workers?
- What are criticisms of the model?

Pod 3: Friday AM
Regulation of Union Security

- **Hot Topic Because:** Ontario Conservative Party and some Federal Tory MPs have proposed bringing Republican style restrictions on union security clauses to Canada for the first time (see R9: "Pathways to Prosperity", Conservative Party of Ontario, 2012)

- **Issues for Discussion**:

  - **Legal Review**: How do American laws work? How do Canadian laws regulate union security clauses at present?

  - **The Role of Lawyers, Legal Academics in these Debates**: How can/ should legal scholarship contribute to this debate?

Quick Review of Existing Legal Models

- Tension over union security arises from Wagner Model's (unusual by international standards) twin principles of: (1) **Majoritism** and (2) **Exclusivity**
- Since workers may be subjected to a union and/or collective agreement they didn't support, questions arise:
  - Should they have to become union members?
  - Should they have to pay union dues?
- USA and Canada responded to questions differently.

The American Approach

- Labor law is Federal (NLRA), but Taft-Hartley Act (1947) permitted states to enact their own union security provisions
- Under Federal law, **closed** shops (only members can be hired) are unlawful, but not **union** shops (must become a member), **agency** shop (don't have to be a member, but must pay dues)
- Two additional points from case law:
  - Even in union shop, employee can't be forced to join a union. Instead, they can opt to pay dues only (financial core members). In essence, they are treated as if under an agency shop clause.
  - Financial core members can opt out of portion of dues used by union for "non-collective bargaining" purposes.

The American Approach

- 26 states have passed laws banning collective agreement clauses that require union membership & mandatory dues payment
- 18 of these did so before 1960, almost all in the deep South (see Tab 6, pg. 5). Interesting history; laws tied to concerns about integration of black and white workers.
- Recent: Oklahoma (2001); Indiana (2012); Michigan (2013, Tab 8)
- Although union cannot bargain mandatory dues clause, **duty of fair representation** applies equally to dues-paying members and non-members who pay no dues
  - Hence: labor movement calls these laws '**right to free ride**' on union services. Supporters call them "**right to work**" without having to pay union dues or join a union.

Review of Canadian Union Security Laws

Handout at Tab 4: Summary of Legal Treatment

- **Union Dues:**
  - Mandatory check-off: Manitoba, Quebec
  - Agency Shop if Union Requests: Ontario, Federal, N&L, Saskatchewan
  - Dues Check-off Permissible, but EE authorizations needed: B.C., Alberta, N.B., N.S.
- **Union Membership:**
  - Mandatory Union Shop, if union requests: Saskatchewan
  - Subject for bargaining: everywhere else.

Review of Canadian Union Security Laws

- Our model influenced by "Rand Formula" reasoning (Tab 5):
  - **Mandatory Dues** are sensible since all benefit, policy is to encourage C.B. & conflict results from fights over dues (para. 26-27)
  - **Mandatory membership** not warranted in dispute before him. People shouldn't be subjected to rules of organization they don't wish to belong to. However, employers should be free to agree to closed, or union shops when this make sense for business. He notes that Ford in U.S. had agreed to union shop and mandatory dues (para. 23)
- No Canadian government since Wagner Model (1940s) has ever banned dues check-off or mandatory membership clauses (though Alberta studied idea in 1990s)

Breakdown of Union Security Provisions

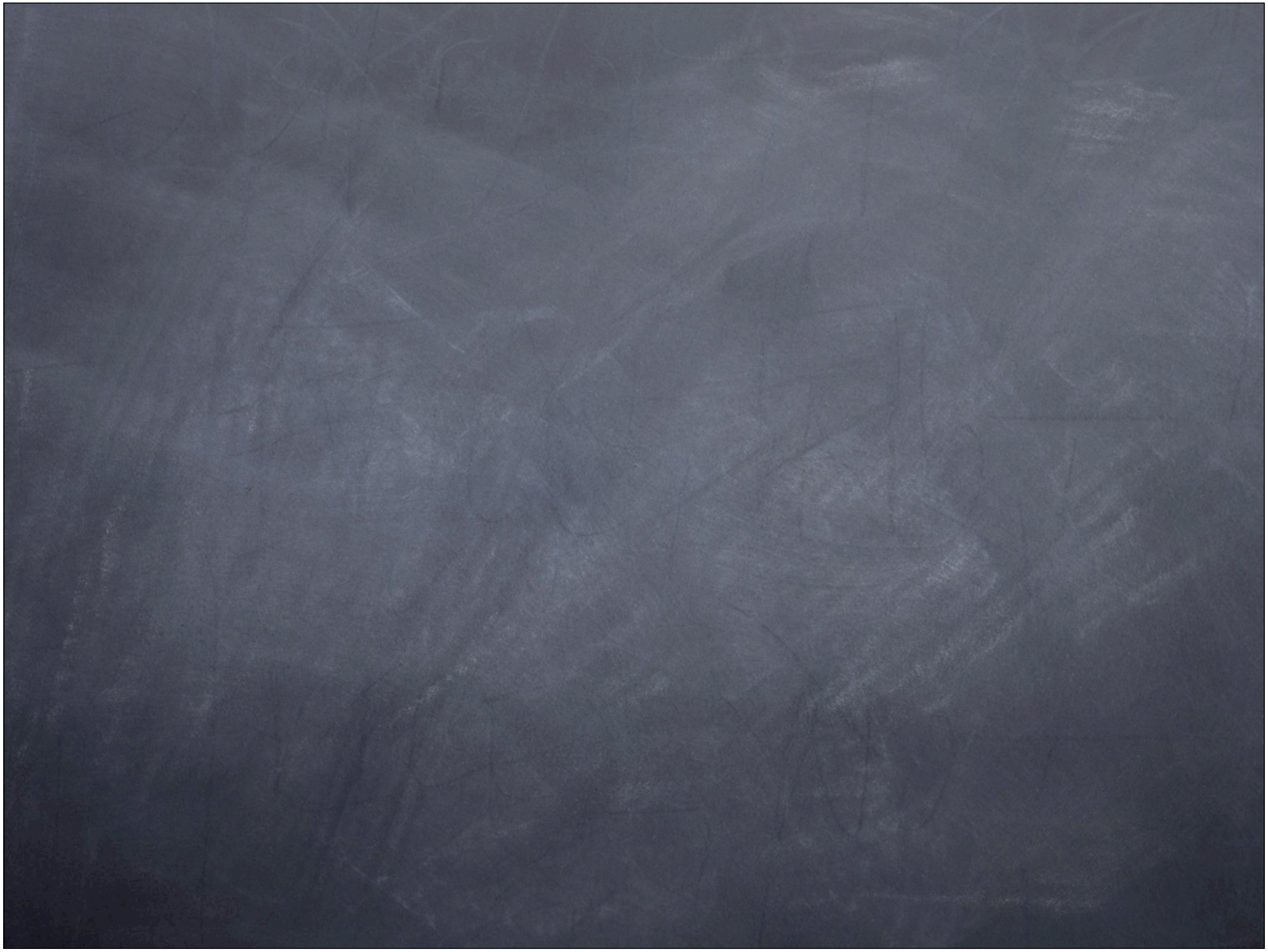
- Taras & Ponak (1995), estimation for all of Canada:
  - Closed Shop: 9%
  - Union Shop: 42%
  - Agency Shop: 39%
  - Open Shop: 6.5%
- Some provinces allow closed/union shops, but forbid EE being terminated for not joining. Closed/Union shop most common in construction, large public sector units. Agency shop most common in private sector.
- Ontario Conservatives claim (Tab 9) that they will ensure workers have a choice whether to pay dues, and whether to become union members.
  - Assumption is that by "choice", they mean either: (1) banning union security clauses like in 26 U.S. states, or (2) allowing individual employees to opt out of those clauses

The Empirical Claims

- CONGRESS SURVEY:
    - Wages: 16% lower in RTW states
    - Union Density: 3x higher in Non-RTW states
    - Employment Levels: About 5% higher over last decade in RTW states (though wide variation if you look state by state)
    - Worker fatalities higher in RTW states
- But Congress Study says not possible to prove a causal link between a union security law and these outcomes. State economies too complex, too many other variables at play to isolate impact of a small labour law.

Possible Angles for Lawyers, Legal Scholars

- Descriptive:
- Historical:
- Charter:
- Normative:
- Comparative:



Pod IV: New Governance Theory
Friday Afternoon

- Why is this a **Hot Topic**:
  - A strand of regulatory theory that became popular in Europe & U.S.
  - Proposed as a solution to failures of 'command & control' regulation
  - In recent years, consider scholarship (in U.S.) applying theoretical insights to work law
  - Hotly contested.

INSIGHTS OF NEW GOVERNANCE

- FORMAL LAW (STATUTES, LEGAL RULINGS) JUST ONE OF MANY SYSTEMS OF RULES
- MODERN SOCIETIES ARE VERY COMPLEX, CHARACTERIZED BY MANY SOCIAL SUBSYSTEMS (ECONOMIC, LEGAL, RELIGIOUS, SOCIAL, ENVIRONMENTAL, POLITICAL…)
- DUE TO THIS COMPLEXITY, NO ONE SUBSYSTEM/ACTOR HAS THE KNOWLEDGE OR POWER TO DIRECTLY CONTROL BEHAVIOUR IN ANOTHER SUBSYSTEM
- THE LEGAL SUBSYSTEM HAS ITS OWN LANGUAGE, AS DO ALL OTHER SUBSYSTEMS
- WHEN A LEGAL SIGNAL ("PAY MINIMUM WAGE") IS TRANSMITTED TO ECONOMIC SUBSYSTEM, IT IS TRANSLATED INTO LANGUAGE OF ECONOMIC SUBSYSTEM ("PAY, DON'T PAY", "MORE PROFIT, LESS PROFIT")
- THIS MAKES IT VERY DIFFICULT TO REGULATE ECONOMIC BEHAVIOUR BY MEANS OF A DIRECT LEGAL COMMAND. MESSAGE TRANSMITTED IS NOT WHAT IS ULTIMATELY HEARD (LIKE KIDS GAME 'TELEPHONE')

IMPLICATIONS

- Government regulation in form of 'command and control' will not have desired effect
- Rather than 'command', more effective regulation uses legal signals to 'steer' employers towards compliance
- How: Aligning Er's Economic goals with State's compliance goals.
- "Regulated Self-Regulation"
  - Reward effective self-regulators, punish those that do not self-regulate

Insights from New Governance on Regulatory Design

- In designing Regulation:
  - Encourage effective internal management systems
  - Harness non-state actors in monitoring
  - "Inject Risk" to provoke useful risk management responses

COMMON REGULATORY DEVICES

- MULTIPLE REGULATORY STREAMS/SANCTIONS
- TOOLS TO EMPOWER PRIVATE ACTORS
- INFORMATION DISCLOSURE

CRITICISMS OF NEW GOVERNANCE

- Nothing New about it
- Really about a lesser role for the state, and greater reliance on 'self-regulation'
  - Often considered part of shift towards neoliberal philosophies
- Still depends on state to monitor and enforce whether self-regulation is effective