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Résumé de l'article

Trois caractéristiques marquent l'état de la recherche contemporaine en relations industrielles. En premier lieu, la déstabilisation des catégories fixes dans les études théoriques sur l'Etat et la société dirige l'attention des politicologues vers ce domaine politisé d'ordre dynamique. Deuxièmement, les développements récents dans le domaine lui-même remettent en question les principales approches qui se disputent la discipline. Enfin, troisièmement, l'élaboration de la discipline même suscite une reconnaissance accrue de la nécessité d'en arriver à un niveau de conscience théorique et méthodologique plus élevé.

La décennie des études comparées du taux de densité syndicale divergents entre les Etats-Unis et le Canada offre de la matière pour explorer ces questions théoriques, surtout lorsque les nouvelles tendances remettent en doute les récents consensus analytiques. Une approche comparative axée sur un concept de "régime du travail" sensible à la dimension historique offre une méthode capable de s'inspirer des principales stratégies analytiques en concurrence, tout en proposant un programme de recherche plus ouvert et plus sûr qu'aucun de ceux qui ont été proposés. Un examen critique des ouvrages de Lipset, Weiler, Teubner, Panitche et Swartz et quelques autres, ainsi qu'une analyse historique comparative forment les éléments de base de l'approche proposée.

# Unionization and Labour Regimes in Canada and the United States:

## Considerations for Comparative Research

David Kettler, James Struthers and Christopher Huxley

THE HISTORY AND THEORY of industrial relations are confronted by surprising demands in the last decades of the 20th century. Students of industrial relations, having become practitioners of disciplines with specialized audiences, occupied with practical concerns of labour-management relations or with the broader but largely intramural issues centred on Marxist perspectives, are drawn back into debates about fundamental problems of modern political theory. As in the early generations after 1870, when political theories of syndicalism and pluralism generalized from emerging industrial relations practices and reflections, certain contemporary theorists of the state are turning to the discipline-bound industrial relations literatures in hope of finding models and propositions relevant to new theoretical perplexities. The prevailing categories of the political, socio-economic, and cultural domains, whose interrelationships are disputed by established theories but which commonly were understood as settled configurations, have been scrambled by recent social developments and thought.<sup>1</sup> In consequence, new attention is being paid to studies of social processes which cut across conventional categories, and which never have been accommodated comfortably within standard lines of demarcation. Although studies of gender and the family are well recognized as important here, the expectations addressed to industrial relations literatures have been noted less commonly.<sup>2</sup>

<sup>1</sup>For an overview of such difficulties in empirical and normative political theory, in a Canadian context, see Charles Taylor, "Alternative Futures. Legitimacy, Identity and Alienation in Late Twentieth Century Canada," in *Constitutionalism, Citizenship and Society in Canada*, vol. 33 of the Research Studies Prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1985).

<sup>2</sup>Twenty years ago, Robert D. Cumming argued that political theories, taken as structures of knowledge, are often distinguished from one another by the selection of "other studies" that they variously take as relevant. See *Human Nature and History. A Study of the Development of Liberal Political Thought* (Chicago 1969), vol. 1, 14-5. For some earlier attempts to make industrial relations studies a prime

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It is not that political theory has discovered only now the importance of labour markets or labour movements. Our point is, rather, that some influential political theory, often in conjunction with a revitalized legal theory, is giving new weight to the analytical units and approaches applied to institutions formed by the interplay among workers' self-organization, predominantly in the form of trade unions, employers of wage-dependent labour, and diverse public agencies. The "neo-corporatist" theorizing of the 1970s is the best-known of these developments,<sup>3</sup> and will not concern us here. Other intriguing responses to the presumed crisis of the legal-rational state draw in a different way on the theory of collective bargaining by seeking help in understanding the formation and self-regulation of intra-state or trans-national collective entities whose actions have a comprehensible, structured character despite uncertain norms of inclusion and tenuously structured internal power distributions.<sup>4</sup> Because the functions of sovereign states are cross-cut regularly or pre-empted by diverse entities, political theory looks for analogies in other studies.

The ensuing wider interest in industrial relations comes at a time when this discipline itself must address difficult questions arising from the abrupt and precipitous declines in union membership and power in a number of countries

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contributor to political theory, see the literature cited in David Kettler, "Works Community and Workers' Organization: A Central Problem in Weimar Labour Law," *Economy and Society*, 13:3 (1984), 278ff. In contemporary state theory, see the debate initiated by Theda Skocpol, "Political Responses to the Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal," *Politics and Society*, 10:2 (1980). Skocpol builds on her earlier work on the relations between civil society and state. Theda Skocpol, *States and Social Revolutions* (Cambridge 1979). For alternative perspectives, see Rhonda Levine, *Class Struggle and the New Deal: Industrial Labor, Industrial Capital and the State* (Lawrence 1988), and Steve Vieux, "Containing the Class Struggle: Skocpol on Revolution," *Studies in Political Economy*, 27 (August 1988), 87-111. More concerned with normative issues of political theory is Barrington Moore, *Injustice: The Social Bases of Obedience and Revolt* (White Plains, New York 1978). The transformation being wrought by feminist writings in political theory as in industrial relations study itself, cannot be treated in this place, although its effects are presupposed by our earlier reference to the "scrambling" of categories. With regard to the legal categories of political theory, see for example, Catherine A. Mackinnon, *Feminism Unmodified* (Cambridge, Mass. 1987), 32-62. Less unorthodox but no less provocative, showing the connections among these themes, is Mary Ann Glendon, *The New Family and the New Prosperity* (Toronto 1981). One of the present co-authors was originally stimulated in his recognition of the larger problems by the research now reported in Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," *Yale Journal of Law and Feminism* (forthcoming).

<sup>3</sup>See, for example, P.C. Schmitter, "Democratic Theory and Neo-Corporatist Practice," *Social Research*, 50 (Winter 1983), 885-928 and the essays collected in W. Streek and P.C. Schmitter, eds., *Private Interest Government: Beyond Market and State* (Beverly Hills and London 1985), especially Wolfgang Streek and Philippe Schmitter, "Community, Market, State — and Associations?". A seminal anthology is Suzanne Berger, *Organizing Interests in Western Europe. Pluralism, Corporatism, and the Transformation of Politics* (Cambridge 1981).

<sup>4</sup>See Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law and Society Review*, 17 (1982/3), 401f., drawing on Philip Selznick *Law, Society and Industrial Justice* (New York 1969). See also David Kettler, "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy," *Law and Society Review*, 21:1 (1987), 9-47. Teubner's recent interdisciplinary work will be discussed below.

where the place of labour organizations in a settled industrial relations system has come to be taken as a premise of inquiry. Elsewhere, independent unions have assumed novel roles, where such organizations have long been prohibited or reduced to self-parody, as with Black trade unions in South Africa or *Solidarnosc* in Poland. Although some observers are satisfied to recall earlier periodic fluctuations, and others accept various progressive social development schemes that accord unions a limited role during a specifiable and finite historical stage (said to be ending in the most developed nations),<sup>5</sup> we argue that current questions about shifts in unionization are important, precisely because of the wider ramifications of theories built around union experiences. Our discussion of research on two cases hopes to contribute to theoretical stock-taking in industrial relations studies, against the background of political theorists' interest in their problems.

The best-studied comparison during the past six years involves union densities in Canada and the United States. The contrasting patterns are now familiar, although they have not remained static during the years since these comparative studies began. Starting in the late 1950s, the relative extent of unionization in the United States first stagnated and then started to decline, while all measures of union involvement in Canada began a steady increase that has recently slackened but not substantially reversed. This protracted divergence is surprising. Except for the latter years of the Great Depression and the period of World War II, the two sets of union density figures — that is, the proportion of the non-agricultural labour force belonging to unions — for Canada and the United States rarely have differed by more than a few percentage points since the early 1900s, and in the ten years prior to 1965, both union movements stabilized at around 30 per cent. During the following twenty years, however, Canadian union density steadily grew toward 40 per cent, with only a slight dip during the past four years, while the American figures (so far as can be ascertained from deficient data) plunged sharply well below 20 per cent.<sup>6</sup> In the next few years, inquiry well might have to address new questions

<sup>5</sup>For a recent overview of approaches to union decline, see Brian Towers, "Running the Gauntlet: British Trade Unions under Thatcher, 1979-1988," *Industrial and Labor Relations Review*, 42:2 (January 1989), 163-88. See also David Kettler and Volker Meja, "Social Progress after the Age of Progressivism: The End of Trade Unionism in the West?" in Jeffrey C. Alexander and Piotr Szatcnpka, eds., *After Progress* (London 1990).

<sup>6</sup>There are problems of measurement here, since various series make different assumptions, but the proportions of the divergent ratios are nowhere in doubt. See George Sayers Bain and Robert Price, *Profiles of Union Growth* (Oxford 1980); Paul Weiler, "Promises to Keep: Rights to Self-Organization under the NLRA," *Harvard Law Review*, 96:8 (June 1983), 1769-1827; Joseph B. Rose and Gary N. Chaison, "The State of the Unions: United States and Canada," *Journal of Labor Research*, 6:1 (Winter 1985), 97-111; Leo Troy and Neil Shefflin, *Union Sourcebook* (West Orange 1985); Leo Troy, "The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR", in Seymour Martin Lipset, ed., *Unions in Transition: Entering the Second Century* (San Francisco 1986), 75-109; Christopher Huxley, David Kettler and James Struthers, "Is Canada's Experience 'Especially Instructive'?" in Seymour Martin Lipset, ed., *Unions*, 113-32. Noah M. Meltz, "Labor Movements in Canada and the United States," in Thomas Kochan, ed., *Challenges and Choices Facing American Labor* (Cambridge, Mass. 1985), 315-34, and "Unionism in the Private Service Sector: A Canada U.S. Comparison," paper presented to conference on "North American Labor Movements into the 1990s: Similarities or

about declining differences or marked sectoral or regional variations. Such prospects make it all the more urgent to consider the comparative work that has been done and to assess our theoretical and methodological resources. We start from the premise that comparative studies are essential to industrial relations theory. We go on to explore the possibility that work in this field can contribute independently to social theories of the state, rather than being a dependent, applied sub-field of the latter.

S.M. Lipset, an influential modern pioneer in the comparative study of Canada and the United States, recently has examined the differences in Canadian and United States unionization rates.<sup>7</sup> His analysis exemplifies the tendency to treat such contrast simply as another opportunity to apply long-held theoretical convictions. In line with his characteristic adaptation of Weberian teachings about the explanatory powers of ideology-formations grounded in diverse group perceptions of class and status, Lipset already had concluded 25 years ago that Canada was a partial exception to "American exceptionalism" because Canada's historical origins and self-defining ideology had been hostile to American middle-class individualism. Canada supported the supposedly symbiotic pairing of a collectivist and statist, paternalistic, conservative elite with an equally collectivist and statist, egalitarian, social-democratic opposition.<sup>8</sup> Lipset argues that the present growing divergence between union density rates, notwithstanding 30 years during which the United States was more unionized than Canada, simply confirms this fundamental historical difference. The interval of 30 years is explained as an anomalous period, when the Great Depression and its immediate aftermath imposed a temporary class division upon the American norm and brought with it, to the lower class, a pattern of comparatively collectivist attitudes and behaviour. To support this explanation of the more recent pattern, Lipset cites not only the causally equivocal correlations between American attitudes towards unions and union membership trends, but also a flood of testimonials by nationalist Canadian historians, left and right, eager to ground Canadian nationhood upon a distinctive, Anglo-genetic ethos.<sup>9</sup> Apart from the surprises that recent rates of union decline in

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Differences?" Harvard University, Center for International Affairs, 3 February 1989. The latest preliminary data available at the time of writing indicates that the union density figures for 1988 were 36.6 per cent for Canada and 16.8 per cent for the United States. For further information, see Meltz, "Unionism in the Private Service Sector," 1-3, and United States, Bureau of Labor Statistics, *Employment and Earnings*, 36:1 (January 1989), 225.

<sup>7</sup>Seymour Martin Lipset, "North American Labor Movements: A comparative Perspective," in Lipset, ed., *Unions in Transition*, 421-52.

<sup>8</sup>Seymour Martin Lipset, "Revolution and Counter-revolution: The United States and Canada," in Thomas R. Ford (ed.), *The Revolutionary Theme in Contemporary America* (Lexington 1965); Seymour Martin Lipset, *Consensus and Conflict* (New Brunswick 1985), chapters 2 and 5; Seymour Martin Lipset, "Canada and the United States: The Cultural Dimension," in Charles F. Doran and John H. Sigler, eds., *Canada and the United States* (Englewood Cliffs, NJ and Scarborough, ON 1985), 109-60.

<sup>9</sup>An example of special interest to students of industrial relations is Gad Horowitz, *Canadian Labour in Politics* (Toronto 1968).

England might pose to such analysts, these arguments depend excessively on the presumed explanatory power of such abstract constructs as "individualism" and "collectivism". The constructs are rendered dubious, for example, by Canadian distrust of, and American deference toward, non-governmental authorities. Recent studies of Canadian attitudes about individual rights and trade unions show that these cannot be distinguished from their American counterparts by reference to such conventional disjunctions. Lipset's ruminations stimulate comparative study, but his analysis presupposes normalities and causal linkages that are not persuasive. Gallup's poll findings are a long way from multinational corporate strategies, the outputs of imperfectly coordinated public agencies, and the multiform conduct of variously stratified work forces. Lipset's mode presupposes a world of universalistically rational markets interacting with a world of structurally similar states diversified by historically-conditioned ideological-cultural tendencies. This is too static and too orderly for our realities; a more open exploration of our question in comparative industrial relations is needed.

Some astute commentators question the weight we assign this comparative question about diverging unionization rates in the United States and Canada. Working with a theoretical model which aspires to greater rigour and closure than Lipset's, Leo Panitch and Donald Swartz have argued that the real question is not whether one or the other country has higher levels of unionization at a given time, but whether the working class can seriously challenge the hegemony of capitalism. In their view, the limitations of the period of divergently increasing unionization in Canada soon were unmasked during the immediately subsequent period of "permanent exceptionalism", when the state utilized its political power to control the labour market for the benefit of capitalist-driven recovery. The Canadian state similarly used the earlier period of "voluntary" juridified collective bargaining under the Rand formula, and, in a new shift, it now threatens to join the United States in moves towards de-unionization. The main point about the phase when legally constrained unions were a major instrument of Canadian state labour market policy, accordingly, is the state's effectiveness both in taming union leadership, and in rendering unions virtually unfit for the mobilizing tasks of trade unionism in uniting the working class for socialist struggle. Analysts who attempt to assess theories through comparisons between such indicators of historically localized differences in capitalist state strategies, they argue, as well as American unionists who look to Canada for lessons, are allowing themselves to be distracted from the basic questions.<sup>10</sup>

<sup>10</sup> "Towards Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations," *Labour/Le Travail*, 13 (Spring 1984), 133-57. Expanded and updated versions of this article have appeared as *From Consent to Coercion: The Assault on Trade Union Freedoms* (Toronto 1985) and *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited* (Toronto 1988). See especially 98-100 in the third of these publications. We return to this analysis later. Panitch and Swartz's argument is unduly influenced by the political judgment that emphasis on such comparative studies implies a "Panglossian" complacency. The meanings of comparative studies are not limited to the immediate political conclusions that some people may misguidedly derive from them. The relationships between

We disagree. Trade union membership rates have a distinctive significance in North America, because they are the most reliable indicators of trade union power. In many European countries, because such power is less closely linked to individual shop representation, and because representation is not in any case linked to majority support, membership figures do not necessarily have the same meaning, and different indicators might well be more revealing.<sup>11</sup> Regardless of fluctuations in bargaining strength, these figures measure the extent to which collective bargaining is normalized as a central institution in North American labour markets, and also provide the best starting point for gauging the incidence and economic salience of such relationships. Because of the distinctive links that the institutions common to all North American collective labour law forge between union membership and binding collective agreements, union density correlates very highly with the proportion of the non-agricultural labour force that is covered by collective agreements. It is also reasonable to surmise that these union density data are good "first cut" approximations of the institutional importance of trade unions — that is, their capacities for effective "political exchanges."<sup>12</sup>

### 1. LABOUR REGIMES

IN AGREEMENT with most of the specialist literature, we argue that neither cultural-ideological nor economic developments alone suffice to explain the divergences between American and Canadian patterns, although they are doubtless important.<sup>13</sup> The critical differentiating factors, we maintain, are the contrasting ways in which the respective *labour regimes* condition responses to structural changes in both the economy and the political culture.<sup>14</sup> As we shall show in explaining and illustrating this key concept of labour regime, differences in the character and pattern of

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ideology and theory are not so direct. We need not disagree with Panitch and Swartz about most questions in union politics any more than we do concerning the philosophical lessons to be derived from Voltaire's cautionary tale about the submissive Candide, Cunegonde and Pangloss, let alone the exploitative Baron Thunder-ten-tronckh.

<sup>11</sup> See literature cited in Kettler and Meja, "Social Progress."

<sup>12</sup> Marino Regini, "The Conditions for Political Exchange: How Concertation Emerged and Collapsed in Italy and Great Britain," in John H. Goldthorpe, ed., *Order and Conflict in Contemporary Capitalism: Studies in the Political Economy of Western European Nations* (Oxford 1984), 124-44.

<sup>13</sup> Weiler, "Promises to Keep"; Richard B. Freeman, "Why Are Unions Faring Poorly in NLRB Representation Elections?" in Thomas Kochan (ed.), *Challenges and Choices Facing American Labor* (Cambridge, Mass. 1985); Meltz, "Labor Movements in Canada and the United States"; Rose and Chaison, "The State of the Unions"; Pradeep Kumar, "Union Growth in Canada: Retrospect and Prospect," in *Canadian Labour Relations*, vol. 16 of the Research Studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1986), 95-160; Joseph Weiler, "The Role of Law in Labour Relations," in *Labour Law and Urban Law in Canada*, vol. 51 of the Research Studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, (Toronto 1986), 1-65.

<sup>14</sup> Huxley, Kettler and Struthers, "Is Canada's Experience?"; an earlier plea for integrating political, comparative and historical dimensions is in Peter Gourevitch, Peter Lange and Andrew Martin, "Industrial Relations and Politics: Some Reflections," Peter Doeringer, ed., *Industrial Relations in International Perspective* (New York 1981).

unionization indicated by the differences in union density rates and trends in the two countries can best be understood by reference to the operations of distinct historical formations that are organizational in character, broadly speaking, combining legal and political dimensions. In our view, the Free Trade Agreement and related political developments in Canada add great urgency to the analytical problems we are addressing, as do a number of recent proposals for changes in labour law and union strategies, which would orient the law more to individual than to collective rights, and undermine conflictual sources of union solidarity.<sup>15</sup>

A comparative approach oriented to the concept of labour regime incorporates the idea of contrasting labour law and administrative policies. But it goes beyond this to situate these variables within historically distinct patterns of conduct, resources and cognitions comprised by the interplay among the principal parties involved.<sup>16</sup> Taken by themselves, laws and policies which sustain unionization in Canada, for example, well might undermine it in Britain. Moreover, an exclusive focus on legal or administrative variables exaggerates the control at the disposal of state agencies, rather than treating the diverse instrumentalities of the state as vital, but by no means necessarily sovereign, collaborators in a process displaying a considerable measure of autonomy. In thus modifying and recontextualizing the lawyers' conventional concept of a legal "regime," we are drawing upon recent international relations theory in order to comprehend not only the quasi-legalistic "principles, norms, rules and decisionmakers"<sup>17</sup> around which the expectations of the relevant political actors converge in a given issue area over an identifiable period of time but also, and more importantly, the power constellations that condition the effectiveness of the institutionalized order in question.

In adapting this international relations concept to a domestic policy field, such as the organization of the internal labour market, we intend to help conceptualize

<sup>15</sup>Actual portents of changes are discussed in Michael Lynk, "Free Trade and the Harmonization of Labour Law," *Canadian Dimension*, 22:5 (July-August 1988), 28-32. Theoretical possibilities are advocated in David M. Beatty, *Putting the Charter to Work* (Kingston and Montreal 1987). Patrick Monahan, *Politics and the Constitution. The Charter, Federalism and the Supreme Court of Canada* (Toronto 1987). For a more concrete application of our concept of labour regime to the study of the implications of the Charter of Rights and Freedoms for trade unionism in Canada, see Thomas A. McIntosh, *Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime* (Kingston 1989).

<sup>16</sup>Larry Haiven, "A Comparison of Industrial Dispute Resolution in Britain and Canada," paper presented to conference on "Industrial Relations in Canada and Britain," organized by the Business and Economics Group of the British Association of Canadian Studies, Manchester, March 1987, has compared our concept of labour regime to Michael Burawoy's theorization of different "factory regimes" in *The Politics of Production: Factory Regimes Under Capitalism and Socialism* (London 1985). While we share with Burawoy a concern with political processes, our concept of labour regimes is designed to accommodate comparative historical perspectives and is less preoccupied with the task of building typologies of forms of employer control. For discussions of Burawoy's work, see P.K. Edwards, *Conflict at Work* (Oxford 1986) and the review by Christopher Huxley in *Critical Sociology*, 15:3 (Fall 1988), 113-20.

<sup>17</sup>Stephen D. Krasner, "Structural causes and regime consequences: regimes as intervening variables," *International Organization* (Special Issue: International Regimes) 36:2 (Spring 1982), 185.



institutions that have an irreducible legal component, but which also are shaped in important measure by the non-legal power resources that participants bring into play. As originally formulated by Krasner, this regime concept encompassed a pattern shaped by a given range of the causal variables of established usage and custom, egoistic self-interest, power capabilities, diffused values, and knowledge among a combination of actors. The point of the concept among students of international relations, where theoretically-serious work has long been dominated by a highly rationalistic and abstract systemic theory of power-maximization, has been to qualify this monistic "realism" so as to facilitate inquiry into the limited but autonomous causal importance of quasi-legalized institutions where and when they can be discerned.<sup>18</sup> Such institutions are not reduced to precisely calculable power factors, while the reality of power factors is not idealistically denied. Recent work in the field has objected to the static character of the original conception, and it has addressed dynamic questions of origins and transformations, increasingly revealing the concept to be more nearly at home at the level of interpretative comparative history rather than rigorous explanatory theory.<sup>19</sup>

Our adaptation shares such modesty, but it should not be misunderstood. The systemic theories we are concerned to modify derive as much from political economy as from other presumed calculuses subject, in principle, to precise explanatory formulation. But in insisting on the values of comparison and in searching for generalizable regularities, the approach also departs from purely ideographic conceptions of historical understanding. There are similarities between our conceptualization and Goldfield's emphasis on changes in the "relation of class forces"<sup>20</sup> and, in quite a different tradition, Max Weber's somewhat embarrassed, comparatively unsystematic treatment of the imperfectly rationalized constitutional law.<sup>21</sup> More immediately to the point, perhaps, is the similarity between our circumscription of the regime concept and the theorizing about collective agreement, largely to be found in the legal literature in Germany, and in both Canada and the United States, commencing during the formative years of industrial relations in the decade before World War I.<sup>22</sup> Neither purely a contract, nor a

<sup>18</sup>For a representative sampling of the controversy about the concept within international relations study, see the essays collected in Robert O. Keohane, ed., *Neorealism and Its Critics* (New York 1986).

<sup>19</sup>An informative but theoretically tentative attempt to refine Krasner's concept to overcome its static character is found in Tsuyoshi Kawasaki, "Towards a New Dimension of Regime Analysis: A Theoretical Essay," paper presented at the Annual Meeting of the Canadian Political Science Association, Winnipeg, Manitoba, June 6-8, 1986.

<sup>20</sup>Michael Goldfield, *The Decline of Organized Labor in the United States* (Chicago 1987).

<sup>21</sup>Max Weber, *Economy and Society*, vol. 1, Gunther Roth and Claus Wittich eds., (Berkeley 1978).

<sup>22</sup>Earlier German discussions, as well as a brief comparison with English conceptions, which the author did much to influence, are well covered in Otto Kahn-Freund, *Labour Law and Politics in the Weimar Republic* (Oxford 1981). Aspects of the German discussion are also summarized in Kettler, "Works Community." Early US discussions are documented in US Commission on Industrial Relations, *Industrial Relations*. Final Report and Testimony submitted to Congress by the Commission on Industrial Relations created by the Act of August 23, 1912. 64th Congress, 1st Session, Senate Document No. 415, 1916. II: "A.F. of L., Socialists, and Industrial Workers" and XI: "Labor and the Law" and in John R.

parallelogram of market forces, nor an armistice between mutually independent hostile forces, the collective agreement originally could be described and classified more easily than it could be explained. In recalling industrial relations to this conceptual dilemma and to the richness of the approaches that the study historically developed in order to relate itself to its antecedents, competitors and putative successors, we are attempting an exercise in theoretical retrieval rather than radical innovation.

In the study of labour, regime refers to the institutionalized political organization of labour markets,<sup>23</sup> comprising the patterned interactions among state (and possibly other legal administrative) agencies, employment-dependent labour, and employers. The degrees and forms of organization of the latter two types of actors obviously will make a decisive difference to the shape of the regime concerned. When applied to the current scene in Canada and the United States, the concept recombines the elements that conventionally are distinguished as the industrial relations system and its public policy environment. Without denying the possibility of a regime in which an autonomous collective-bargaining system is governed by a state-maintained "settlement" (which has been the paradigmatic model for both the most common prevalent approach and for its principal adversaries), our proposed conceptual shift is designed to facilitate inquiry into the political dynamics of any such regime, as well as its historical sources and competitors.

As a constituted pattern, a regime embodies a measure of resistance to disruptive change. It places constraints upon the forms and exercises of power deployed. Both of these features differ significantly in degree from regime to regime, and from time to time in the life of a regime. A regime may be designed by its most powerful proponents to further a preferred objective, but this structural tendency will be subject to quite important exceptions. No regime functions in a purely instrumental way. To endure, even an imposed regime must be accorded a measure of legitimacy by participant actors, and this is rarely consistent with pure unilateralism. Some writers on regimes prefer to speak of feedback loops regarding both values and knowledge to characterize the interest which all participants develop in the smooth operations of the regime, at some sacrifice to the causal factors which initiate their participation.<sup>24</sup> However characterized, the phenomenon commonly has been observed during comparatively stable periods of industrial relations systems, in the absence of endogenous changes that overpower the autonomous regime momentum or the commitment to the regime of one of its

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Commons and John B. Andrews, *Principles of Labor Legislation* (New York 1916). A wider view of the issues is taken in Selznick, *Law, Society and Industrial*, 121-82. Among recent important contribution is James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst, Mass. 1983); see also Paul N. Cox, "On Debunking Labor Law Doctrine: A review of James Atleson's *Values and Assumptions in American Labor Law*," *Utah Law Review*, 1 (1985), 191-30, and Robert Brousseau, "Toward a Theory of Rights for the Employment Relation," *Washington Law Review*, 56:1 (1980).

<sup>23</sup>Claus Offe, "Social Policy and Theory in State," in John Keane, ed., *Contradictions of the Welfare State* (Cambridge, Mass. 1984), 95ff.

<sup>24</sup>Kawasaki, "Towards a New Dimension."

principal participants. Regimes differ as to complexity, flexibility, and tolerance for inner inconsistency or conflict. But they all display that visible blend of legal manner and power factors that mark international law, which was the paradigm for the international relations theorists' version of the concept. The German Marxist theorist, Karl Korsch, also used international law as a model of the analysis of labour law, when the latter is realistically understood in its social effects.<sup>25</sup>

Labour regimes embody legal and administrative designs which reflect and in turn regularize the way in which business, labour and the state interact within the sphere of industrial relations, insofar as this interrelationship has been differentiated from other social relations. This relationship, as well as the political constellations created by the direct involvement of these parties in political life, are integral to the pattern of any regime. Differences in governmental policies and practices in the labour sphere must be seen in conjunction with differences in the outlooks and activities of unions and employers. For the United States, Kochan, Katz, and McKersie recently have developed perspectives for the study of "strategic choices" by employers.<sup>26</sup> Our analysis, however, partly as a consequence of the political interest which initiated the research, pays more attention to the effects of state designs and union political strategies on the constitution of labour regimes.

## 2. PROBLEMS OF COMPARATIVE STUDY

IT HAS BEEN COMMON for comparativists to treat industrial relations in Canada and the United States as two examples of a single North American type of system.<sup>27</sup> Our approach to the question of deviations in labour density rates suggests, however, that the labour regimes have been more similar in form than in substance, despite recurrent uncertainties at the boundaries between them, especially at certain times and in certain sectors. The recent period has seen a considerable measure of differentiation even in legal forms, and many informed observers are content to cite legal factors alone in explaining differences in unionization rates. We use these

<sup>25</sup>Karl Korsch, "Jus belli ac pacis im Arbeitsrecht," *Kritische Justiz*, 5: 2 (1972), 142ff. It should be said, however, that Korsch drew the parallel largely in order to discredit the pretensions of both international and labour law.

<sup>26</sup>Thomas A. Kochan, Harry C. Katz, and Robert B. McKersie, *The Transformation of American Industrial Relations* (Boston 1986); see also "Review Symposium" on the book in *Industrial and Labor Relations Review*, 41:3 (April 1988), 439-55. A more thoroughgoing analysis would have to review the literature on the relationships between unionization and changing compensation schemes, as well as the other aspects of the "human resources" movement emphasized by Kochan *et al.* See J. Fiorito, C. Lowman, and F.D. Nelson, "The Impact of Human Resources Policies on Union Organizing," *Industrial Relations*, 26 (1987), 113-26; P.A. Gregg and J.S. Machin, "Unions and the Incidence of Performance Linked Pay Schemes in Britain," *International Journal of Industrial Organization*, 6 (1988), 91-107; and, directly relevant to the study of changes in the Canadian labour regime, although as yet in preliminary stages, Derek C. Jones and Jeffrey Pliskin, "Unionization and the Incidence of Performance-Based Compensation in Canada," a paper presented to the ACES panel at the ASSA Annual Meeting in December 1988.

<sup>27</sup>G. Cella and T. Treu, "National Trade Union Movements," Chapter 10 of R. Blanpain, ed., *Comparative Labour Law and Industrial Relations* (Deventer, Netherlands 1982).

findings, but, in keeping with our regime approach, treat them only as starting points.

Although there is no single dramatic contrast between Canadian and American legal policy with regard to collective labor law, it nevertheless is possible to identify a complex of distinguishing features. Most Canadian jurisdictions, for example, will certify a union as exclusive bargaining agent upon evidence that 55-60 percent of the employees in an administratively accepted bargaining unit have signed membership applications. American procedure not only requires a secret referendum as well (which some Canadian jurisdictions have introduced), but also interprets the employees' choice as an "election" in which the employers have "free speech" rights to campaign against the union during the sometimes-extended interval allowed to elapse between application and referendum, with well-documented extensive pressure upon employees being the rule rather than the exception.<sup>28</sup> Many Canadian jurisdictions, moreover, impose by law a requirement, achievable in the United States jurisdictions where it is not altogether prohibited only by collective bargaining at some cost, that all members of a certified bargaining unit pay an equivalent to union dues if they are not members of the union.<sup>29</sup> Canadian regulatory labour boards have been strengthened by legislative and judicial moves towards greater judicial deference to their findings, as well as by substantially strengthened remedies.<sup>30</sup> A number of prominent jurisdictions also have moved towards imposing settlements by binding arbitration where unions in newly certified units are unable to conclude first agreements.<sup>31</sup> Although Canadian provinces exercise full power over most labor relations, and a few have experimented with providing inducements for investment at the cost of unions, none has enacted yet anything like the "right-to-work" laws of numerous American states. All these distinctive Canadian legal-administrative patterns refer to features that have been shown to inhibit unionization in the United States. But they cannot be adequately understood as products of divergent ideological predispositions or political intentions. An historical approach is needed to comprehend the important tendency towards divergent labor regimes.

During and immediately after World War II, the familiar structure of Canadian and American labour regimes constituting relations among organized labour,

<sup>28</sup> Paul Weiler, "Promises to Keep," and *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation* (Cambridge, Mass. 1984).

<sup>29</sup> Donald D. Carter, "Legal Restraints upon Employer Conduct during the Collective Bargaining Process," Research and Current Issues Series No. 42, Industrial Relations Centre, Queens University (Kingston 1982).

<sup>30</sup> George W. Adams, "Labour Law Remedies," in Kenneth P. Swan and Katherine E. Swinton, *Studies in Labour Law* (Toronto 1982), 56-78.

<sup>31</sup> Carter, "Legal Restraints." The materials adduced in this paragraph exemplify the information that Panitch and Swartz, *Assault on Trade Union Freedoms* rightly qualify with ample materials emphasizing the costs to unions of Canadian regulatory patterns, as well as their precariousness, fluidity and dependence on non-legal factors. But neither the ambiguities nor the uncertainties of the Canadian labour regime are denied by our analysis; our principal concern is to recognize these features without risking reductionism.

decisive segments of business, and state agencies for the next three decades took shape. (However, we shall argue below that in Canada important and symptomatic regime elements date back at least to the Industrial Disputes Investigation Act at the turn of the century.) Within both nations, these regimes were supported by similar legal frameworks deriving from the design of the American National Labor Relations (Wagner) Act of 1935.<sup>32</sup> In return for state recognition of workers' rights to collective bargaining, trade unions in both countries agreed to institutionalize labor conflict within a comparatively narrow terrain of issues bounded by legally conditioned terms of entry, legally constituted collective agreements, and legally approved tactics. The corresponding agreement by business groups was more reluctant, qualified, and by no means universally accepted; the history of the regimes has been marked by persistent efforts by some parts of the business community and intermittent efforts by most of them to undo it. The labour regimes, accordingly, are constituted by continuing political conflicts, notwithstanding their appearance in the form of settled systems.

The developments internal to the two parallel North American labour regimes have yielded different outcomes. Whether the two sets of cumulative changes in degree should now be treated as a reconstitutive change in either or both cases is uncertain, especially in view of the volatility of the Canadian situation, not least because of its political-economic dependence on the United States. The new "Free Trade" agreement, taken as a political development quite apart from its legal effects, may well work for Canadian adaptation to the American developments.<sup>33</sup> Yet the contrasts remain marked at present, and the period of contrast is the subject of our study. The Canadian labor regime still establishes an adversarial pattern of collective bargaining within legal constraints which limit but also legitimate and otherwise normalize the pattern. In the United States, in contrast, the adversarial relationship between business, organized labour, and state actors within the labour regime now has been moved back a step, in the direction of a patterned struggle over the legitimacy and normality of collective bargaining itself. This contrast is not to be understood as suggesting the existence of a consistently more "pro-labour policy" in Canada. Like the labour regimes of other modern states, that of Canada is importantly conditioned by the larger designs of the state's public economic policies, and especially by its attempts to manage the labor market in the interests of business-generated economic growth.<sup>34</sup> However, compared to the United

<sup>32</sup>David Brody, "The Expansion of the American Labor Movement: Institutional Sources of Stimulus and Restraint," in David Brody, ed., *The American Labor Movement* (New York 1971) and *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York 1980); Stuart Jamieson "Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966," Study No. 22, *Task Force on Labour Relations* (Ottawa 1968); Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Labour Relations System during World War Two," *Labour/Le Travail*, 3 (1978).

<sup>33</sup>Lynk, "Free Trade."

<sup>34</sup>Offe, "Social Policy." Because Beatty, *Putting the Charter*, is not alone among Canadian commentators who look to the German labour regime as a model, it is worth citing not only Offe's work, which draws on German and English, as well as US experiences, but also the exceptionally thoughtful argument

States, such management has proceeded more frequently through attempts at multipartite negotiations at the highest level, or through *ad hoc* interventions which regulate or supercede the outcomes of collective bargaining in designated classes of cases, especially in the public sector, than through a systematic weakening of the competitive position of organized labor within the adversarial system.<sup>35</sup>

The existence of an American labour regime sometimes has been obscured because the ordering of labour relations is said to have a contractual rather than regulative core, in contrast to the regimes in most of western Europe, and to depend on voluntarism rather than intervention.<sup>36</sup> This is essentially correct, except that it is also necessary to recognize that the structure of this contractual voluntarism is itself a mode of control and also subject to considerable interventionist manipulation. The interplay between state agencies and social actors gives reality to the effective design and constitutes a labour regime. Because Canadian public policy has been less inhibited about direct interventions than has that of the United States, it has been correspondingly less inclined to rely on affecting outcomes indirectly by manipulating the parties' bargaining strengths or the legal structure of contract itself.<sup>37</sup> Closely related to this difference is the higher level of welfare-oriented employment law in Canada, covering standards, conditions, and terms of employment. Contrary to common-sense expectations, historically shared by important segments of the American trade union movement, such legislation generally served to strengthen unions rather than to render them redundant.<sup>38</sup>

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in Spiros Simitis, "Zur Verrechtlichung der Arbeitsbeziehungen," in Friedlich Kuebler, ed., *Verrechtlichung von Wirtschaft, Arbeit und Sozialer Solidarität. Vergleichende Analysen* (Baden-Baden 1984), 74-165.

<sup>35</sup> Anthony Giles, "The Canadian Labour Congress and Tripartism," *Relations Industrielles/Industrial Relations*, 37:1 (1982), 93-125. Panitch and Swartz, *Assault on Trade Union Freedoms*; Fernand Morin and Claudine Leclerc, "The Use of Legislation to Control Labour Relations: The Quebec Experience," in *Labour Law and Urban Law in Canada*, vol. 51 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1985), 67-166.

<sup>36</sup> This paragraph, like the two preceding ones, contains only slight modifications of some passages in Huxley, Kettler, and Struthers, "Is Canada's Experience?"; Arthur Lenhoff, "Some Basic Features of American and European Labor Law: A Comparison," *Notre Dame Lawyer*, 26:3 (Spring 1951), 389-428; Benjamin Aaron, "Labor Relations in the United States from a Comparative Perspective," *Washington and Lee Law Review*, 39:4 (Fall 1982), 1247-65.

<sup>37</sup> Robert A. Dahl and Charles E. Lindblom, *Politics, Economics, and Welfare* (New York 1953); Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review*, 89 (1976), 1685ff; R.C.V. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario," in David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1, (Toronto 1981); H. Clare Pentland, "A Study of the Changing Social, Economic, and Political Background of the Canadian System of Industrial Relations," *Draft Study prepared for the Task Force on Labour Relations* (Ottawa 1968); Paul Craven 'An Impartial Umpire': *Industrial Relations and the Canada State, 1900-1911* (Toronto 1980).

<sup>38</sup> Brian Langille, "Labour Law is a Subset of Employment Law," *University of Toronto Law Journal*, 31 (1981), 200; R.D. Clarke, "Worker participation in health and safety in Canada," *International Labour Review*, 121:2 (1982), 199-206; Katherine E. Swinton, "Enforcement of Occupational Health and Safety Legislation: the Role of the Internal Responsibility System," in Swan and Swinton, *Studies in Labour Law*, 144-71; Bennett Harrison, "Plant closures: efforts to cushion the blow," *IRRA Conference Excerpts, Monthly Labor Review*, (June 1984), 34-44; Paul Lewis, "Ten years of unfair dismissal legislation in Great Britain," *International Labour Review*, 121:6 (Nov-Dec 1982), 713f.

As the competitive position of American industry has worsened, American legal policy has given increasing scope to employer resistance to unionization and collective agreement. It also has restricted the scope of legal bargaining (and thus the incentives to unionization), thereby opening the way for employer-controlled patterns of adaptation to change.<sup>39</sup> In contrast, most Canadian jurisdictions have reinforced collective bargaining as the norm in most branches of non-agricultural employment. State labor market policy in Canada has relied upon a combination of neo-corporatist mechanisms and *ad hoc* "exceptional" interventions to steer adaptations to changing conditions, building in both types of cases upon the normalization of collective bargaining relations and collective agreement.<sup>40</sup>

These differences in governmental policies and practices must be seen in conjunction with differences in the political outlook and activities of unions in both countries, which in turn are vital factors in the political makeup of the two regimes. Employers in the United States have been more apt in general to pursue the goal of union-free organizations, especially in new and growing sectors, and unions have been more ready to accept role-limitations imposed by employer resistance. Similar market conditions, it seems, have had marginally but still significantly different effects on the structure and outcomes of collective bargaining, by virtue of the existence of differing labour regimes. Canadian employers and unions also are both more willing to accept each other as principal counterparts in their direct interventions in the public policy process, at least in several policy-domains, and both commit themselves more directly and bindingly to political parties. Although the New Democratic Party (NDP) has never threatened the preponderant electoral position of the other two parties in federal parliamentary elections, it has occupied a strategic position during several periods of minority government, and it has been the governing or official opposition party in several of the more important provinces, whose governments control the bulk of labour policy. Unlike the American trade union movement, which has been divided from an important segment of its historical political support since the conflicts of the 1960s, the alliances constituting the NDP have remained intact.<sup>41</sup>

On this level of analysis, the differences between the Canadian and American situations depend on differences between the political characteristics of the two trade union movements. The Canadian movement has been more aggressive in recent decades, more consistently committed to lasting political associations,

<sup>39</sup>Richard N. Block and Kenneth McLennan, "Structural Economic Change and Industrial Relations in the United States' Manufacturing and Transportation Sectors Since 1973," in Hervey Juris *et al.*, eds., *Industrial Relations in a Decade of Economic Change*, Industrial Relations Research Association Series, 1985.

<sup>40</sup>Roy J. Adams, "Industrial Relations and the Economic Crisis: Canada Moves Towards Europe," in *Ibid.*; Panitch and Swartz, *Assault on Trade Union Freedoms*.

<sup>41</sup>This aspect is informatively discussed by Peter G. Bruce, "Political Parties and Labor Legislation in Canada and the US," *Industrial Relations*, 28: 2 (Spring 1989), 115-141; see also Neil Bradford and Jane Jenson, "The Roots of Social-Democratic Populism in Canada," paper presented to the Conference on "Popular Power in Post-Industrial Societies," Wagner Institute, CUNY, February 1989.

including a labour party occupying an influential position in the most important Anglophone political units. To characterize this difference, we draw on a recent attempt by Cella and Treu<sup>42</sup> to develop a comprehensive comparative typology of national trade union movements.

Most relevant for our purposes are the distinctions Cella and Treu make between "business" and "competitive" unionism. The former they define in the usual way, by "its mainly economic objectives, pursued strictly through collective bargaining, outside stable political initiatives, and by relying mostly on direct organization at the workplace." The latter, in contrast, competes at many social and political points on behalf of a distinctive social vision. "Its objectives are broader; they include basic socio-economic reforms and are pursued by initiatives both on the economic and political fronts, often highly conflictual, with close but not necessarily institutionalized relationship with the political system."<sup>43</sup> In contrast to Cella and Treu themselves, who identify all North American unionism simply with the former model, we suggest that it is worth thinking of a continuum between the two types and to locate the Canadian movement significantly closer than the American to the "competitive" end of this continuum.

The three "most decisive variables" isolated by Cella and Treu in distinguishing between models of unionism suggest the need for such a distinction. In nations characterized by "competitive" unionism, density rates range between 30 and 50 percent, there is some degree of "interdependence" between unions and political parties, and a more interventionist political system typically prevails. "Business" unionism, in contrast, is associated with density rates below 30 percent and with only "occasional" union linkages to political parties. It is located within political systems less inclined to intervene directly in the sphere of industrial relations. These variables, applied by Cella and Treu to a wide range of nations, coincide quite closely with the three patterns of divergence which have struck most recent commentators comparing unionism on both sides of the forty-ninth parallel. Since the mid-1960s, Canadian union density rates have deviated sharply from the American trend; the ties between the Canadian trade union movement and the NDP in the jurisdictions where most unionists live and the comparable ties, for a time, between the major Francophone federations and the Parti Quebecois in Quebec<sup>44</sup>

<sup>42</sup>G. Cella and T. Treu, "National Trade Union Movements," Chapter 10 in R. Blanpain, ed., *Comparative Labour Law and Industrial Relations* (Deventer, Netherlands 1982).

<sup>43</sup>Both quotations from *Ibid.*, 186.

<sup>44</sup>The labour movement has played an important role within the changing balance of political forces in Quebec ever since the Quiet Revolution of 1960, especially during the short lived period of very close association between sections of the labour movement and the Parti Quebecois. See Carla Lipsig-Mummé, "La crise du Syndicalisme nord-américain: Elements d'Interpretation," *Relations Industrielles*, 39: 2 (1984), 275-84. An overview of the governmental and administrative dimensions is provided in Fernand Morin and Claudine Leclerc, "The Use of Legislation to Control Labour Relations: The Quebec Experience," in *Labour Law and Urban Law in Canada*, vol. 51 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1985), 67-166.



are more binding and mutually influential than the corresponding links between American labour organizations and the political parties they support; and throughout this century Canada has developed a more highly regulated system of collective bargaining than is to be found in most other Western industrial countries.<sup>45</sup> The clearly greater strength of two of these variables in Canada makes it less surprising that the third should also tend to be greater, although this level of analysis cannot account for the tendencies themselves, their degree or their timing. While an ideal type of this sort cannot itself explain the correlations it comprises, it heightens the intelligibility of complex phenomena and gives clearer shape to comparisons and more detailed analyses.<sup>46</sup> To the extent that the constituent factors have been found to cohere regularly in the real world, then, we do have some reason for thinking that the type stands for a complex of comparatively stable causal interrelationships, even if the task remains of working them out in detail.

### 3. AN HISTORICAL APPROACH

THE SEARCH for such explanation begins with historical analysis. To account for the comparatively greater approximation to "competitive" unionism in Canada, we start with the pattern of state interventionism in the field of public labour policy. On the one hand, it predates by more than a half a century both the formation of permanent and effective linkages between organized labour and a party of the left, as well as the beginnings of significant divergence in Canadian and American union density rates. On the other hand, as noted earlier, most commentators agree that it is in the field of labour policy that the most convincing explanations for the recent divergence in union density rates are to be found. Consequently, the origins of Canada's highly managed system of collective bargaining are of contemporary interest. Indeed, it can be argued that if the current American labour relations policy represents a drift back towards a pre-1935 pattern of voluntarism, then in Canada the historical precedents for such a retreat are less evident. In one form or another, governments in Canada, as in its sister dominions of Australia and New Zealand, have been actively involved in labour relations since the turn of the century.

The dominant aim of the Canadian state in this endeavour, most commentators also agree, has not been to foster union growth so much as to secure industrial peace. "Each of the incremental steps along the road to the Canadian collective bargaining system," Joseph Weiler writes, "was in response to some sort of industrial crisis, usually a strike."<sup>47</sup> "Compulsion" has been the state's characteristic response to such conflicts, in the form of the compulsory conciliation and "cooling off periods" of the Industrial Disputes Investigation Act (IDIA) in 1907, the compulsory union recognition and collective bargaining under P.C.1003 in

<sup>45</sup> Christopher Huxley, "The State, Collective Bargaining and the Shape of Strikes in Canada," *Canadian Journal of Sociology*, 4: 3 (Summer 1979), 223-39; Joseph Weiler, "The Role of Law."

<sup>46</sup> Gianfranco Poggi, *The Development of the Modern State. A Sociological Introduction* (London 1978), xii.

<sup>47</sup> J. Weiler, "The Role of Law," 14.

World War II, or, more recently, compulsory back-to-work legislation in the 1970s and 1980s. But the actual constitution of a labour regime is not a matter of unilateral state design or control and its character cannot be authoritatively inferred from evidence about the intentions of any of the actors whose combined actions give it shape, or from the claims about its design which form part of the political contests internal to any regime. The regime concept is meant to guard against such mistaken simplifications and to provide an analytical underpinning for the complexity and inconsistency which the historical record reveals.

Although Canada's more highly interventionist style of labour relations has been widely noted,<sup>48</sup> there is less agreement on its sources of inspiration. The most detailed study of these origins by Craven<sup>49</sup> suggests that the initial propensity for the Canadian state to become directly involved in collective bargaining was rooted in the vulnerability of a staples economy, in particular "the historical impetus it gave to the willingness of both organized business and organized labour to look to the state for solutions to their difficulties in dealing with their problems, particularly their problems in dealing with each other." (360) The volatility of Canada's open, export-oriented economy not only enhanced the likelihood of industrial conflict (and hence the often futile search for mechanisms of conflict avoidance), a point noted by a number of recent studies,<sup>50</sup> but also encouraged both business and labour to turn towards an activist state for protection across a wide range of industrial fronts. The result, according to Craven, was to establish a different pattern of state, business and labour interactions than existed south of the border. Whereas American business and union leaders before the 1930s opposed legislative intervention into the field of collective bargaining, their Canadian counterparts supported it, as early as 1907, even when directly affiliated to larger organizations south of the border.<sup>51</sup> In Canada the need for business-labour co-operation over the tariff, combined with both parties' mutual dependence on the state for economic assistance in other areas, facilitated the entry of the state into the regulation of industrial conflict.

A similar pattern of business and labour *rapprochement* over tariff protectionism in Australia during the same time period, and in reaction to similar strong pressures for alternative free trade policies, led to an early pattern of state intervention in the labour relations field in that country. In its form of compulsory wage

<sup>48</sup>Pentland, "A Study of the Changing Social"; Jamieson, "Times of Trouble"; J. Weiler, "The Role of Law"; C.B. Williams, "Notes on the Evolution of Compulsory Conciliation in Canada," *Relations Industrielles*, 19 (1964); Huxley, "The State, Collective Bargaining"; W. Craig Riddell, "Canadian Labour Relations: An Overview," in *Canadian Labour Relations*, vol. 16 of the Research Studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1986), 1-93.

<sup>49</sup>Craven, *An Impartial Umpire*. Page numbers in parentheses refer to this book.

<sup>50</sup>J. Weiler, "The Role of Law"; Riddell, "Canadian Labour Relations"; R. Lacroix, "Strike Activity in Canada," in *Canadian Labour Relations*, vol. 16 of the Research Studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1986), 161-209.

<sup>51</sup>James Weinstein, *The Corporate Ideal in the Liberal State, 1900-1918* (Boston 1969); Philip Taft, *The A.F. of L. in the Time of Gompers* (New York 1970).

arbitration this went even further than the Canadian IDIA experiment. Parallels between Australia and Canada, for our purpose of labour regime analysis, are highly suggestive, particularly in reinforcing the thesis about the early political and economic underpinnings of Canadian divergences from the American voluntarist pattern.

Although obviously conditioned by a somewhat different political economic context, Stuart McIntyre's recent analysis of the Australian arbitration system contains much of relevance for understanding the Canadian labour regime. As McIntyre writes, "State intervention and the creation of mechanisms designed to contain industrial conflict ... occurred *before the full maturation of an industrial class structure.*"<sup>52</sup> Much the same can be said of Canada's IDIA innovation. Australian employers, McIntyre argues, grudgingly accepted "the institutional recognition given trade unions" because "their acceptance of arbitration was secured by the incentives of high tariff protection and industrial peace."<sup>53</sup> Business consent for compulsory conciliation in Canada seems to be rooted in similar pragmatic considerations which stemmed, at bottom, not only from the vulnerability and volatility of a resource dependent economy, but also, and perhaps more importantly, from the substantial political power of free trade forces in Canada, as in Australia, at the turn of the century.

Once established, the Canadian pattern of interventionism remained an enduring feature of the Canadian labour regime, comparatively latent during the phases when it most closely approximated to the American but a diffuse value, in the sense of regime analysis, available for more active invocation at different stages in the history of the regime, as with the burst of interventionism in public sector negotiations during the late 1970s. Although markedly unsuccessful in its ostensible aim of reducing industrial conflict, the original development of compulsory conciliation in "public utilities" and frequent mediation elsewhere did serve to institutionalize and, within such visible sectors as the railways, to legitimize collective bargaining within Canada more than within the United States before the New Deal.

However, the Canadian state's quest for industrial peace before World War II stopped short of enforcing compulsory union recognition. Only a 1943 wartime strike wave unequalled since 1919, and an unprecedented surge in popular support for the socialist Cooperative Commonwealth Federation (CCF), combined with the peculiar market conditions of war, pushed a reluctant Canadian government into further interventionism. Through P.C.1003, some features of Wagner Act principles of compulsory union recognition and collective bargaining were grafted, in crisis, onto a labour relations regime in which compulsion and extensive state administrative intervention had become accepted features.<sup>54</sup> In contrast to the

<sup>52</sup>Stuart McIntyre, "Labour, Capital, and Arbitration, 1890-1920," in Brian W. Head, ed., *State and Economy in Australia* (Melbourne 1983), 111 (emphasis supplied).

<sup>53</sup>*Ibid.*

<sup>54</sup>MacDowell, "The Formation of the Canadian"; Jeremy Webber, "The Malaise of Compulsory Conciliation: Strike Prevention during World War II," in Bryan Palmer (ed), *The Character of Class Struggle: Essays in Modern Working Class History* (Toronto 1986).

American Wagner Act experience, the Canadian move towards compulsory union recognition remained devoid of any stated intention to promote union growth either as a desirable democratic objective or as an economic recovery strategy. As in the past, the prime motivation remained the containment of industrial unrest. The result, nonetheless, as Weiler and others have pointed out, was a "two-sided public policy that continued the dominant strategy of ... controlling work stoppages but added mechanisms which would nurture the spread of collective bargaining."<sup>55</sup>

In short, Canada's wartime labour settlement, although derived extensively from the American model, took shape within a different political and economic context. War, not depression, shaped its origins; third-party politics conditioned its timing, and an already well-established pattern of governmental interventionism into collective bargaining eased the chock of the state's more active reach into the sphere of employer-workers relationship after the war. For these reasons, perhaps, Canada's adoption of compulsory collective bargaining, although more recent than that of the United States, did not encounter the immediate post-war legislative backlash represented by the Taft-Hartley Act in the United States, and has retained a more lasting legitimacy. Indeed, while numerous American states quickly took advantage of the opportunity to enact "right to work" laws, in Canada all provinces except Quebec quietly incorporated the Wagner Act features of compulsory collective bargaining, as well as the agency shop, into their own labour codes in the early post-war years,<sup>56</sup> in important measure simply recognizing achievements which had been embodied in key collective agreements during the immediate post-war years.

Although the main theme in the Canadian state's interventionist approach to labour relations has been the reduction of industrial conflict and not the promotion of union growth, the cumulative effect of these policies has been to create a more favorable climate for union development north of the 49th parallel. The vulnerability which initially prompted interventionism still remains an enduring feature of the Canadian economy, with the result that conflict and tripartite mechanisms for its resolution remain an important and growing part of the Canadian industrial relations scene<sup>57</sup> enhancing the potential political leverage of unions within the power constellation underpinning the labour regime. The greater degree of institutionalization that supports collective bargaining provides a wider scope for administrative discretion which may have served to insulate unions from the worst excesses of the employer offensive against unionization south of the border, particularly during the recession of the early 1980s. Finally, the complementary development of labour's political resources through the NDP since 1961 has provided an additional and crucial source of protection for labour's position within the Canadian polity, especially when this is contrasted with the drastic decline in

<sup>55</sup>Weiler, "The Role of Law," 14-5.

<sup>56</sup>Brody, "The Expansion of the American" and "Workers in Industrial America"; Weiler, "The Role of Law."

<sup>57</sup>Roy Adams, "Industrial Relations"; Riddell, "Canadian Labour Relations."

American labor's capacity for independent political exchanges during the 1940s.<sup>58</sup>

As noted earlier, Lipset argues that the distinctive character of the Canadian political culture, particularly its greater receptivity to collectivist designs, stands behind these political departures from the American pattern and also largely accounts for the divergent outcomes in labour's fortunes in Canada and the United States in recent decades.<sup>59</sup> Without simply dismissing his reasoning, we find it too indeterminate for the problem at hand. Many different outcomes other than a divergence in the character of the trade union movements, which are of interest here, would be compatible with the cultural contrast made, especially since it aggregates conservative and socialist tendencies into a composite "collectivism" given form largely by the conventional contrasting model of a presumed American "individualism". We are inclined to focus instead on the differing ways in which the various organizations in the two settings — labour organizations, above all — utilize their resources to manage quite similar labour market problems.<sup>60</sup> In sum, we see competitive unionism in Canada, as well as the labour regime which its activities help to shape, as the complex result of union activism, industrial militancy and the response of the state, business and labour to the problems of economic vulnerability posed by an export-oriented, staple economy.

#### 4. PROBLEMS OF THEORY

NO ANALYSIS of contrasting developments in the organization of two labour markets can ignore differences in economic structures and circumstances, of course. But we do not find that we can analyze contrasting union density tendencies in Canada and the United States without an historical approach, which understands economic factors mostly in their capacity as limits and opportunities for actors in dynamic and internally-contested regime formations. No purely theoretical formulation encountered in the industrial relations literature will explain the differences in union fortunes on both sides of the border: a general conclusion we shall underpin by relating our position to the three major alternative established theoretical tendencies in that literature.

The familiar, simplified trifurcation of industrial relations writing into unitary, pluralist, and marxist approaches<sup>61</sup> will guide our encounter with the literature. Although such classification is often linked to an unmasking of the political commitments and/or social interests underlying each one, we are much less interested in exposing ideological biases than in sorting out some challenging themes in each of the categories, and explaining our preference for an approach centered on comparative history for understanding Canadian and US labour re-

<sup>58</sup> Mike Davis, *Prisoners of the American Dream* (London 1986); Goldfield, *The Decline of Organized*.

<sup>59</sup> Lipset, "North American Labor."

<sup>60</sup> Wolfgang Streek, *Gewerkschaftliche Organisationsprobleme in der sozialstaatlichen Demokratie* (Koenigstein 1981).

<sup>61</sup> Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (London 1974); Geoffrey England, "Some Observations on Selected Strike Laws," in Swan and Swinton, *Studies in Labour Law*, 221-98.

gimes. Accordingly, we shall focus on one sophisticated and powerful theoretical model for each of the three kinds of political interpretations intended by the classification scheme, taking them as interesting and valuable arguments for the respective positions.

First, we reject out of hand unitary arguments such as those offered by followers of von Mises and Hayek,<sup>62</sup> who simply deny an autonomous role for organized labour in the economy either on the grounds of a supposed supremacy of property rights, or because of sweeping assertion of a community of interests between employers and workers, achievable only under untrammelled managerial control. But we do find both stimulation and instruction in the sophisticated theoretical approach of Gunther Teubner, as representative of a new functionalism, although it can also be shown to lead to unitary conclusions when applied to the study of the developments here under review.<sup>63</sup>

If the decline of American union density is traced to the transformation of the American labour regime, as we have proposed, and if this transformation is linked to massive employer disregard of the law and systematic under-enforcement by public agencies, as is evident from the historical record, an analysis might link this development plausibly to the more general contemporary problem of hyper-juridification and the consequent presumed crisis of legality, discussed by Teubner in the aftermath of Habermas' recent work. In a study of this problem, Teubner has combined some elements of Luhmann's neo-functionalism with elements of Habermas' critique of legalization to offer a general explanation for failures of law.<sup>64</sup> He maintains that the effectiveness of law must be understood in terms of a three-way relationship between three differentiated subsystems of society: politics, the law, and the social domain to be regulated. The course of social development, he argues, has seen these subsystems increasingly take on the character of auto-poietic systems systems which are self-reproducing and self-referential, controllable only by their own essential mechanisms of reproduction, and wholly subject to their own cognitive modes. Politics can get from the law only what the law can understand politics to want, and the law can impose on social actors only what the requirements of their social activities permit them to comprehend and to grant. When there is a massive failure of effect (for example, when courts appear to ignore labour legislation, or illegality becomes the practical norm within some social domain such as the labour market), the first question to consider, according to this

<sup>62</sup>Ludwig von Mises, *Human Action* (New Haven 1949); Friedrich Hayek, *The Constitution of Liberty* (Chicago 1960) and *Law, Legislation and Liberty* (Chicago, 3 vols, 1973-79).

<sup>63</sup>For an introduction to the current state of the approach associated with Teubner and others in the Bremen legal theory group, comparing it with the work of American Critical Legal Studies, see Christian Joerges and David M. Trubek, eds., *Critical Legal Thought: A German-American Debate* (Baden-Baden 1989).

<sup>64</sup>Juergen Habermas, *Theory of Communicative Action*, 2 (Boston 1986) and "Wie ist Legitimitaet durch Legalitaet moeglich?," *Kritische Justiz*, 20:1 (1987), 1-16; Niklas Luhmann, *Soziale Systeme. Grundrisse einer allgemeinen Theorie* (Frankfurt 1984) and "The Self-Reproduction of Law and Its Limits," in Gunther Teubner, ed., *Dilemmas of Law in the Welfare State* (Berlin 1985).

analysis, is whether there is a breakdown of communications between systems.<sup>65</sup>

Utilizing the central concepts of this functionalist social theory of differentiated autopoietic subsystems,<sup>66</sup> a plausible way of reading the contrast between American and Canadian developments in the political organization of the labour market from this implicitly unitary perspective would be to suggest that American developments represent a classical case of the unionizable economic subsystem as an autopoietic system successfully rejecting the disruptive external intrusion of unions backed by union-oriented regulation in order to cope with the need to reproduce itself under conditions of extreme environmental stress arising from new competitive and technological demands. It was, after all, employers' resistance, often defying weak regulatory restraints, which practically immobilized the post-war union-oriented labour regime's regulatory supports for labour organization and collective bargaining. Also, it has been employers' initiatives which have generated alternative mechanisms for regulating both external and internal labour markets. According to this interpretation, shifts in the roles of US state agencies within the labour regime that have been prejudicial to labour's self-organization and the centrality of collective bargaining in the United States labour regime then simply appear as signs that the relevant mechanisms within both the political and legal subsystems have recognized and acknowledged these limits of the former regulative law. It would follow that unions are now obsolete and that formal collective bargaining is becoming a dysfunctional mechanism.

Extrapolating from this functionalist and tendentially unitary standpoint, the divergent Canadian pattern might well appear as a classic instance of the damage inflictible by transgressing the limitations of laws' capacities, with costs measured by lower productivity growth rates, and ever more-evident structural flaws in the economy as a whole. This appears to be the view of the provincial government of British Columbia, which recently has adjusted its collective labour law so as to bring it closer to that of the American.<sup>67</sup> And it may even be a more or less conscious rationale underlying recent government policy aiming at freer trade with the United States, as well as efforts by influential groups to persuade the courts to interpret the guarantees of equality provided in the recently-adopted Charter of Rights so as to undermine the privileged position of the collective bargaining regime within the Canadian labour market.

This would be a paradoxical conclusion for Teubner's analytical approach, since his own objectives are far from hostile to collective bargaining, or to other

<sup>65</sup> Gunther Teubner, "Juridification. Concepts, Aspects, Limits, Solutions," in Gunther Teubner, ed., *Juridification of Social Spheres* (Berlin 1987).

<sup>66</sup> Gunther Teubner, "Hypercycle in Law and Organization," *European Yearbook in the Sociology of Law* (1988) and "Social Order from Legislative Noise? Autopoietic Closure as Problem for Legal Regulation," in Gunther Teubner, ed., *State, Law, Economy as Autopoietic Systems* (Berlin 1988); Axel Goerlitz and Ruediger Voigt, *Rechtspolitologie* (Opladen 1985).

<sup>67</sup> David McMurray, "Labour Legislation and Policy: Summary Outline," in W.D. Wood and Pradeep Kumar, eds., *The Current Industrial Relations Scene in Canada, 1985* (Kingston); Weiler, "The Role of Law."

modes of redirecting the logic of market processes towards goals of social equity and progressive measures associated with the welfare state. His aim, in fact, has been to use the Wagner Act's collective bargaining regime as a paradigm for the concept of "reflexive law" as a regulatory device, a mode of regulation which establishes the legal terms upon which the self-regulation of sub-systems is reoriented so as to safeguard vital social interests, including those of due process and basic democratic rights.<sup>68</sup> Reflexive law is supposed to be able to penetrate the boundaries of autopoietic systems and to induce adjustments in self-regulation which will protect the distinctive purposes of democratic public authorities, such as when collective bargaining under a union-inclusive labour regime provides for considerations of equity in decisions on mass layoffs without introducing blatant economic irrationality.<sup>69</sup> But Teubner's hopes cannot control the logic of the approach he has adopted.<sup>70</sup> Whatever may be the case where codetermination regimes are established, as in Germany,<sup>71</sup> it is difficult to foresee, in the current trends of US labour policy, any self-generated reflexive outcomes that would be favorable to union growth or stability. The paradox of Teubner's position can be resolved only by abandoning collective bargaining regimes altogether and allowing the newer employers' techniques of self-regulation to prevail, or by reconsidering the functionalist and systems-theoretical formulation of his insights.<sup>72</sup>

Our preference is for the latter. The autopoietic systems model is at once too closed and too indefinite. It is too closed because it neglects the role of power in its various modes, as is evident from our extension of its logic to the case of the decline of American unionism. And it is too indefinite because it seems to apply equally well or equally poorly to every conceivable kind of social formation from a theoretically constituted entity such as the market or industry or the industrial relations system to a specific organization such as an enterprise or a union or a collective bargaining relationship. Teubner's approach is suggestive, though, be-

<sup>68</sup> Gunther Teubner and Helmuth Willke, "Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht," *Zeitschrift fuer Rechtssoziologie*, 6: 1 (1984), 4-35; Teubner, "After Instrumentalism?" in Gunther Teubner, ed., *Dilemmas of Law*; Helmuth Willke, *Entzauberung des Staates* (Koenigstein 1983); for an evolutionism parallel to Teubner's thinking, see Philip Nonet and Philip Selznick, *Law and Society in Transition* (New York 1978); see also Hubert Rottleuthner, "Theories of Legal Evolution: Between Empiricism and Philosophy of History," *Rechtstheorie*, Beiheft 9, (1986).

<sup>69</sup> Morely Gunderson, "Alternative Mechanisms for Dealing with Permanent Layoffs, Dismissals and Plant Closings," in *Adapting to Change: Labour Market Adjustment in Canada*, vol. 18 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto 1986).

<sup>70</sup> Niklas Luhmann, *Politische Theorie im Wohlfahrtsstaat* (Munich and Vienna 1981); and "Einige Probleme mit reflexivem Recht," *Zeitschrift fuer Rechtssoziologie*, (June 1985), 1-17.

<sup>71</sup> Gunther Teubner, "Industrial Democracy through Law? Social Functions of Law in Institutional Innovation," in Terence Daintith and Gunther Teubner, eds., *Contract and Organization* (Berlin 1986); and "Enterprise Corporatism, New Industrial Policy and the 'Essence' of the Legal Person," *The American Journal of Comparative Law*, 36 (1988), 401.

<sup>72</sup> Portions of this argument have been published, with substantially different emphasis, in David Kettler, "Figure and Ground in Collective Labor Regimes," in Axel Goerlitz and Ruediger Voigt, eds., *Limits of Law* (Pfaffenweiler 1989).



cause it does call attention to the limits of direct state regulation and thus, in our view, to the dangers of dismissing the labour regime as no longer pertinent in an era of expanding protective employment law. It is true that collective bargaining may not always appear to be the most promising mechanism for achieving a number of urgent social objectives, quite apart from questions of fundamental social democratization. In increasingly segmented labour markets, unions often sacrifice the weaker for the sake of protecting the relatively established.<sup>73</sup> But these are shortcomings which can be counteracted in some measure through the internal politics of unions, as well as through some public constraints on the processes of collective bargaining, as with the mandated internalization of human rights standards within the terms and administration of collective agreements.<sup>74</sup> The alternatives to these imperfect approaches seem to be self-evidently worse or wildly unpredictable. Teubner's functionalist analysis is instructive on these matters, but cannot explain divergent outcomes within United States and Canadian labour regimes during the past two decades without self-contradiction. There is no destiny which countermands a recovery of unionism and collective bargaining in the United States, although there are massive inner and outer obstacles in the way. And there is no fate that decrees a dismantling of the social constitution of collective labour in Canada, although there are serious and mounting threats.

Such problems have preoccupied recent writings generally classed as pluralist. Central to this approach is the idea of an "industrial relations system" centred on the contractual and state-monitored resolution of conflicting and adversarial labour and management interests and collective preferences in the employment relationship, as well as the institutionalization and control of this conflict. To judge by the compilations of this literature in the pertinent recent studies for Canada's Macdonald Commission, representative Canadian pluralists are more impressed by the precipitous decline in unionization in the United States than they are by the comparative resilience of Canadian unions. They attribute the problem of union decline firstly to a drastic loss of public trust in unions, and secondly to the obstacles that collective bargaining supposedly presents for adaptation to dramatic economic change.<sup>75</sup> For the sake of union legitimation and expansion into the newer growth areas in the economy, they urge new attention to co-operative techniques of labour-management relations, and a dismantling of adversarial habits of thought and action on the part of labour.

It is important not to fall into political distortion in characterizing the pluralist position. There is substantial regard for the autonomy of workers' organization among these writers, and little disposition to impose new regulations or sanctions

<sup>73</sup>Simitis, "Zur Verrechtlichung"; Offe, "Social Policy."

<sup>74</sup>Katherine E. Swinton and Kenneth P. Swan, "The Interaction between Human Rights Legislation and Labour Law," in Swan and Swinton, *Studies in Labour Law*, 112-42; Katherine E. Swinton, "Enforcement of Occupational Health and Safety Legislation: the Role of the Internal Responsibility system," *Ibid.*, 144-71.

<sup>75</sup>Riddell, "Canadian Labour Relations"; Kumar, "Union Growth"; Weiler, "The Role of Law."

on them, even in regard to strikes and other conflict techniques. The adaptations they seek are to be fostered by persuasion and inducements. Yet if our analysis of the differences between Canadian and US unions is correct, this approach is wrong in its diagnosis and harmful in its prescriptions. The more "competitive" type of union movement need not by any means reject coordination and collaborative planning with business or governmental agencies, but it proceeds here by "political exchanges" which presuppose its competitive strength and its ability ideologically to mobilize its members.<sup>76</sup> In the North American context, we argue, these presuppositions cannot be met unless unions adopt a forceful adversarial style in collective labour bargaining. Simply put, we prefer "the Canadian experience" to any reincarnation of the "American Plan".<sup>77</sup>

The most interesting contemporary Canadian versions of a marxist approach seriously question whether either one of the North American labour movements can generate the militancy to reinstate a credible justification for unions. They do so precisely because they conclude that the leaderships' commitment to the existing legal frameworks have put the organizations at the mercy of state policies now inclining towards a new union-free labour regime. The argument has two principal parts. The first, which has historical antecedents in the debates within many labour movements at the beginning of the century, seeks to establish that the normalization of unions and collective bargaining by means of a legal regime systematically devalues militant organization. In both the United States and Canada, despite differences in the legal means by which the results are achieved, exponents of this approach emphasize the displacement of organizational strikes by certification procedures and the outlawing of strikes during the life of collective agreements, as well as the restrictions on matters for collective bargaining.<sup>78</sup> The effect of the

<sup>76</sup>Ragini, "The Conditions for Political Exchange."

<sup>77</sup>Although these two formulas are familiar, our pointed references should be clarified. "The Changing Situation of Workers and Their Unions," the Report of the AFL-CIO's Committee on the Evolution of Work (Washington 1985) shows a special interest in the causes and possible remedies for the failure of the U.S. trade union movement to keep up with the expansion of the work force. "The Canadian experience is especially instructive," the Report remarks (*Ibid.*, 15), but the central findings, reflecting an analysis of that "experience" that we seek to correct, consist of a lame call for a change in public labour policy and some public-relations oriented adjustments by unions. For a discussion of the "American Plan," initiated by U.S. employers as an anti-union strategy in the 1920s and involving many anticipations of techniques that some pluralists now urge unions to support, see Irving Bernstein, *The Lean Years: A History of the American Worker, 1920-1933* (Boston 1972).

<sup>78</sup>Panitch and Swartz, *Assault on Trade Union Freedoms*; England, "Some Observations"; Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," *Minnesota Law Review*, 62 (1979), 265; Karl E. Klare, "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin," *Maryland Law Review*, 44: 3 (1985), 731-840; Karl E. Klare, "Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform," *Catholic University Law Review*, 38: 1 (1989), 1-68; Atleson, *Values and Assumptions*; Christopher Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (Cambridge 1985); see also Rainer Erd, "Gesetzgebung oder Machtpoker? Das Beispiel der amerikanischen Gewerkschaften," in Ruediger Voigt, ed., *Abschied vom Recht?* (Frankfurt 1983).

labour regime, it is maintained, has been to "deradicalize" the movements whose mobilization gained this measure of recognition, to "integrate industrial conflict within the control system of society,"<sup>79</sup> and to turn leaders of unions into "agents of social control over their members rather than their spokespersons and organizers."<sup>80</sup> The "settlements" which established the "industrial relations system" around the time of World War II thus appear as a mode of capitalist hegemony, a complex of incorporative and rationalized coercive devices for state management of the labour market.

As developed during the past few years, particularly by Panitch and Swartz, the second part of the argument proceeds to claim that economic developments (especially the fiscal crisis of the state and key shifts in technology and international markets) now impel the state to move beyond the "era of free collective bargaining," tentatively toward "neo-corporatist" cooptation of the labour movement, and then toward its effective disorganization, in the name of "trust and belief."<sup>81</sup> While Panitch and Swartz, for example, see some hope that the loss of ideological justifications by reference to "social justice" and the end of the legitimation derived from self-regulation under the old established labour regime might rekindle workers' militancy and radicalize their organizations, the main tendency of the marxist analysis is to despair of these long-tamed organizations.

Although we have learned from the critical political commentary associated with this approach, we cannot rely on it as a systematic theoretical framework for analysis of the problem we attempt to address. We start from the supposition that significant differences in labour union density rates do matter, and we cannot make out a clear marxist position on this basic point in the literature under review. The over-all approach could imply that these differences make little difference to future developments, or even that dismantling the legalized labour regime might be viewed with equanimity, and the decline of insufficiently politicized unions be seen as no special cause for alarm. But, in practice, applications of the approach seek to amend the legislative or administrative base of the labour regime, or to fortify its constitutional foundations.<sup>82</sup> Panitch and Swartz paradoxically even cite the failure of Canadian unionists to campaign for constitutional guarantees of "free collective bargaining" — a gateway to more intensive juridification of the collective labour regime through its renewed judicialization as an indication of their lack of militancy. We are sensitive to the dilemmas created for these analysts by the shift between levels of analysis and by bonds of solidarity with such labour movement as may exist, but we prefer to respond by backing away from any grand theory which makes it so hard to make necessary discriminations.

An analysis founded on a counterfactual model of a labour movement coming to revolutionary consciousness understates the difficulties and constant costs of

<sup>79</sup>England, "Some Observations," 271.

<sup>80</sup>Panitch and Swartz, *Assault on Trade Union Freedoms*, 27.

<sup>81</sup>*Ibid.*, 34.

<sup>82</sup>England, "Some Observations"; Panitch and Swartz, *Assault on Trade Union Freedoms*.

workers' organization and overstates the power and discretion of organized labour and its leaders over the century. A characterization of the labour regime as a univocal hegemonic expression of capitalist domination, treating manipulative ideological assertions by employers' spokespersons or calculated pronouncements by governmental actors as authoritative revelations of an achieved uniform design, underestimates the continuation of conflict about the meaning of such constituted orders and the range of political possibilities internal to them. Such distortions afflict the recent attempts at systematic marxist analyses that we have been considering, despite the ingenuity with which correctives are often sought. Our approach must remain open to a wider variety of considerations.

We are, in short, indebted to all three of the principal types of approaches, but we think that the matters we are investigating require a different, more political and historically grounded analysis. We recognize that the concept of labour regime, which we have made central to our commentary, needs to be refined and further specified, just as our comparison will benefit from critical extension to other countries.<sup>83</sup> However, the divergences in union densities between Canada and the United States, we think, are indicative of different developments within the respective labour regimes, brought about, at least in important measure, by the contrasting tendencies towards "competitive" and "business" unionism. Ultimately what is needed is the advancement of a more fully developed theory in this field, although we expect that this theory will have a distinctive kind of structure, further removed from the systematic hopes of the more prevalent conception discussed in this paper. The stimulating political theorists' interest in industrial relations studies noted at the outset cannot yet be adequately satisfied. But reciprocal exchanges help both types of inquirers in their search for alternatives to the conventional political theory models of consensus, hierarchy, or contract in the legalistic sense, models which have in the past afflicted and limited both studies.

<sup>83</sup>Incidental comparative references to other cases in the course of the paper indicate that each of the collaborators is separately at work on distinct historical and geographical problems that should cumulatively strengthen the joint effort.

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