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TOWARDS A CIVIC REPUBLICAN READING OF THE *CHARTER*? THE EXAMPLE OF FREEDOM OF ASSOCIATION

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ABSTRACT

The evolution of freedom of association in Canada reflects a fundamental tension relating to the application of a classically liberal instrument (the *Canadian Charter of Rights and Freedoms*) to a private relationship (i.e., employment). To resolve this tension, the Supreme Court of Canada engaged in a series of dialogues which eventually shifted the application of the *Charter* from an application typical of a liberal bill of rights to one closer to a civic republican instrument. This new interpretation is consistent with Anderson and Pettit's view of the workplace as a site of (republican) unfreedom. This article explores that tension through an examination of the Court's jurisprudence on freedom of association.

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RÉSUMÉ

L'évolution de la liberté d'association au Canada reflète une tension fondamentale liée à l'application d'un instrument libéral classique (la *Charte canadienne des droits et libertés*) à une relation privée (à savoir, la relation

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d’emploi). Pour résoudre cette tension, la Cour suprême du Canada s’est engagée dans une série de dialogues qui ont finalement fait évoluer l’application de la *Charte*, passant d’une application typique d’une charte des droits libérale à une application plus proche d’un instrument républicain civique. Cette nouvelle interprétation est conforme à la vision d’Anderson et Pettit selon laquelle le lieu de travail est un lieu de non-liberté républicaine. Cet article explore cette tension à travers un examen de la jurisprudence de la Cour en matière de liberté d’association.

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INTRODUCTION

IN 1987, the Supreme Court of Canada, adopting what can be described as a classically liberal[1] approach to freedom of association, rejected union arguments and decided that freedom of association, protected under section 2(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*),[2] did not protect a right to bargain collectively. According to the majority, the *Charter* protected an individual's right to join a union, free from the interference of the state. This protection did not extend to collective union activities. In short, the Court favoured a negative and individual approach to freedom, consistent with the liberal ideal of protection from government interference. In 2007, the Court reversed its position.

Examining the evolution of the Court's jurisprudence on freedom of association and collective labour rights, one can identify certain points of tension that go beyond whether section 2(d) of the *Charter* protects the acts performed by the association. Namely, there is controversy surrounding the nature of freedom, the role of the state, and the place of equality in protecting collective labour rights. That is because the *Charter* can be viewed as a classically liberal bill of rights whose focus is on non-interference by the state. This view was prevalent in early *Charter* writing.

In contrast, the employment relationship is both private and inherently unequal, or, to use the vocabulary that will be explored further, employment is a situation of horizontal domination and the workplace, a site of republican unfreedom. To reconcile such a private relationship with a liberal instrument focused on non-interference by the state, focus must be shifted from non-interference to non-domination. In short, it is

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1 The term "liberalism" refers to a range of philosophical and political approaches, primarily centered around liberty. See generally Shane D Courtland, Gerald Gaus & David Schmitz, "Liberalism" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy*, Spring 2022 ed (Stanford: Metaphysics Research Lab, Stanford University, 2022), online: <plato.stanford.edu> [perma.cc/8ZMS-P9FV]. For the purposes of this article, "classical liberalism" is used to refer to a philosophy according to which all human beings have a natural right to life, freedom, and property and individuals must be protected from state interference in the exercise of these natural rights.

2 S 2(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

useful to view freedom of association through a civic republican lens instead of a liberal lens.

Contemporary neo-republican thought has its origins in Roman thought. Much like liberalism (to which we shall return shortly), republicanism places its focus on freedom, specifically freedom from domination. Philip Pettit defines domination as "subjection to an arbitrary power of interference on the part of another—a *dominus* or master—even another who chooses not actually to exercise that power."[3]

Republicanism can be viewed as building upon the liberal tradition.[4] Liberalism has also been considered an epistemic priority for republicanism, in that the knowledge of republican freedom supposes possession of the knowledge of liberal freedom.[5] Pettit himself recognizes affinities between his own republicanism and liberalism, though he states that liberalism's "indifference" to domination has made the approach "tolerant of relationships in the home, in the workplace, in the electorate, and elsewhere, that the republican must denounce as paradigms of domination and unfreedom."[6] In short, classic liberalism is tolerant of unfreedom in the private sphere.

In short, the core of republican theory is the equal freedom of citizens, "in particular their freedom as non-domination—the freedom that goes with not having to live under the potentially harmful power of another."[7] In republican theory, subordination, an essential component of the employment contract, is viewed as a form of domination.[8] Freedom as non-domination is, in neo-republican thought, an ideal for the state to

3 Philip Pettit, "Keeping Republican Freedom Simple: On a Difference with Quentin Skinner" (2002) 30:3 Political Theory 339 at 340 [emphasis in original].

4 Charles Larmore, "Liberal and Republican Conceptions of Freedom" in Daniel Weinstock & Christian Nadeau, eds, *Republicanism: History, Theory and Practice* (London, UK: Routledge, 2012) 96 at 107–08.

5 See e.g. Boudewijn de Bruin, "Liberal and Republican Freedom" (2009) 17:4 J Political Philosophy 418.

6 Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford Political Theory (Oxford: Oxford University Press, 1997) at 9 [Pettit, *Republicanism*].

7 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, The Seeley Lectures, vol 8 (New York: Cambridge University Press, 2012) at 5 [Pettit, *People's Terms*].

8 Dáire McCormack-George, "Philip Pettit's Republicanism and Labour Law: A Defence" (2021) 37:4 Intl J Comp Lab L & Industrial Relations 417 at 435.

promote[9] and, for neo-republicans, “law is [required] to prevent both actual and potential domination.”[10] Consequently, a neo-republican approach to labour law would primarily be concerned with ensuring the freedom of workers from the arbitrary power of their employer.

The present article draws on a view best expressed by philosopher Elizabeth Anderson in *Private Government*, namely that workers are unfree, being subjected to the arbitrary power of their employer.[11] By incrementally shifting away from the liberal approach and towards a civic republican approach to freedom, the Court avoided one of the limits of the *Charter* as it related to labour rights, specifically, its limited application.[12] Equality and freedom in private relations fall outside of the scope of the *Charter* when the *Charter* is viewed through a liberal lens; that is to say,

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9 Pettit, *Republicanism*, *supra* note 6 at 4.

10 McCormack-George, *supra* note 8 at 444.

11 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)*, University Center for Human Values Series (Princeton: Princeton University Press, 2017) at ch 2 [Anderson, *Private Government*].

12 The application of civic republican theory to the field of labour law is an emerging field of inquiry outside of Canada, though it remains largely ignored when discussing collective labour rights in Canada in general and under the *Charter* in particular. According to David Cabrelli and Rebecca Zahn: “The import of the concept of ‘justice as non-domination’ viewed specifically through the lens of labour law lies primarily in its impact on the substantive fairness of the bargain concluded between management and an employee” (see “Civic Republican Political Theory and Labour Law” in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law*, Philosophical Foundations of Law (Oxford: Oxford University Press, 2018) 104 at 116 [emphasis omitted]). Of course, not all political philosophers feel that the concept of domination applies to the employment relationship. Indeed, Tom O'Shea for example, rejects structuralist accounts of domination and argues for a capabilities-based approach to the employment relationship (see “Are Workers Dominated?” (2019) 16:1 J Ethics & Soc Philosophy 1 at 18–19). Some scholars support O'Shea's claim that subordination—the defining element of the employment relationship—is distinct from domination in civic republican thought, while nonetheless recognizing the promise of civic republicanism to the field of labour and employment law (see Guy Davidov, “Subordination vs Domination: Exploring the Differences” (2017) 33:3 Intl J Comp Lab L & Ind Rel 365). The present article draws heavily on Elizabeth Anderson's description of unfreedom in the workplace (see Anderson, *Private Government*, *supra* note 11). Interestingly, O'Shea describes “modern republicans” as “relational egalitarians” (see *supra* note 12 at 12), a term embraced by Anderson, both in *Private Government* and in earlier writing, as discussed in this article.

when we consider the *Charter* as an instrument to protect individuals against state interference. Within the private sphere, or so the classical liberal would say, the individual is free from state interference and does not require *Charter* protection.

This article begins with a narrative account of the evolution of freedom of association in the labour context. We note from the outset that though civic republicanism may inform the reading of other rights and freedoms, this article focuses solely on freedom of association as protected under section 2(d) of the *Charter*. Additionally, freedom of association expands beyond labour and employment, though the primary focus of the Court in examining freedom of association has been the relation between this freedom and collective labour rights.[13]

As we move through the examination of how freedom of association has evolved and how it has been interpreted by the Court, the tensions between the competing views of the *Charter* will become more apparent, as will the limits of a liberal approach to *Charter* rights when applied to collective labour rights (Part I). Each of the points of tension will be addressed in turn (Part II).

I. THE EVOLUTION OF FREEDOM OF ASSOCIATION IN CANADA: TENSION AND DIALOGUES

The evolution of freedom of association before the Court reveals the tension inherent in applying a classic liberal bill of rights to a private relationship. Each point of tension can be viewed as a dialogue within the Court between proponents of a classically liberal view of *Charter* freedoms and proponents of a civic republican approach to *Charter* rights. A liberal approach to freedom of association is consistent with the Court's early opinion that the *Charter* is a liberal instrument "intended to constrain governmental action" as expressed in *Hunter et al. v. Southam Inc.*[14]

13 This limited approach has been critiqued, most recently by Dwight Newman (see "The Legal Landscape of Freedom of Association in Canada: The Complex Path to Half of a Constitutional Freedom" (2024) 12:1/2 European J Comp L & Governance 77).

14 1984 CanLII 33 at 156 (SCC).

The trade union movement primarily expressed indifference towards the *Charter* at the time of its enactment,[15] though a document published by the Confédération des syndicats nationaux states the union's firm opposition to the *Charter* as it embodied "des droits individuels du XIXe siècle" (nineteenth-century individual rights),[16] echoing the view of the *Charter* as a liberal instrument of little use to collective actors. It has been said that, by ignoring the process of *Charter*-building, the labour movement "missed the boat."[17]

No trade unions participated in the hearings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (1980–1981) before the adoption of the *Charter*.[18] On 22 January 1981, MP Svend Robinson recommended adding "the freedom to organize and bargain collectively" to the proposed text of section 2(d) of the *Charter* (freedom of association).[19] He argued that this made explicit the implicitly recognized principles contained in the international instruments signed by Canada. Robinson also stated that this would, in no way, protect a right to strike.[20] The proposed amendment was defeated[21] and the debate surrounding the proposition was brief. According to MP Bryce Mackasey, the amendment was not necessary as there was nothing preventing workers from organizing.[22] Consequently, no mention of a right to bargain collectively was included in the *Charter*.

Before the enactment of the *Charter*, the connection between a constitutionally protected freedom of association and trade union rights had

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15 Paul JJ Cavalluzzo, "Freedom of Association: Its Effect Upon Collective Bargaining and Trade Unions" (1988) 13 Queen's LJ 267 at 267.

16 Confédération des syndicat nationaux, "NON au rapatriement unilatéral de la constitution", *Le Travail* (January 1981 supplement) at 6 [translated by author].

17 Thomas A McIntosh, *Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime*, Research and Current Issues Series, No 58 (Kingston, ON: Industrial Relations Centre, Queen's University, 1989) at 45.

18 House of Commons & Senate, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32-1, No 43 (22 January 1981) at 76 (James McGrath).

19 *Ibid* at 68 (Svend Robinson).

20 *Ibid* at 69 (Svend Robinson).

21 *Ibid* at 77 (Bryce Mackasey).

22 *Ibid* at 71 (Bryce Mackasey).

already been examined by the Judicial Committee of the Privy Council. In 1965, Trinidad and Tobago enacted the *Industrial Stabilisation Act*, *1965*, which imposed a system of compulsory arbitration in lieu of a right to strike. As freedom of association and assembly were protected under the Trinbagonian constitution, the Privy Council examined whether those freedoms conferred any other substantive rights other than that of forming an association. Applying the freedoms restrictively, the Judicial Committee of the Privy Council found that removing the right to strike did not make freedom of association devoid of all content.[23] In this decision, the restrictive approach of the Privy Council foreshadowed the classically liberal approach that would be taken by the Supreme Court with regards to freedom of association under the *Charter*.

Andrew Petter, writing in the early days of the *Charter*, described it as "a 19th century liberal document set loose on a 20th century welfare state."[24] For Terry Sheppard, not only is the *Charter* of "liberal inspiration" but it "has instilled in the public an awareness of their individual rights that cannot be reversed."[25] Consistent with this liberal stance and stating outright his support for collective bargaining as a valuable institution[26] (before the Supreme Court of Canada handed down its first decisions on the issue), Joseph M. Weiler expressed opposition to the inclusion of collective bargaining in section 2(d) of the *Charter* for three reasons. First, that the freedoms listed in section 2 of the *Charter* are aimed at political and democratic rights and should not include the protection of economic interests. Second, that the *Charter* should not protect a specific model of industrial relations. Third, that judges should not have to make policy judgments regarding the nature and scope of collective bargaining systems in the context of an evaluation under section 1 of the *Charter*.[27]

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23 *Collymore v Attorney General*, [1969] UKPC 11.

24 Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45:6 Advocate 857 at 857.

25 Terry Sheppard, "Liberalism and the Charter: Freedom of Association and the Right to Strike" (1996) 5 Dal J Leg Stud 117 at 120.

26 Joseph M Weiler "The Regulation of Strikes and Picketing under the Charter" in Joseph M Weiler & Robin B Elliot, eds, *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto & Vancouver: Carswell & Pacific Institute of Law and Public Policy, 1986) 211.

27 *Ibid* at 223.

Reflective of Weiler's scepticism, the Court's freedom of association jurisprudence, particularly as it relates to collective labour relations, has been marked by five dialogues:

(a) The first dialogue (or point of tension) is between those embracing a collectivist view of freedom of association and those embracing an individualist approach to *Charter* rights; this dialogue was particularly prevalent in early writing.

(b) The second dialogue is between negative and positive conceptions of *Charter* rights. This dialogue was particularly marked by attempts at arguing for freedom from association as a protected *Charter* right but is also reflected in recent decisions on the extent to which a *Charter* freedom can give rise to the collective bargaining process as a right.

(c) Around the turn of the millennium, focus shifted to the uneasy relationship between freedom and equality; this third dialogue was precipitated by the Court's approach in *Dunmore v. Ontario (Attorney General)* (*Dunmore*).

(d) Finally, after the recognition of a constitutional right to bargain collectively in 2007, scholarship was marked by a dialogue between those calling for greater judicial restraint and those defending the intervention of the Court.

(e) The final period of the Court's jurisprudence centers around the uneasy recognition of a constitutionally protected right to strike derived from the right to bargain collectively.

A. *Early Jurisprudence: Individual Rights and Collective Activities*

In 1987, the Supreme Court of Canada delivered a trilogy of cases[28] that critically examined the implications of section 2(d) of the *Charter* concerning union activities. In *Reference Re* Public Service Employee Relations Act *(Alta.)* (*Alberta Reference*),[29] the majority concluded that section 2(d) did not safeguard a right to strike, with Justices Le Dain and McIntyre delivering concurring opinions. Justice McIntyre articulated that

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28 *Reference Re* Public Service Employee Relations Act *(Alta)*, 1987 CanLII 88 (SCC) [*Alberta Reference*]; *RWDSU v Saskatchewan*, 1987 CanLII 90 (SCC); *PSAC v Canada*, 1987 CanLII 89 (SCC).

29 *Supra* note 28.

freedom of association fundamentally pertains to individual rights rather than group rights, asserting that collective claims to rights that are not individually enshrined in the *Charter* lack legitimacy. In contrast, Justices Dickson and Wilson dissented, with Chief Justice Dickson emphasizing that freedom of association was central to modern labour relations. Returning to the individual and collective dimensions of freedom of association, Chief Justice Dickson wrote that what section 2(d) of the *Charter* sought "to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage."[30] He added that "Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect."[31] Chief Justice Dickson then acknowledged that certain activities did not have an individual equivalent, such as the right to strike. According to Chief Justice Dickson, the remaining question was "whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits," adding that the "legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature."[32] Consequently, the dissenting judges concluded that section 2(d) of the *Charter* protected the right to strike.[33]

In *PSAC v. Canada* and *RWDSU v. Saskatchewan*, decided concurrently, the Supreme Court reaffirmed its stance from the *Alberta Reference*, emphasizing an individualistic interpretation of section 2(d) of the *Charter*.[34] Justice Carter expressed concern that Justice McIntyre's narrow reading might jeopardize union security in future cases, such as *Lavigne v. Ontario Public Service Employees Union* (*Lavigne*), then pending before lower courts.[35] This interpretative approach was later echoed in *Professional*

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30 *Ibid* at para 88 [emphasis in original].

31 *Ibid* at para 89.

32 *Ibid*.

33 *Ibid* at para 97.

34 *Ibid* at para 54.

35 Donald D Carter, "Canadian Labour Relations Under the Charter: Exploring the Implications" (1988) 43:2 RI 305 at 307–08.

Institute of the Public Service of Canada v. Northwest Territories (Commissioner), where legislative changes stripped the aforementioned institute of its representative role for nurses.[36] The Court, led by Justice Sopinka, held that such restrictions did not infringe section 2(d) unless they directly targeted the existence of the association, reiterating the *Alberta Reference*'s logic.[37] Even Chief Justice Dickson, dissenting author in the *Alberta Reference*, concurred in dismissing the appeal, citing binding precedent.[38] By the early 1990s, many labour scholars had concluded that the *Charter* offered limited protection for collective bargaining, viewing political action—not litigation—as the primary tool for labour advocacy. Legal scholar Harry Arthurs, critiquing the predictability of such *Charter* litigation, wryly remarked that it resembled golf: a game not suited for "serious people" in labour relations due to its lack of suspense.[39] Similarly, Thomas A. McIntosh argued that meaningful *Charter*-based protection for labour would first require recognition of collective rights, yet a textual reading of the *Charter* provided little support for their existence.[40] In short, early analysis of the application of the *Charter* in the field of labour focused squarely on its perceived individual protections.

B. *The Freedom from Association Cases: The Negative Dimensions of Freedom of Association*[41]

A second dialogue in the Court's jurisprudence emerged shortly after the *Alberta Reference*. In this second dialogue, the divided Court examined two questions tied to the negative dimension of freedom of

36 [1990] 2 SCR 367, 1990 CanLII 72 (SCC).

37 *Ibid* at 404.

38 *Ibid* at 374.

39 HW Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" (1989) 13:2 Queen's LJ 17 at 18.

40 *Supra* note 17 at 45.

41 The present section examines compelled association under the union monopoly created by *Wagner Act* forms of labour codes, such as those found in Canada. Other forms of compelled association have been examined by the Supreme Court of Canada (see e.g. *Canadian Egg Marketing Agency v Richardson*, 1997 CanLII 17020 (SCC); *Libman v Quebec (Attorney General)*, 1997 CanLII 326 (SCC); *Black v Law Society of Alberta*, 1989 CanLII 132 (SCC)) though these forms of compelled association fall outside the scope of this paper.

association. The first question was whether freedom of association could be used negatively to protect against compulsory union membership or the payment of union dues. The second question, which remains somewhat unresolved,[42] is whether one can derive a positive right from a negative freedom. This second question, intimately tied to the liberal reading of *Charter* freedoms, primarily emerged after 2007's *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia* (*Health Services*) decision.

Around the time of the *Alberta Reference*, unions realized that the *Charter* could be used to undermine the collective bargaining system by invoking individual rights at the expense of collective union rights. The *Lavigne* case (involving a teacher who refused to join a union but was required to pay union dues) prompted the Court to consider whether the forced payment of union dues, used for political purposes, violated *Charter* rights and freedoms.[43] According to Brian Etherington, a "slim majority in *Lavigne* stumbled towards the recognition of some concept of freedom *from* association under subsection 2(d),"[44] disagreeing only as to the scope of the freedom.[45] The majority of the Court concluded to the inexistence of the right to freedom *from* association,[46] but Justice La Forest argued that the forced collection of dues did violate the *Charter*, though this violation could be justified under section 1.[47] In *R. v. Advance Cutting & Coring Ltd.* (*Advance Cutting & Coring*), the Court again addressed

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42 This debate marked the core of the Quebec Court of Appeal decision regarding the unionization rights of managers, *Association des cadres de la Société des casinos du Québec c Société des casinos du Québec*, 2022 QCCA 180 at paras 118–38. In this decision, the court of appeal put aside the determination of whether a negative freedom would confer a positive right. In its extremely divided decision, the Supreme Court did not conclusively resolve this debate (see *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13).

43 [1991] 2 SCR 211, 1991 CanLII 68 (SCC) [*Lavigne*].

44 Brian Etherington, "*Lavigne* v. *Opseu*: Moving Toward or Away from a Freedom to Not Associate?" (1991) 23:3 Ottawa L Rev 533 at 536 [emphasis in original].

45 *Ibid* at 541.

46 *Lavigne*, *supra* note 43 at 258–59.

47 *Ibid* at 318. Section 1 specifies that the rights and freedoms set out in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (see *supra* note 2, s 1). The test to determine whether such limits are reasonable was developed by the Court in *R v Oakes*, 1986 CanLII 46 (SCC).

freedom of association, this time in the context of a requirement for construction workers in Quebec to join a union in order to obtain certifications.[48] Writing for the majority, Justice LeBel appeared to move away from the individualist approach to *Charter* freedoms when he wrote that the Court had "defined the right of association primarily as an instrument of self-fulfilment and realization of the individual, but it has never forgotten that the act of association brings together, for some common purpose, a group of human beings, giving birth to a new relationship between themselves."[49] The Court reaffirmed that certain forms of compelled association could be compatible with the *Charter*. Finally, in *Bernard v. Canada (Attorney General)*, the Court found no violation of an employee's freedom of association when her personal address was disclosed to the union,[50] referencing both *Lavigne* and *Advance Cutting & Coring*.

Etherington identified two opposing judicial approaches to interpreting freedom of association: a dominant narrow view that limits protection to individuals' freedom to enter consensual relationships, excluding the goals and methods of associations, and a minority broad purposive view that emphasizes the underlying intent of the right.[51] This interpretive divide reflects the broader tension between negative and positive rights under the *Charter*. The Supreme Court's *Health Services* decision marked a significant shift by recognizing a constitutionally protected right to collective bargaining, including a duty for employers to negotiate in good faith. Brian Langille and Benjamin Oliphant argue that this recognition introduces a bold and complex legal question: if employers bear a constitutional duty to bargain, it necessarily follows that workers possess a corresponding right.[52] However, identifying the specific holder of this right—i.e., the party to whom the duty is owed—raises foundational questions about the legal structure and enforceability of such rights, which cannot remain unanswered.

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48 2001 SCC 70 [*Advance Cutting & Coring*]

49 *Ibid* at para 170.

50 2014 SCC 13.

51 *Supra* note 44 at 536.

52 Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 at 252.

These positive and negative dimensions will be explored through a civic republican lens in the second part of this paper.

C. The Dunmore *Departure: Evaluating the Role of Equality*

The Supreme Court of Canada's jurisprudence on freedom of association at the turn of the twenty-first century revealed tensions between freedom and equality rights, reflecting differing views within the Court on the scope of the *Charter*. This tension was notably evident in *Dunmore* in 2001.

In *Dunmore,* the Court addressed the exclusion of farm workers from protection under the Ontario labour code.[53] The case marked the Court's first examination of the total exclusion of a category of workers from statutory protections. The appellants argued that the exclusion hindered not just collective bargaining, but broader union activities like workers' empowerment, workplace democracy, political education, and access to courts. The Court recognized that these activities were crucial for workers' participation in society and democracy, and thus, the exclusion interfered with their constitutional right to associate.[54] Justice Bastarache advanced a purposive approach to freedom of association, arguing that section 2(d) protects not just individual rights, but collective rights essential to the operation of associations, such as unions. He clarified that while the right to collective bargaining was excluded from section 2(d), other activities critical to union functions should be protected. He also suggested that laws that substantially interfere with constitutional rights could be challenged under section 2(d) even if they do not explicitly breach a specific provision.[55]

The Court also considered section 15(1) of the *Charter*, which guarantees equality, and found that the exclusion of agricultural workers could lead to an underinclusion that effectively denied them a fundamental freedom. The Court rejected the government's argument that the

53 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 1 [*Dunmore*].

54 *Ibid* at paras 65–66.

55 *Ibid* at para 22.

exclusion was justified by the need to protect family farms, finding the legislation overreaching and disproportionate.[56]

Dunmore represented a departure from previous cases in several ways not least of which in that it acknowledged a positive obligation on governments to protect associational rights for vulnerable groups. This marked a shift toward a more expansive view of the *Charter*'s protections for workers. However, *Dunmore*'s ruling remained ambiguous. It explicitly excluded collective bargaining from section 2(d), and its recognition of a positive obligation to protect associational rights was contingent on the vulnerability of workers. The Court's decision implicitly linked the unequal access to associational rights to the ability of agricultural workers to participate fully in Canadian society, a concept traditionally associated with section 15 (equality) rather than section 2(d) (freedom of association).

Authors have argued that *Dunmore* created an overlap between section 2(d) and 15(1) of the *Charter*,[57] with Langille going so far as to call it a section 15 case stuffed into the 2(d) framework.[58] In *Dunmore*, the union presented itself as an equality-seeker under both sections 2(d) and 15(1) of the *Charter*. The combination of both sections, as invoked by a union representing disadvantaged workers, created a "constitutional platform upon which to advance their collective economic aims."[59]

D. The Uncertain Recognition: Questioning the Role of the Court

In 2007, Harry W. Arthurs wrote that the *Charter* only affected labour law "at the margins, and in unexpected and often negative ways"[60] and that labour and social rights are mainly determined by what he calls the

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56 *Ibid* at paras 64–65.

57 Nitya Iyer, "Disadvantaged Unions: The Merging of ss. 2(d) and 15(1) of the *Charter*" (2005) 12:1 CLELJ 1 at 17.

58 Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get Out of It" (2009) 54:1 McGill LJ 177 at 208.

59 Iyer, *supra* note 57 at 5.

60 Harry W Arthurs, "Labour and the 'Real' Constitution" (2007) 48:1/2 C de D 43 at 61.

"real constitution," i.e., our economic realities.[61] Referencing British union struggles in the last half of the twentieth century, Arthurs wrote:

> It seems, then, that "real constitutions" are what we make them. If so, labour and social rights under Canada's "real constitution" will not be magically conjured up by a process of constitutional exegesis. They will be hard won, by workers' struggles on the shop floor and picket line, by political and social campaigns, and by clear thinking and effective advocacy.[62]

In short, Arthurs echoed earlier authors for whom, writing at the time the *Charter* was enacted, trade union battles were not to be won through litigation or constitutional modification.

Before *Health Services*,[63] the Court had shown reluctance in developing a meaningful interpretation of the right to freedom of association under the *Charter*, especially in the context of collective bargaining. In 2007, the Court revisited section 2(d) of the *Charter* to assess whether it protected the right to engage in collective bargaining. The Court ruled that section 2(d) does offer limited constitutional protection, but it only guarantees the right to engage in the collective bargaining process, not a specific outcome or statutory framework. The decision focused on the capacity of workers to associate and collectively pursue workplace goals. The Court clarified that section 2(d) did not guarantee a particular outcome but protects the process of collective bargaining. It also created a duty for employers to bargain in good faith with employees to achieve peaceful, productive outcomes. Substantial interference with the collective bargaining process could violate section 2(d). However, the Court maintained that the scope of protection was limited to the process itself, and each case would require a fact-specific inquiry into whether the process of good faith bargaining was significantly undermined.[64]

Health Services generated mixed reactions, with some celebrating the Court's shift towards recognizing collective bargaining as a

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61 *Ibid*.

62 *Ibid* at 64.

63 *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*Health Services*].

64 *Ibid* at para 92.

constitutionally protected right,[65] while others criticized the reasoning and implications of the decision.[66] The ruling clarified that the freedom of association under section 2(d) of the *Charter* included the right to engage in collective bargaining, though it stopped short of guaranteeing a particular model or outcome. This was seen as a clarification, not an expansion of rights.[67] Langille called the state of freedom of association jurisprudence "a mess," citing contradictions in applying section 15 of the *Charter*, misunderstanding of Canadian labour history, and a lack of clarity between freedoms and rights.[68] Perhaps the sharpest criticism of *Health Services* came from Justice Rothstein in his dissenting opinion in *Ontario (Attorney General) v. Fraser* (*Fraser*), criticizing the Court's expansion of section 2(d) to constitutionalize collective bargaining rights.[69] Justice Rothstein argued that section 2(d) was meant to protect individual freedoms, not to guarantee collective goals like negotiating collective agreements.[70]

The majority judges in *Fraser* did not find that Ontarian legislation relating to agricultural workers violated section 2(d) of the *Charter*,[71] as section 2(d) guaranteed neither a particular model of collective bargaining, nor a particular outcome.[72] Reiterating the Court's position in *Health Services*, Justices McLachlin and Lebel wrote that "what s. 2(*d*) protects is the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless."[73]

For Justices McLachlin and LeBel, Rothstein's critique founded on the strictly individual dimension of 2(d) was unfounded as, citing Justice

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65 Susanna Quail, "Labour Rights and Labour Politics Under the *Charter*" (2013–2014) 45:2 Ottawa L Rev 343 at 346.

66 See e.g. Paula Knopf, "The 'Supreme Court of Canada's Labour Law Trilogy': Its Legacy and Implications on the Future" (2013–2014) 45:2 Ottawa L Rev 265 at 269.

67 *Ibid*.

68 Langille, *supra* note 58 at 179.

69 2011 SCC 20 at para 124 [*Fraser*].

70 *Ibid*.

71 *Ibid* at para 113.

72 *Ibid* at para 90.

73 *Ibid* at para 46 [emphasis omitted].

Bastarache in *Dunmore*, "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."[74] Furthermore, the judges repeated that the majority decision in *Health Services* framed section 2(d) as an individual right, namely the rights of employees and union members,[75] ending their analysis as follows:

> In summary, *Health Services* was consistent with the previous cases on the issue of individual and collective rights. It recognized, as did previous jurisprudence, that s. 2(*d*) is an individual right. But it also recognized, as did previous cases, that to meaningfully uphold this individual right, s. 2(*d*) may properly require legislative protection of group or collective activities.[76]

As for Justice Rothstein's distinction between positive and negative rights, the majority rejected this distinction outright: "This bright line between freedoms and rights seems to us impossible to maintain. Just as freedom of expression implies correlative rights, so may freedom of association. The freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it."[77] The majority was clear that the purposive interpretation of a freedom may require positive government action.[78] As in previous cases, an equality claim was raised and ignored.

E. *The Right to Strike*

Up to this point, the Court appears to have been inconsistent in its application of a standard to define the scope of 2(d) of the *Charter*. In the *Alberta Reference*, Justice McIntyre developed the parallel liberty approach to section 2(d) which served to protect certain activities done in concert.[79] In *Dunmore*, Justice Bastarache relied on Chief Justice Dickson's dissent

74 *Ibid* at para 63, citing *Dunmore*, *supra* note 53 at para 17.

75 *Fraser*, *supra* note 69 at para 64.

76 *Ibid* at para 65.

77 *Ibid* at para 67.

78 *Ibid* at para 70.

79 Benjamin Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike" (2012) 70:2 UT Fac L Rev 36 at 44.

to find that exclusive reliance on the parallel liberty standard was unduly restrictive for uniquely collective activities.[80] *Health Services* constitutionalized a right to collective bargaining "unmoored from any generally applicable definition of freedom of association," making it unclear to whom the duty to bargain in good faith was owed.[81] *Fraser* has been said to have done "little to resolve confusion over the applicable standard,"[82] creating an indefensible unpredictability regarding the meaning of section 2(d).[83] A criticism of the parallel liberty standard is that it leaves union activities unprotected. Oliphant argued that it protects all collective activities that an individual is free to do alone, referencing Justice McIntyre's "right to golf" analogy. Thus, in a labour context, it would protect the freedom of individuals, acting collectively, to refuse to work without a contract.[84]

On this note, in early 2015, the Court handed down three decisions on freedom of association which, again, changed the legal landscape surrounding section 2(d) of the *Charter*.

In *Mounted Police Association of Ontario v. Canada (Attorney General)* (*Mounted Police*),[85] the Court reversed its earlier stance in *Delisle v. Canada (Deputy Attorney General)*.[86] The majority emphasized a broad and generous interpretation of section 2(d) of the *Charter*, framing freedom of association as an independent right essential to the development of civil society and democracy.[87] This interpretation extended beyond mere individual rights, recognizing collective rights inherent within associations that facilitate collective action and resist state-enforced isolation. The majority adopted a purposive approach to section 2(d), highlighting the empowering nature of freedom of association. It emphasized that this right is not merely a vehicle for individual freedoms but is crucial for enabling

80 *Ibid* at 46.

81 *Ibid* at 49.

82 *Ibid* at 50.

83 *Ibid* at 54–55.

84 *Ibid* at 63.

85 2015 SCC 1 [*Mounted Police*].

86 1999 CanLII 649 (SCC).

87 *Mounted Police*, *supra* note 85 at para 49.

groups to amplify the voices of individuals who might otherwise be marginalized.[88]

The Court emphasized that for an association to meet the requirements of section 2(d) in the context of collective bargaining, it must provide both sufficient choice and independence from the employer. Effective choice involves allowing members to meaningfully influence the goals of the association, while independence ensures that the association's activities align with the interests of its members.[89] The Court also recognized that the *Wagner* model of labour relations was not the only viable model to satisfy these requirements.[90]

In this case, the majority found that the Royal Canadian Mounted Police's (RCMP) employee association failed to provide adequate independence from management and limited the members' choice in the selection of their representation. Consequently, the Court concluded that the RCMP's exclusion from the right to unionize violated section 2(d) of the *Charter*.[91]

In *Meredith v. Canada (Attorney General)*,[92] heard alongside *Mounted Police*, the Court addressed the constitutionality of the RCMP's labour relations regime under section 2(d) of the *Charter.* The majority, relying on its reasoning in Mounted Police, concluded that the regime did not substantially impair the RCMP members' collective pursuit of workplace goals. Specifically, the Pay Council provided a process for consultation on compensation matters within the existing, constitutionally inadequate framework, and the government's actions did not prevent meaningful collective action.[93] However, the Court clarified that this finding should not be interpreted as an endorsement of the constitutional validity of the process or similar schemes.[94] In a concurring opinion, Justice Rothstein agreed with the majority's result but offered a different analytical approach, emphasizing that section 2(d) requires an assessment of whether

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88 *Ibid* at paras 54–58.

89 *Ibid* at paras 81–90.

90 *Ibid* at para 95.

91 *Ibid* at para 5.

92 2015 SCC 2.

93 *Ibid* at paras 46–48.

94 *Ibid* at para 30.

the legislation renders meaningful collective bargaining "effectively impossible." He found that the ERA did not meet this threshold, noting that it allowed for future negotiations on compensation, despite the lack of prior consultation with RCMP representatives before the act's royal assent.[95]

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Court extended constitutional protection to the right to strike under section 2(d) of the *Charter*, completing the trajectory set by prior rulings in the "trilogy" cases.[96] The Court was divided, with the majority finding that the *Public Service Essential Services Act* unconstitutionally interfered with the right to meaningful collective bargaining by prohibiting certain employees from striking.[97] Justice Abella, writing for the majority, concluded that the prohibition amounted to a substantial interference with the collective bargaining process, thereby recognizing the right to strike as constitutionally protected.[98]

Justice Abella's opinion highlighted the centrality of the right to strike to the collective bargaining process, referencing Canada's historical and international labour law framework. The majority emphasized that the right to strike is integral to ensuring equality in bargaining and aligning with international obligations, including conventions from the International Labour Organization and the *International Covenant on Economic, Social, and Cultural Rights*.[99] Furthermore, the Court rejected the notion of judicial deference in *Charter* review, asserting that it is the role of the judiciary to scrutinize laws for constitutional compliance.

In contrast, Justices Rothstein and Wagner dissented, arguing that the majority was improperly establishing a standalone constitutional right to strike, distinct from the collective bargaining process protected by section 2(d).[100] They criticized the majority's decision as inconsistent with past rulings in *Fraser* and *Health Services*, where the Court had

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95 *Ibid* at para 33.

96 2015 SCC 4.

97 *Ibid*.

98 *Ibid* at para 75.

99 *Ibid* at paras 67–71.

100 *Ibid* at paras 106–07.

rejected the requirement for a statutory dispute resolution process, and contended that the majority conflated historical and modern understandings of strike action.[101] The dissent also raised concerns about judicial overreach into labour relations, arguing that the Court's decision disrupts the legislative balance between employers, employees, and the public by constitutionalizing the right to strike and undermining legislative flexibility.[102]

It is the issue of the Court's role in labour relations which appears most problematic to the dissenting judges:

> The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees, and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained.[103]

Finally, Justices Rothstein and Wagner wrote that the constitutional protection of a right to strike would introduce uncertainty in labour relations by making statutory limits on strike action presumptively unconstitutional.[104]

Some authors question the categorical classification of the *Charter* as a liberal instrument, stating that though some sections, such as section 2, are consistent with classical liberalism, other sections (particularly sections 35, Aboriginal rights) have been interpreted according to "a vision that is radically different from classical liberalism."[105] Inevitably, the classical liberal approach, when applied to the inherently illiberal government of the workplace, would lead to friction within the Court's reasoning.

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101 *Ibid* at paras 128–49.

102 *Ibid* at paras 114–24.

103 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 107 [*Saskatchewan Federation of Labour*].

104 *Ibid* at para 123.

105 John Carpay, "A Level Playing Field for Classical Liberalism: The Abolition of the Court Challenges Program Empowers a Diversity of Perspectives on Freedom and Equality" (2007) 16:3 Const Forum Const 117 at 120.

II. THE WORKPLACE AS A SITE OF UNFREEDOM: A CIVIC REPUBLICAN RESPONSE TO THE COURT

By reading an obligation to bargain in good faith into freedom of association, the Court shifted its approach to fundamental freedoms. Freedom of association no longer served to protect individuals from government interference in the creation of associations, as it now served to promote equal freedom in the workplace *through* workplace association.

In *Private Government*, Anderson invites a reconsideration of the workplace as a locus of private government.[106] According to Anderson, contemporary political philosophy treats government synonymously with the public sphere, usually represented by the state. She writes: "The supposed counterpart private sphere is the place where, it is imagined, government ends, and hence where individual liberty begins."[107] This, however, does not reflect the current institutions of workplace governance. Thus, in Anderson's view, "we need to revive the concept of private government,"[108] which she defines as follows:

> A government is private with respect to a subject if it can issue orders, backed by sanctions, to that subject in some domain of that subject's life, and that subject has no say in how that government operates and no standing to demand that their interests be taken into account, other than perhaps in narrowly defined circumstances, in the decisions that government makes. Private government is government that has arbitrary, unaccountable power over those it governs. This of course is a matter of degree.

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106 Anderson, *Private Government*, *supra* note 11 at ch 2. Our analysis draws heavily on Anderson's aforementioned *Private Government*, as well as on a 1999 article entitled "What Is the Point of Equality?" (see Elizabeth S Anderson, "What Is the Point of Equality?" (1999) 109:2 Ethics 287 [Anderson, "What Is the Point?"]). Both pieces examine issues of freedom and equality. *Private Government* analyzes (un)freedom in the workplace, while "What Is the Point of Equality?" considers equality as equal access to rights and freedoms. Both works can be seen as distinctly neo-republican, though Anderson herself uses the terms egalitarian.

107 Anderson, *Private Government*, *supra* note 11 at 41 [emphasis omitted].

108 *Ibid* [emphasis omitted].

> Its powers may be checked in certain ways by other governments, by social norms, and by other pressures.[109]

The modern workplace is characterized by a centralized authority[110] whose influence extends beyond working hours. Indeed, federal and provincial boards and arbitrators have examined comments made on social media (outside of working hours) when employees have been dismissed for insubordination.[111] Additionally, employers can effectively control behaviour outside of working hours through drug and alcohol testing, subject to certain limits. Though mandatory, random, and unannounced drug and alcohol testing of all employees has been generally perceived as a violation of workers' dignity and privacy, testing is permitted when there is reasonable cause (including a generalized problem of substance abuse in the workplace).[112] Thus, the main characteristic of private government is that its subjects are unfree[113] with work imposing a "far more minute, exacting, and sweeping regulation of employees than democratic states do in any domain outside of prisons and the military."[114] Outside of collective bargaining (to which we shall return extensively), employers' authority is both sweeping and arbitrary.[115]

Anderson identifies four strategies for protecting the liberties and interests of governed peoples: exit, the rule of law, substantive constitutional rights, and voice.[116] Exit is the freedom to leave. In the case of private workplace government, it is the freedom to exit the contractual relationship and is, according to Anderson, "usually touted as a prime libertarian strategy for protecting individual rights."[117] Anderson's rule of

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109 *Ibid* at 45.

110 *Ibid* at 51–52.

111 Jared Teitel, "Fired Over Facebook: The Consequences of Discussing Work Online" (2012) Western J Leg Studies 1 at 11.

112 *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 6.

113 Anderson, *Private Government*, *supra* note 11 at 41.

114 *Ibid* at 63.

115 *Ibid* at 54.

116 *Ibid* at 65–66.

117 *Ibid* at 66. Though economic or cost-based analysis of Anderson's arguments would suggest that one should not worry about the dictatorial nature of a company if the cost of exit remains low (see Tyler Cowen, "Work Isn't So Bad After All" in

law and constitutional rights protections reflect the existence of statutes limiting employer power and protecting worker rights (creating a workplace "bill of rights"), respectively.[118]

Through the series of dialogues presented in Part I, the Court shifted its approach towards a civic republican view of freedom of association. Of course, this shift was not explicit and areas of tension remained. This second part takes up these areas of tension and attempts to develop a republican response that can be compared and contrasted with the liberal view.

A. Individual Freedom in the Workplace

In the *Alberta Reference* of 1987, Justice McIntyre stated that while it must be recognized that freedom of association might advance group interests, "it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise."[119] Though the emphasis on individual rights is recognized as a cornerstone of liberalism (and of liberal instruments like the *Charter*), the *Charter* does appear to recognize the rights of collectivities. Furthermore, it is unclear whether the protection of collective bargaining is truly a collective right, rather than, for example, the right of an agent. It is important to distinguish between differing views of collective rights and group rights. Once this distinction is clear, we can more clearly examine the right to bargain collectively through a neo-republican lens.

For John Edwards, discourse about rights in liberal states is discourse about individual rights. "The rights-tradition in the west has its roots in individual rights."[120] For some scholars, however, liberalism is not incompatible with the recognition of collective rights.[121] Rob Edger defines

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Anderson, *Private Government*, *supra* note 11, 108 at 109). Anderson points out the existence of contractual barriers to exit, namely the existence of noncompete clauses (see *Private Government*, *supra* note 11 at 66).

118 Anderson, *Private Government*, *supra* note 11 at 67–68.

119 *Alberta Reference*, *supra* note 28 at para 155.

120 John Edwards, "Collective Rights in the Liberal State" (1999) 17:3 Nethl QHR 259 at 259.

121 See e.g. Daniel M Weinstock, "How Can Collective Rights and Liberalism Be Reconciled?" in Rainer Bauböck & John Rundell, eds, *Blurred Boundaries: Migration,*

collective rights simply as rights held by groups rather than individuals where "group" generally refers to a set of individuals "with strong racial, state, religious, or linguistic ties."[122] In Canada, the expression "collective rights" was first used in the 1972 Gendron Commission (the Commission of Inquiry on the Position of the French Language and on Language Rights in Québec), though late public law scholar François Chevrette concluded that the expression was too imprecise to be of legal use.[123] According to Linda Cardinal, although the Supreme Court had not (by the time of writing in 2000) formally used the term "collective rights," it had nonetheless recognized such rights in relations to minority language rights and the rights of First Nations.[124]

In Canada, collective rights have been invoked in relation to groups associating under ethnic, linguistic or religious grounds, but not in relation to class or gender. Michael Hartney speculates that the focus on these groups is due to the fact that both the *Constitution Act, 1982*, and the *Charter* contain provisions aimed at these groups.[125] Indeed, scholars have

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Ethnicity, Citizenship, Public Policy and Social Welfare, vol 23 (Aldershot: Ashgate, 1998) 281. For some, the distinction between group and individual human rights is more than a question of philosophical allegiance, with group rights being perceived as potential threats to individual rights, that is to say rights claimed over individuals (see Peter Jones, "Human Rights, Group Rights, and Peoples' Rights" (1999) 21 Hum Rts Q 80 at 81).

122 Rob Edger, "Collective Rights" (2009) 72 Sask L Rev 1 at 4.

123 Linda Cardinal, "Collective Rights in Canada: A Critical and Bibliographical Study" (2000–2001) 12 NJCL 165 at 167.

124 *Ibid* at 168.

125 Michael Hartney, "Some Confusions Concerning Collective Rights" (1991) 4:2 Can JL & Jur 293 at 295–96. Indeed, sections 25 and 35 of the *Charter* establish protections for Aboriginal and treaty rights, indicating that there is a recognition that Indigenous people, as a group, hold rights. They read:

> (25) The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. ...

claimed that sections 25 and 35 of the *Charter* are premised on the notion that groups can have rights.[126]

Not all authors agree on the definition of group or collective rights, with some emphasizing the collective agent and others emphasizing the collective interest protected by the group. J. Angelo Corlett traces a first distinction between collective moral rights and collective legal rights, the latter being "conferred by legal rules on some collective as a legal guarantee against the infringement of that collective's interest [or] choice."[127] Green distinguishes rights of collective agents from rights to collective goods or collective interests.[128] Most legal systems recognize that entities other than individuals (corporations or political parties, for example) can have rights.[129] This, however, is not a protection of collective rights, as "collective rights are distinguished not by the sort of agents they protect, but by the sort of interests they protect."[130]

Hartney questions much of the discourse surrounding the protection of collective rights as "the energy of defenders of collective rights seems to be spent arguing for the moral importance of communities, and charging opponents of collective rights with denying any value to communities"[131] whereas few question the value that community plays in human

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> (35) (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) *treaty rights* includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons (see *Charter*, *supra* note 2, ss 25, 35 [emphasis in original]).

126 Edger, *supra* note 122 at 1.

127 J Angelo Corlett, "The Problem of Collective Moral Rights" (1994) 7:2 Can JL & Jur 237 at 239.

128 Leslie Green, "Two Views of Collective Rights" (1991) 4:2 Can JL & Jur 315 at 315.

129 *Ibid*.

130 *Ibid* at 320.

131 *Supra* note 125 at 296.

flourishing.[132] A right (or, indeed, a freedom) may have a purpose directly related to a collectivity or to a community without it being a collective right. An individual may have the freedom to join a group and, having joined the group, may now possess rights as a member of the group. This freedom and this right, however, are held in an individual capacity.[133] This is the approach favoured by the Court in the *Alberta Reference*. This is most apparent when the majority describes the scope of freedom of association as the freedom to interact with others, and to give and receive support when engaging with others.[134]

Building on Raz's *Morality of Freedom*, Peter Jones states that though individuals have rights as individuals, they may also hold rights as groups when "the joint interest of a sufficient number of individuals provides sufficient justification for imposing duties upon others" even if the interest of only one such person would provide insufficient justification for imposing such duties.[135] According to Miodrag A. Jovanović (also echoing Raz), "the interest of a group in its flourishing is decisively, yet indirectly, connected to the individual member's well-being."[136] This view, which Jones refers to as "collective," is then contrasted with a view he calls "corporate," the difference being that "while the collective conception ascribes moral standing only to the individuals who jointly hold the group right, the corporate conception ascribes moral standing to the group as such." Thus, the holder of the right is the group, rather than the individual.[137]

We now see the particularity of trade unionism. Supposing that individuals have a right to working conditions that are free from arbitrary domination, this would suppose a collective conception of rights (with freedom being held by each individual subject in the private government of the workplace). However, to achieve a state of non-domination, workers under the *Wagner Act* system of collective bargaining give up their

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132 *Ibid*.

133 Jones, *supra* note 121 at 82.

134 *Alberta Reference*, *supra* note 28 at para 88.

135 *Supra* note 121 at 84.

136 Miodrag A Jovanović, *Collective Rights: A Legal Theory* (Cambridge, UK: Cambridge University Press, 2012) at 83.

137 Jones, *supra* note 121 at 86 [footnotes omitted].

individual right to negotiate to a collective (the union), echoing a corporate view of collective rights.

As explained previously, a reason cited for rejecting the reading in of collective bargaining within the *Charter* protection of freedom of association was Justice McIntyre's insistence that the *Charter* protected individual rather than collective rights. Ultimately, however, the Supreme Court recognized the rights of unions to bargain collectively and imposed a correlative duty on third parties to negotiate in good faith. For Langille, discussion of collective rights obscured a very important point, namely that the right to bargain collectively allows individuals to achieve what would be inconceivable on the individual level.[138] The shift to collectivism also obscured the primary purpose of labour law, namely "to protect and advance the interests of workers."[139] With that said, it remains unclear whether the union can be considered an individual holder of the rights of its members or whether this is an actual recognition of collective rights, as will be further discussed below.

The reconciliation of freedom of individual workers and the collective right to bargain is made possible by examining freedom as freedom from domination. Non-domination, according to Pettit, is not a goal that can be satisfactorily pursued by individuals.[140] When viewed through a republican lens, the individual-collective debate as it relates to collective bargaining becomes moot. Each individual has a right to live free from domination, but such a goal cannot be achieved by individuals. Non-domination in the private government of the workplace requires the establishment of reciprocal power and such reciprocal power can only be exercised by the group when such a group has the right to compel management to negotiate.

Scholars have drawn a connection between Justice McIntyre's analysis emphasizing individual rights with the contestations to compelled unionization as seen in *Lavigne*.[141] Freedom from association, as it relates to freedom from domination, will be explored in the following section.

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138 Langille, *supra* note 58 at 187.

139 *Ibid* at 188.

140 Pettit, *Republicanism*, *supra* note 6 at 92.

141 Carter, *supra* note 35 at 307.

B. *The Negative and Positive Dimensions of Freedom of Association*

A liberal examination of (or an examination of the limits of liberalism in relation to) the positive and negative dimensions of freedom of association can refer to two distinct issues. The first is the distinction between negative freedoms and positive rights; the second is the question of freedom from mandatory association. Both shall be examined in this section.

1. Negative Rights and Positive Freedoms

In *Health Services,* the Court read into a "negative" freedom (freedom of association), a positive right (the right to bargain collectively), and a corresponding duty on third parties (the duty to bargain in good faith). This turn was criticized by Langille and Oliphant as a modification that ignored the "grammar of law."[142] The correlative of freedom is not a right or a duty, but a "no-right" or an absence of a right[143] or, in liberal parlance, a sphere free from state interference. Thus, the correlative of my freedom to associate for trade union purposes would be neither my right to bargain nor your duty to bargain in good faith, but merely the absence of the state's right to restrict my freedom to associate with others. Furthermore, Langille and Oliphant ask, if we recognize a right to bargain, then who possesses this right?[144]

Central to liberal thought is the idea that political structures should be based on the individual "possessing a maximum amount of liberty,"[145] where liberty is defined by freedom from interference from the state.[146] Thus, a freedom in a public law instrument like the *Charter* would be, in a classically liberal approach, a freedom from state interference.

A requirement of justice is the promotion, by the state, of freedom as non-domination for all its citizens.[147] To achieve non-domination, the

142 Langille & Oliphant, *supra* note 52.

143 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed by Walter Wheeler Cook (New Haven: Yale University Press, 1919) at 36, 38–39.

144 Langille & Oliphant, *supra* note 52 at 273.

145 Sheppard, *supra* note 25 at 118.

146 *Ibid* at 119.

147 Pettit, *People's Terms*, *supra* note 7 at 130.

state must, according to Pettit, "have the power of coercively imposing the order it establishes."[148] Thus, shifting from a classically liberal perspective to a neo-republican perspective, the imposition of duties on third parties is a component of the state's duty of ensuring justice for its citizens. A coercive power to force good faith bargaining by either side has been granted to labour boards,[149] both provincial and federal, in the Wagnerian model in force in Canada. That these *Wagner*-model rights and duties were elevated to the status of constitutional rights raised concerns about the power of the Court (as opposed to the legislature).

As for the possessor of the right to bargain, as explored previously, to avoid domination, workers will cede their individual rights to a collective agent, the union. Thus, the union and not the workers are in possession of the right to bargain and it is with respect to the union, and not individual workers, that employers have a corresponding duty to bargain in good faith.

This subversion of individual workers within the union has raised issues of freedom with regards to compelled (or universal) unionization.

2. Freedom from Compelled Association

If the correlative of privilege (or freedom) is not a right or a duty, but a "no-right" or an absence of right,[150] it would seem that compelled unionization or mandatory union dues would be a direct interference with the exercise of personal freedom. Yet, while constituting an interference, mandatory or compelled unionization promotes freedom from domination, thus maximizing (rather than inhibiting) freedom.

This issue was dealt with by the Court in *Lavigne* and in *Advance Cutting & Coring*. In a concurring opinion in *Lavigne*, Justice La Forest found that forced union dues did violate section 2(d) of the *Charter* but that this violation was justified under section 1.[151] According to the majority in

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148 *Ibid* at 133.

149 See e.g. *Canada Labour Code*, RSC 1985, c L-2, s 80(3)(a); *Labour Relations Code*, RSBC 1996, c 244, s 139(h); *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A, s 17; *Code du travail*, RLRQ c C-27, arts 53, 111.33.

150 Hohfeld, *supra* note 143 at 36, 38–39.

151 *Supra* note 43 at 318.

Advance Cutting & Coring, if the obligation to join a union "triggers the negative component and becomes a breach of s. 2(*d*)," then "it might well mean that all forms of compulsory membership provided for or even authorized under statute would be open to challenge under the *Charter*."[152] The Court added that the "proper analysis of *Lavigne* and of the nature of the constitutional guarantee does not allow for such a result."[153]

Noting that the concept of liberty (or freedom) could be used to argue both in favour of unionization (freedom of association) and against mandatory unionization (freedom from association),[154] Mark R. Reiff argued for mandatory (or universal) unionization in the American context justified on the basis of republican freedom.[155]

Starting from the premise that the firm is a threat to liberty,[156] Reiff argues that universal unionization enhances republican liberty, as unions "dramatically increase the enactment and enforcement of the laws designed to protect workers from the arbitrary acts of their employers and somewhat decrease the chances of management behaving in an antisocial manner and engaging in acts of domination against the general public at large."[157]

Reiff's argument is based on the recognition of a certain number of pre-institutional rights on which other rights (including freedom of speech and even freedom of association) are premised.[158] Though this is not dissimilar to the Court's reliance on values which underly *Charter* rights in *Health Services*,[159] Reiff goes a step further. The union, according to Reiff, is a basic institution. Indeed, if society is to be viewed as having three levels (a basic structure, its basic institutions, and the output of said institutions), unions should be considered a basic institution of society,

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152 *Supra* note 48 at para 205.

153 *Ibid* at para 206.

154 Mark R Reiff, *In the Name of Liberty: The Argument for Universal Unionization* (Cambridge, UK: Cambridge University Press, 2020) at 2–3.

155 *Ibid* at 64, 66–67.

156 This position is not dissimilar to Anderson's position in *Private Government* outlined earlier.

157 *Supra* note 154 at 148–49.

158 *Ibid* at 83.

159 Andrea Talarico, Book Review of *In the Name of Liberty: The Argument for Universal Unionization* by Mark R Reiff, (2020) 75:3 RI 621 at 623.

that is to say an institution required for making the basic structure more just. To determine whether the union qualifies as a basic institution, Reiff focuses not on specific (post-institutional) rights, but on the rights and values from which other rights derive (in this case, freedom).[160]

Thus, for Reiff, unionization is not only positive in a neo-republican view of society where freedom is an underlying value, unionization is a requirement to achieve freedom from domination. Thus, universal unionization should not only be viewed as not limiting republican freedom, it should be viewed as a requirement for republican freedom.[161]

Though the Court never goes as far as Reiff, his neo-republican approach and his insistence on pre-institutional rights justify both the Court's approach to mandatory union dues in *Lavigne* and to sector-wide unionization in *Advance Cutting & Coring*. Furthermore, it is the recognition of pre-institutional rights (which the Court calls *Charter* values) that will allow for the recognition of a right to bargain collectively in *Health Services*.

C. *Republican Freedom and Relational Equality*

Whereas liberalism can be said to overemphasize freedom to the detriment of equality, a republican approach to freedom of association allows us to view freedom and equality as two sides of the same coin.

Anderson's 1999 article entitled "What Is the Point of Equality?" planted the seeds for *Private Government*.[162] This earlier article reoriented

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160 *Ibid* at 622.

161 Beyond mandatory union membership or mandatory union dues, other forms of compelled association exist. For example, there is a widespread obligation to be a member of a professional body to perform certain acts. Though this may be considered a form of interference in the individual's choice to refrain from associating, it may be considered justified as a means of protecting the public. Other forms of compelled association, such as affiliation to a specific group (civic or religious) to occupy a function may be more problematic. Though such an analysis falls well outside the scope of this article, ultimately, a civic republican framework may be used to evaluate forms of compelled association on the grounds of whether such association protects against other forms of domination.

162 Niko Kolodny, "Help Wanted: Subordinates" in Anderson, *Private Government*, *supra* note 11, 99 at 99.

the debate around equality in American philosophy, effectively steering it away from a redistributive focus to a focus on relational equality.[163]

The focus on "the distribution of divisible, privately appropriated goods, such as income and resources" by theories of equality led to neglecting the "much broader agendas of actual egalitarian political movements,"[164] namely ending oppression. Anderson's approach is not focused on ensuring that one gets what one deserves, but on creating "a community in which people stand in relations of equality to others."[165] Anderson points out that, in historical terms, inequality referred less to a question of distribution and more to relations "between superior and inferior persons."[166] These unequal social relations then generated inequalities in distribution of resources.[167] Thus, democratic equality is "a relational theory of equality"[168] which seeks to guarantee effective access to the social conditions of freedom.[169]

As with Berlin's two views of freedom, democratic or relational equality has both negative and positive dimensions. Negatively, democratic equality seeks the abolition of oppression, "that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others."[170] In its positive dimension, what is sought is the creation of "social order in which persons stand in relations of equality," one in which persons live "in a democratic community, as opposed to a hierarchical one."[171]

Returning to the idea of distribution, the distribution of nature's fortune (whether good or bad) is, according to Anderson, "neither just nor unjust."[172] Democratic equality looks at what is societally done in

163 *Ibid* at 100.

164 Anderson, "What Is the Point?", *supra* note 106 at 288.

165 *Ibid* at 288–89.

166 *Ibid* at 312.

167 *Ibid*.

168 *Ibid* at 313.

169 *Ibid* at 289.

170 *Ibid* at 313.

171 *Ibid*.

172 *Ibid* at 331.

response to this distribution of fortune[173] to avoid relations of oppression and to ensure full and equal societal participation. For example, a wheelchair user may not, according to Anderson, have a right to walk, but he or she has a right to ramps and other means allowing for full participation.

Anderson’s view of democratic equality must be read in conjunction with republican views of freedom. As stated previously, for Pettit, where liberalism focuses on freedom from interference (or freedom as a state of non-interference),[174] republicanism focuses on freedom from domination (or freedom as non-domination).[175] The dominating party may be an individual or a collective agent. The domination may target a group but it will then “constitute domination of individual people but in a collective identity or capacity or aspiration.”[176] While interference can include a wide range of behaviors including physical coercion, coercion of the will, and manipulation,[177] domination is characterized by the fact that the power-bearer has “the capacity to interfere arbitrarily, even if they are never going to do so.”[178] Thus, domination is distinct from interference and can occur without interference, because domination merely requires the capacity for arbitrary interference, not actual arbitrary interference.[179]

For Raz, individual freedom and autonomy in particular are cornerstones of liberal morality,[180] though his *Morality of Freedom* is intended to read as a “critique of individualism” and an “endeavor to argue for a liberal morality on non-individualistic grounds.”[181] Though freedom has a distinct value, this value is intertwined with others and cannot exist by itself.[182] Like Pettit, Raz doesn’t seek equality for equality’s sake, stating

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173 *Ibid*.

174 Pettit, *Republicanism*, *supra* note 6 at 9.

175 *Ibid* at 4.

176 *Ibid* at 52.

177 *Ibid* at 53.

178 *Ibid* at 63.

179 *Ibid* at 23.

180 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 2 [Raz, *Freedom*].

181 *Ibid* at 18.

182 *Ibid* at 19.

that political morality must contain principles "concerning the well-being of people and the degree of our responsibility towards others."[183] Pettit does not think that justice requires that the state should impose substantive equality amongst citizens,[184] but that "whatever benefits the state makes available as a matter of justice to its citizens, it is subject to the constraint of making them available in an expressively egalitarian way."[185]

Thus, both in Pettit's neo-republican analysis and in Anderson's egalitarian analysis, equality and freedom must be analysed together, as freedom requires a certain level of equality to be free from arbitrary domination and equality requires equal freedom. The state, according to Pettit, "ought to promote the enjoyment of free or undominated choice amongst its citizens, under the expressively egalitarian constraint of treating those citizens as equals."[186]

D. *The Strike as a Tool for Achieving Republican Freedom and Relational Equality*

In 2015, the majority of the Court read a right to strike into freedom of association protected under the *Charter*.[187] In a dissenting opinion, Justices Rothstein and Wagner considered the majority's finding that the right to strike constituted an indispensable component of meaningful collective bargaining contrary to the definition of meaningful collective bargaining put forward in *Fraser* and *Health Services*.[188] According to the dissenting judges: "finding that there is a constitutional right to strike (or to an alternative statutory dispute resolution process), is an express contradiction of this Court's ruling in *Fraser* that s. 2(*d*) of the *Charter* does not require a statutory dispute resolution process."[189] The focus here is not on the right to strike as part of a dispute resolution process but rather on

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183 *Ibid* at 234.

184 Pettit, *People's Terms*, *supra* note 7 at 78.

185 *Ibid*. This view can be compared with Raz's view (see *Freedom*, *supra* note 180 at 217–44).

186 *People's Terms*, *supra* note 7 at 82.

187 See *Saskatchewan Federation of Labour*, *supra* note 103 at para 24.

188 *Ibid* at para 128.

189 *Ibid* at para 147 [references omitted].

the right to strike as a form of reciprocal power that is indispensable to achieving freedom in the workplace.

Pettit identifies two strategies for achieving non-domination: reciprocal power and constitutional provision[190] (or the introduction of a constitutional authority depriving one party of their power to interfere arbitrarily).[191] The strategy of reciprocal power aims at equalizing the resources of dominator and dominated to enable the previously dominated person to defend themselves against interference though Pettit recognizes that this "ideal defensive form" is rarely available. Usually, the feasible alternative is to allow the parties to threaten interference with punishment.[192]

Pettit uses the trade union movement as an example of reciprocal power, stating that the movement advanced the non-domination of workers in the industrial world by "giving them collective powers with which to confront the powers of employers."[193] Republican freedom also legitimized the use of strikes, as strikes "may represent the only hope of winning freedom as non-domination for those who are employed. It may be the only way of giving workers sufficient power to enable them to stand up, individually, to their employer."[194]

In short, republican theory legitimizes strikes for their own value in countering domination in the private government of the workplace. Strikes are no longer merely rights, but an exercise in reciprocal power.[195]

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190 *Republicanism*, *supra* note 6 at 67.

191 *Ibid* at 67–68.

192 *Ibid* at 67.

193 *Ibid* at 95.

194 *Ibid* at 142.

195 Alan Bogg and Cynthia Estlund do not oppose the derivative rights approach to the right to strike and reconcile this approach with a civic republican framework. For the aforementioned authors, the right to strike derives not only from freedom of association, but from freedom of expression, as "a right to contest the employer's discretionary decision-making as it bears on the employee's life at work" (see "The Right to Strike and Contestatory Citizenship" in Collins, Lester & Mantouvalou, *supra* note 12, 229 at 238). Thus:

> A collective and temporary withdrawal of labour can be a powerful yet peaceful way to amplify employees' grievances or demands, one that is supported, like a three-legged stool, by the three basic liberties of exit, voice,

The state must then guarantee access to this mechanism of reciprocal power to ensure freedom.

E. Horizontal Domination and the Legitimacy of the Court's Actions

Shortly after the *Alberta Reference*, Paul Cavalluzzo wrote that courts were an inappropriate forum for deciding upon the "delicate balance of ... interests" inherent in collective bargaining.[196] The early cases were merely a re-affirmation that trade union rights were statutory rather than constitutional rights and could thus serve as protection against "s.2(d) attacks brought by employers and dissident employees against labour laws which provide for exclusive representation and union security clauses."[197]

The shift from focus from non-interference to non-domination[198] shifts the role of the state. According to Pettit:

> Imagine that we have a choice between leaving employers with a lot of power over employees, or men with a lot of power over women, and using state interference to reduce such power. Maximizing overall non-interference is perfectly compatible with taking the first option. While we do not guard against interference by the stronger under that option, we may not think that is very likely to occur; and because we do not guard against interference by the stronger, we will count the absence of state interference as a great boon.[199]

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and association. This marks an important advance in the "derivative right" strategy for justifying the right to strike (*ibid* at 240).

196 *Supra* note 15 at 270.

197 *Ibid* at 272.

198 A critique leveled against this approach is that it ignored systemic forms of control endemic to modern society, including systemic racism and widespread prejudice (see Michael J Thompson, "Reconstructing Republican Freedom: A Critique of the Neo-republican Concept of Freedom as Non-Domination" (2013) 39:3 Philosophy & Soc Criticism 277). In response to such critiques, M. Victoria Costa points out that there are causal relationships between prejudice and arbitrary interference, so that when one targets prejudice, once also reduces domination (see "Freedom as Non-Domination and Widespread Prejudice" (2019) 50:4 Metaphilosophy 441 at 444).

199 *Republicanism*, *supra* note 6 at 85.

As non-domination is not a goal that can be satisfactorily pursued by individuals[200] (as discussed earlier), having the state seek to promote non-domination by non-dominating means becomes more promising,[201] Thus, republican views of the role of law and law-makers will differ considerably from libertarian (and some liberal) views. For a republican, a properly constituted law may represent a form of interference, but it is a non-dominating interferer that does not compromise liberty.[202] According to Pettit: "Good laws may relieve people from domination—may protect them against the resources or *dominium* of those who would otherwise have arbitrary power over them—without themselves introducing any new dominating force."[203]

The issue raised here is not *state* action (where the state is usually associated with the legislature) but *court* action. It is an issue of legitimacy raised by decisions made by the court as opposed to through legislative channels. Some scholars question the legitimacy of the courts and where that legitimacy derives when performing what is perceived as a constraint on majority rule,[204] a problem Alexander M. Bickel calls "counter-majoritarian difficulty"[205] and expressed by numerous scholars in the aftermath of *Health Services*.

For Langille and Oliphant, the freedom of association cases brought to light how the *Charter* "blurred the lines" between judicial and legislative functions in Canada.[206] In his seminal analysis of the United States Supreme Court, Bickel wrote that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system."[207] Though the legislature cannot operate by consulting the population through repeated plebiscites, the entire legislative decision-making system is subject to a

200 *Ibid* at 92.

201 *Ibid* at 93.

202 *Ibid* at 35.

203 *Ibid* at 36 [emphasis in original].

204 Ian Shapiro, *Politics Against Domination* (Cambridge, Mass: Belknap Press of Harvard University Press, 2016) at 41.

205 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986) at 16–23.

206 *Supra* note 52 at 298.

207 *Supra* note 205 at 16.

certain amount of public scrutiny and account.[208] Jeremy Waldron is explicit when stating that "judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society."[209] Indeed, for Waldron, it's counter-majoritarian nature makes it democratically illegitimate: "By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."[210] Aileen Kavanagh challenges Waldron's claim that "'giving people a say' in the political decision-making of majoritarian institutions is more important than the outcomes of that decision-making process" and asserts that judicial review itself can be viewed as a valuable channel of political participation.[211] As will be discussed below, the judicial review of legislation by the courts can even be considered part of our democratic dialogue.

According to some, an advantage of judicial action is that judges make decisions rooted in the "flesh and blood" of actual cases and not from pure abstraction.[212] On the other hand, Waldron points out that, by the time an issue reaches the Supreme Court, it often presents a level of abstraction similar to the issue presented before the legislature.[213]

For Raz, courts are political bodies but do not deal with the same matters as the legislature.[214] Questions of competing civil and political rights inevitably combine issues of individual interest with issues of common interest, and should therefore be dealt with by the courts.[215] Since these questions cannot be settled except by deciding questions of public interest, the Court is inevitably involved in politics. However, seeing how —according to Raz—these matters are best settled on the basis of the

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208 *Ibid* at 17.

209 Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346 at 1348.

210 *Ibid* at 1353.

211 Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 Law & Phil 451 at 453.

212 Bickel, *supra* note 205 at 116.

213 Waldron, *supra* note 209 at 1379–80.

214 Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995) at 58.

215 *Ibid* at 57.

central tenets or principles of the political tradition, "it is fitting that they should be removed from the ordinary democratic process and be assigned to a separate political process."[216]

Within neo-republican thought, the counter-majoritarian difficulty also raises controversy. For Ian Shapiro, judicial review is not problematic as such, though its merits "have been greatly oversold."[217] Though an independent judiciary is sold as the "best bet" to protect minority rights from the dangers of majoritarianism, Shapiro finds that "[m]ost judges are conventional establishment figures" and that Supreme Court judges, when appointed, reflect the values of the government appointing them.[218] Shapiro adds that if they sway from those values, "it is more likely to be in the direction of public opinion as expressed through elected branches than away from it."[219] In Canada, the Court has historically rejected two-thirds of the *Charter* claims it hears.[220] Finally, Shapiro adds that it is "exceedingly difficult to show that judicial review matters for the prevention of domination," as, citing fascism and apartheid as examples, "authoritarian governments routinely flout courts when they are intent on oppression."[221]

There are two main responses to the counter-majoritarian difficulty as raised in the freedom of association cases. First, as presented above, freedom from domination requires state action and, possibly, Court action. Under republican theory, the role of the state is protective; law may present a form of interference, but it does not dominate.[222] On the contrary, law may relieve people from domination and protect against those that would otherwise yield arbitrary power.[223] If the promotion of freedom as non-domination for all citizens is a requirement for justice, then

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216 *Ibid*.

217 *Supra* note 204 at 71.

218 *Ibid*.

219 *Ibid* [footnotes omitted].

220 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised ed (Toronto: Irwin Law, 2016) at 9.

221 Shapiro, *supra* note 204 at 72.

222 Pettit, *Republicanism*, *supra* note 6 at 35.

223 *Ibid* at 36.

the state cannot limit itself to examining only its activities; it must also seek to limit arbitrary domination in the workplace

Second, the Court's action was more limited than what critics would suggest, giving a wide margin within which the legislature could act. Indeed, the Court never imposed a particular legislative model of collective bargaining rights.[224] In leaving the actual model of collective bargaining rights open to legislative intervention, the Court entered into a dialogue with the legislator. Indeed, for Kent Roach, the freedom of association cases present an excellent example of how judicial review leads to dialogue between the Court and the legislature. In *Dunmore*, the Court struck down legislation but suspended the remedy for eighteen months. A decade later, in *Fraser*, the Court upheld the government's new legislation.[225] The dialogic interaction between the Court and the legislature was described by the Court itself as follows:

> As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some. In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.[226]

In Canada, the Court has frequently delayed its declaration on invalidity, thus suspending the remedy to give legislatures opportunity to adopt new legislation.[227] In the case of freedom of association, legislatures have indeed crafted a range of replies to the Court's decisions, often justifying

224 This distinction was applied in a series of decisions in Quebec in the decade following *Health Services* when various statutes were contested (see *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc*, 2016 QCTAT 6870 at para 220; *Centrale des syndicats du Québec* c *Québec (Procureur général)*, 2013 QCCS 32 at para 390; *Confédération des syndicats nationaux* c *Québec (Procureur général)*, 2008 QCCS 5076 at para 221).

225 Roach, *supra* note 220 at 350, n 62.

226 *Vriend v Alberta*, 1998 CanLII 816 at para 138 (SCC) [references omitted].

227 Roach, *supra* note 220 at 226.

the limits they impose on certain facets of expanded freedom of association.[228]

Finally, Bickel uses the particular role played by the courts (the United States Supreme Court in his case) to justify their review of legislative action. According to him, the function of the US Supreme Court in constitutional matters "is to define values and proclaim principles."[229] Government action invariably has two aspects: the immediate effects and the—perhaps unintended—"bearing on values we hold to have more general and permanent interest."[230] If the legislature is better suited to satisfying the immediate needs of the many, the US Supreme Court is better suited to supporting and maintaining "enduring general values."[231] Roach sees this aspect of decision-making as one which contributes to democracy. The US Supreme Court enhances democracy not by avoiding constitutional judgment but by defining broad, enduring principles which are then refined by the legislation required in particular cases.[232]

CONCLUSION

In 1986, the majority of the Supreme Court of Canada defined "government" in section 32 of the *Charter* as "the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities."[233] Though this is a commonly held view of government, Anderson calls for a rejection of the "false narrowing" of government to the state, arguing that liberty can be significantly constrained in domains of private activity.[234] Indeed, though liberalism focuses on freedom from state intervention, Anderson highlights the state of unfreedom that one finds oneself subject to under the private government of the workplace. Private government, according to Anderson, "has arbitrary, unaccountable power over those it

228 *Ibid* at 349–52.

229 Bickel, *supra* note 205 at 68.

230 *Ibid* at 24.

231 *Ibid* at 27.

232 Roach, *supra* note 220 at 166–67.

233 *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 at para 33 (SCC).

234 *Private Government*, *supra* note 11 at 48.

governs."[235] The legally binding obligation to bargain collectively seeks to redress this imbalance of power by giving workers voice in the decisions that affect them, thus redressing workplace unfreedom and inequality. As such, in *Health Services*, the Court wrote—in its justification of extending constitutional protection to collective bargaining—that one "of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees."[236]

Protecting collective bargaining, and indeed the right to strike, can be viewed as part of the protective role of the state. Though such intervention can be carried out by the legislature, when the ball is placed in the court of the judiciary (not to say the Court's court), the Court, as guardian of principles, may draw on pre-institutional rights to read into the right to join a union both a right to bargain and a right to strike. In Canada, the Court refers to these moral concepts as *Charter* values. Ultimately, the legislature will be responsible for adopting or amending legislation in a way that is consistent with its protective role of preventing domination. Thus, the Court and the legislature will play two distinct yet complementary roles; the Court will provide a moral framework and the legislature will be guided by this moral framework in protecting rights and freedoms.

While the use of these pre-institutional rights (or *Charter* values) in large part facilitated this shift, it was not without controversy. Indeed, perhaps the strongest worded critique of *Health Services* was Justice Rothstein's dissent in *Fraser*. In this dissent, the judge espoused an interpretation more consistent with classical liberalism and the Court's earlier jurisprudence, namely that the *Charter* protected individual rights and that section 2(d) granted a protection from obstacles to association (a freedom and not a right).[237] Finally, Rothstein disagreed with the Court's use of *Charter* values, arguing that the interpretation strayed too far from the words of the *Charter* itself.[238] To Justice Rothstein's dissent, the majority in *Fraser* wrote that "a value-oriented approach to the broadly worded

235 *Ibid* at 45.

236 *Supra* note 63 at para 84.

237 *Fraser*, *supra* note 69 at paras 178, 190–95.

238 *Ibid* at paras 252–53.

guarantees of the *Charter*" had been "repeatedly endorsed by *Charter* jurisprudence."[239]

By interpreting *Charter* rights and freedoms broadly, and in a way that was consistent with the protective function of the state, and in an attempt to reduce domination, the Court created constitutional (rather than merely statutory) obligations for private actors. To reduce workplace domination, the Court interpreted freedom of association through a moral lens but also with an objective of reducing domination and relational inequality. To achieve this aim, the Court needed to create mechanisms of anti-power. Such mechanisms already existed in provincial legislation, as well as in the *Canada Labour Code*. We may ask, though, how exactly the Court used moral arguments to elevate statutory rights and duties, giving them constitutional protection. This question shall be the object of further study. Additionally, the shift from non-interference to non-domination fundamentally alters the role of the state in the protection of fundamental rights, as well as providing a framework for resolution of conflicting rights (to establish, for example, limits on freedom of expression in relation to equality rights). Thus, though a civil republican framework certainly applies to other rights and freedoms, such an analysis falls well outside the scope of this paper.

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239 *Ibid* at para 96.