1986

The Political Consequences of Labor Law Regimes: the Contractualist and Corporatist Models Compared

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I. INTRODUCTION: LABOR LAW REGIMES AND STYLES OF LABOR MILITANCY

This article discusses the effects of two types of legal regimes of labor relations upon the orientation of the labor movements that have grown up within them. In most modern regulated economies, the legal organization of labor relations has moved in two quite different directions. One direction is the contractualist model of labor relations, with the system of collective bargaining modelled more or less imperfectly on individual contract.[1] The other direction is that of the corporatist or regulatory model,[2] first fully developed by the fascist countries of inter-war Europe and now surviving in its purest forms in Latin America.[3] Many countries, especially in continental Western Europe, combine the two directions in varying proportions.[4]

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[1] For the definition of the term contractualist labor law regime, see infra text 1005-08 and accompanying notes 9-12.

[2] The concept of a corporatist labor law system is defined infra text 1008 and accompanying notes 13-18.

[3] For a discussion of the development of corporatism in fascist Europe, see R. Paxton, Vichy France: Old Guard and New Order, 1940-1944, at 211-20 (1972). In recent years, European scholars have shown considerable interest in the idea of corporatism but have tried to distinguish the concept from its traditional association with fascism. These more recent writers have coined the term neo-corporatism to describe alternative forms of corporatist organization. See C. Offe, Disorganized Capitalism: Contemporary Transformation of Work and Politics 236 (1985). For an example of the older view that corporatist and fascist arrangements necessarily go together, see P. Togliatti, Liçoes Sobre O Fascismo (São Paulo: Livraria Editora Ciencia Hamanas) (1978). For a discussion of corporatist arrangements in Latin America, see generally The New Corporatism: Social-Political Structures in the Iberian World (F. Pike & T. Stritch eds. 1974).

[4] For general discussions of corporatist arrangements in Western Europe, see C. Crouch, Class Conflict and the Industrial Relations Crisis: Compromise and Corporatism in the Politics of the British State (1977); P. Doeringer, Industrial Relations in International Perspective: Essays on Research and Policy (1981). For a treatment of the mixture of corporatist and non-corporatist features in a Western European country, see generally Kriesi, The Structure of the Swiss Political System, in Patterns of Corporatist Policy-Making 133 (G. Lehmbruch & P. Schmitter eds. 1982) (describing the limited number of interest associations, the hierarchical

The perspective from which I consider these two styles of labor organization is that of their respective influence on the militancy and politicization of the labor movement. The practical significance and theoretical interest of this perspective should be clear. The diversity of labor regimes and the specificity of their effects have been obscured by a tradition of social and legal analysis that systematically understates the institutional indeterminacy of concepts like capitalism, democracy, or industrial society.[5] Nothing in these concepts prepares us to understand the basic choices that contemporary societies have made when dealing with issues as important as the alternative ways of supporting, protecting, or controlling the working classes.

At the center of this article stands an apparent paradox. The corporatist or regulatory model of labor relations was pioneered by right-wing authoritarian regimes and it has often served as an instrument for the repression of the labor movement.[6] Yet it is in countries with corporatist labor regimes that labor movements have often become the most vigorous, independent, and politicized. The major thesis of this article is that the corporatist model favors the extremes of either quiescence or politicized militancy while the contractualist or voluntarist model of labor relations encourages a moderate, economistic style of militancy. If this thesis is correct, the traditional view that the contractualist model is more democratic[7] disregards a crucial ambiguity in the sense in which a labor regime can be democratic and contribute to the democratization of society.

A few definitions may help right from the start. By militancy I mean any conflict in which workers are collectively involved, whether organized or not, over the terms of their employment, the structure of the workplace, the structure of society, or the control and uses of governmental power. Economistic militancy or economism is the militancy that chiefly concerns wages and benefits, working conditions, and job security. It is compatible with pressure upon national governments for favorable tax or tariff treatment and for rules and policies that favor a labor movement with an economistic orientation. Politicized militancy or politicization takes place when workers and their leaders treat economic demands as inseparable from goals of in-

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organization, and state recognition as corporatist features of Swiss unions and noncompulsory membership and lack of monopoly as non-corporatist elements).

[5] See R. Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy, Cambridge University Press (forthcoming 1987).

[6] See supra note 3.

[7] For a presentation of the traditional view by American writers, see Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955); Cox, Some Aspects of the Labor Management Relations (Taft-Hartley) Act, 1947 (pt.I), 61 Harv. L. Rev. 1 (1947).

stitutional transformation; that is, from the institutional arrangements that define the workplace and the larger organization of government and the economy beyond the workplace. Politicization can set in at a relatively low level of militancy, though it can quickly escalate to an extreme of agitation, for its appetite is hard to satiate with limited concessions. Conversely, economistic militancy can become massive and conflictual without being politicized, though the perpetuation of conflict provides a fertile ground for politicization.

In the terms of these categories, this article's central argument can be redefined as the claim that the contractualist model encourages economistic militancy while the corporatist model either serves as an instrument of control and repression or helps politicize the labor movement. The key factor in the switchover from the controlling to the politicizing use of the corporatist regime seems to be a weakening of political will and effective authority on the part of a formerly authoritarian government. But the analysis of this switchover and its causes falls largely outside the limited scope of this article.

The argument of the article goes through four stages, two preliminary and two substantive. The first stage defines two ideal types of contractualist and corporatist labor relations. The second stage suggests the significant, though limited, extent to which these two models are in fact realized in the United States and Brazil. The third stage of the argument refers back to the ideal types laid out in Section I and discusses the institutional logics for economistic and politicized militancy. The fourth and final stage of the argument considers examples from American and Brazilian labor history that may illustrate the hypotheses advanced in the previous section.

This article does not pretend to corroborate the claims it suggests. Throughout, I emphasize the distinct features and the probable tendencies of the two major institutional systems discussed. I embark on no historical revision. Rather, I suggest that my thesis is compatible with a great deal of historical evidence and contemporary experience and that it places this experience and evidence in a revealing yet unfamiliar light. I do not discount competing or complementary explanations that emphasize, for example, economic co-optation and national culture.[8] But I am convinced that these other explanations are inadequate, often ad hoc, and generally understate the extent to which styles of resistance are the creatures of institutional frameworks and

[8] See, e.g., S. Lipset, The First New Nation (1963), suggesting cultural foundations of the American labor movement. For an example of a theory emphasizing economic co-optation, see J. Goldthorpe, D. Lockwood, F. Bechhofer & J. Platt, The Affluent Worker in the Class Structure (1969).

of the traditions of collective action that these frameworks have helped shape.

II. Two Models of Labor Organization

My analysis and argument will deploy two ideal types.* These two types describe, in abstract and exaggerated form, the major directions pursued by contemporary democracies in ordering labor-management relations and the participation of government in these relations. The institutional characteristics comprising these types are only loosely connected, but they are connected nonetheless. Each set of characteristics exhibits a unifying theme.

The following section argues that the American and the Brazilian labor systems each approach one of the ideal types. Most Western European systems fall somewhere in between.

A. *The Contractualist Type*

The first ideal type is the contractualist or collective bargaining model.[9] This type could just as easily be called the countervailing-power model. For within this first major system, the institutions and instruments of organized labor serve chiefly to define a private interest group and to enhance its bargaining power. Trade unions provide their members with a platform for collective action—a vehicle of organized pressure in wage-term conflicts or more general labor-management disputes. In a system that makes collective worker organization and collective labor contracts possible, most labor relations may continue to be governed by individual contracts. According to the assumptions of this model, the resources of unionization and collective bargaining can be seized upon whenever the normal, individual forms of contract are insufficient to avoid the danger of economic coercion.[10]

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* Here I'm indebted for discussions of method to Roberto Unger.

9 There is no general agreement on the existence of a contractualist type labor law regime. However, a number of works on contractualist approaches to labor organization have proven especially helpful in the formulation of my argument here. See, e.g., A. Fox, Beyond Contract: Work, Power, and Trust Relations (1974). Selections from American labor law scholarship include: Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394 (1971); Chamberlain, Collective Bargaining and the Concept of Contract, 48 Colum. L. Rev. 829 (1948); Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265 (1978); Shulman, supra note 7; Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509 (1981); Weiler, Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983).

10 The assumption of the contractualist model, at least in the United States, is made explicit in the statement of purpose of the National Labor Relations Act ("NLRA") which states

The first feature of the contractualist model is voluntary unionization. Unions are freely formed by employees throughout the workforce. All workers are free to belong to, and participate in, unions. However, only those workers who personally join, and only those groups that deliberately organize, form part of the collective structure. The entire process of unionization is patterned on the model of the private group. The government facilitates collective self-organization by guaranteeing the right to organize and granting legal recognition to unions as agents for their membership groups. But it neither sponsors nor directly participates in the process of union formation. All the practical tasks and material burdens required to organize and run the unions fall exclusively to the workers themselves and the resources generated independently from within the labor movement.

A second feature of the contractualist model is plural trade unionization. No single principle of classification determines how groups of workers are divided up for purposes of union representation. The unions may be organized in any number of ways according to the divergent strategies and orientations that animate particular groups within the labor movement. In a pluralist system, one principle of classification may prevail simply because it is the easiest or the most natural. For example, a union or alliance of unions may start with the workers in a group of plants in a similar sector of industry. But new principles of classification may be introduced at any moment. Groups of workers from totally different sectors of industry may amalgamate for purely ad hoc reasons: because they accept the same leadership, or happen to like the strike, dues, and benefit policies of a particular union organization, or any number of other reasons. From the standpoint of the political consequences of plural unionization, the most important point is that different sets of unions may be organized according to different and *incompatible* principles of classification. Thus, a unitary system is like a well-ordered jigsaw puzzle: all the pieces are guaranteed to fit together into a single picture. But a pluralistic union system is like a collection of fragments of many different jigsaw puzzles, junked together. There is no overall picture, either in fact or by right.

A third feature of the contractualist model is the voluntary determination of employment relations. Wages and working conditions are maximally left to the system of individual bargains and deals,

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that the Act helps create "equality of bargaining power between employers and employees." NLRA (Wagner Act) § 1, 29 U.S.C. § 151 (1982). For an elaborate discussion of these assumptions, see Chamberlain, supra note 9.

worked out independently, and subject to the ordinary rules of construction at private law. These bargains may be either individual or collective agreements. But in either case, the model of private exchange reigns supreme. In this system, even the collective agreements are defined by analogy to the individual private exchange. The only difference between the two is that the latter is entered into by a legal personality—the union—organized as a counterweight to the employer.

A fourth and related feature of the contractualist model is the relatively free play given economic forces and group militancy over economic advantage. Organized conflict between workers and bosses is a fundamental part of the process of negotiation. Workers are allowed to join together to impose their demands through strikes and other forms of industrial action. The free scope granted industrial action is simply the corollary to the principle of voluntary determination.[11] Unless workers had the power to organize and strike in the course of collective bargaining, collective contract arrangements would reflect the one-sided balance of managerial might rather than the free product of joint determination. Of course, the structure of bargaining powers itself depends on the set of legal entitlements that each side has at its disposal. But within this framework of rights, concerted struggle by employers and workers is, in principle, freely permitted and considered the legitimate way to resolve labor disputes.

The fifth feature of the contractualist model is the private character of the bargaining process. The whole order of labor relations is set up on the model of the contractual agreement. The state remains at a distance from the negotiation and settlement of private and public agreements. The contractualist model requires a heavier use of arbitration to adjust and administer conflict and agreement. But arbitration is an extension rather than exception to the contractual order. The form of arbitration preserves the private character of the system. Thus, access to the system is voluntary, or nonbinding, or both. Within arbitration, disputes are resolved by appeal to private interest and right. Public law and government policy are shielded from the forum, just as they would be in the hearing of an ordinary, common-law case in court.

The final feature of the contractualist model is the strict separation of the union structure from the welfare system. Labor unions have no direct relation to the state's welfare scheme. The unions

[11] See generally Chamberlain, supra note 9, and Shulman, supra note 7 (discussing the relation of economic coercion to collective contract within a contractualist collective bargaining regime).

neither participate in the planning of the welfare system nor in the distribution of state-sponsored or subsidized social services or goods. Of course, the unions may actively pursue these matters in the political arena as voluntary organizations and pressure groups. But such voluntary activity leaves intact the distinction between interest-group struggle for private advantage and organized activity undertaken by unions from within the public welfare regime.

Each of these features contributes to the creation of a privatized labor system. This system encourages the disengagement of labor-business conflict from broader struggles that bring into question the basic structure of society, or even the organization of the workplace itself.[12] The whole of labor relations is cast as a set of private deals. The purpose of collective organization and collective bargaining is supposedly to prevent the coercion and inequality that would make the employment relation unassimilable to the model of contract. Whatever cannot be resolved through individual or collective labor agreements—according to this model—can and should be resolved through the procedures of democratic politics.

B. *The Corporatist Type*

The second major ideal type of labor organization studied here is the corporatist or regulatory type.[13] Its decisive feature is the tangible, overt superimposition of the state and its regulations on the system of management-labor relations. This superimposition is as much a matter of political and legal thought as of the actual forms of labor organization. It is as much a state of mind as a system of institutional arrangements. The unions are meant to be an integral part of the *public* organization of society rather than members of a realm of private interest groups. The national government is expected to be pervasively present in the regulation of every major feature of the employment situation rather than removed to a distance where it sets up groundrules for private conflict and bargaining. Unions are not supposed to be just one more tool for the pursuit of private interests,

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[12] Offe reaches similar conclusions from a different theoretical position. See C. Offe, supra note 3, at 208-09.

[13] The term corporatist in most social science writings has been used to refer to a specific type of social organization. See, e.g., G. O'Donnell, Modernization and Bureaucratic Authoritarianism: Studies in South American Politics (1973); H. Wiarda, O Modelo Corporativo na America Latina. (Petrópolis: Editora Vozes, Ltd.) (1983); Schmitter, Still the Century of Corporatism?, 36 Rev. of Pol. 85 (1974). I use the concept in a different way because I deny that these institutional categories are either indivisible entities or supra-historical types. The elements that compose them can be altered, and the rearrangements that result provide a number of new institutional possibilities. See R. Unger, supra note 5.

best suited to the extreme situations in which many workers confront a single employer. Instead, unions are intended to serve as a centerpiece of the entire social order and to combine within themselves the roles of group representation and social integration.

Consider now the characteristics that make up the ideal type of corporatist labor relations. These characteristics are enumerated here in a manner and in an order designed to highlight the contrast with the contractualist-ideal type.

An initial feature of the corporatist model is compulsory unionization.[14] The entire labor force is supposed to be unionized. The government is responsible for staging elections in all workplaces where a significant number of workers congregate. Once a union is recognized, all workers belong, whether they choose to or not. Unions are automatically financed, often through enforced deductions from wages (with or without employer contribution) that are distributed by the Ministry of Labor. Of course, the elections may fail to be held in major segments of the workforce. The unions that are organized may be largely under the control of handpicked leaders, subservient to the employers and the governmental bureaucracy. But the institutional logic of the system requires that every wage laborer (and even small, independent property owners) ultimately be drawn into this structure.

A second characteristic of the corporatist type is single unionization, the counterpart to compulsory unionization. All the unions are organized into a coherent pyramidal structure, culminating in national confederations that represent different segments of the workforce according to the segment of the economy in which it labors. At no hierarchical level of the system can there be rival unions competing for members. Of course, factional competition may go on all the more vehemently in the form of rivalry among different tendencies within the labor movement for the control of the unions, just as political parties may compete to control different levels of government.[15]

A third characteristic is downplaying the voluntary determination of wage and work conditions. The corporatist labor regime per-

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[14] Compulsory unionization may be accomplished in a number of ways and in varying degrees. See, e.g., O. Newman, The Challenge of Corporatism 5 (1981) (suggesting ways in which union membership may be publicly encouraged, even if not legislatively mandated). For a Brazilian example, see infra text 1018 and accompanying notes 48-49 (arguing that the distribution of social benefits by unions is one such way).

[15] See C. Sabel, The Internal Politics of Trade Unions, in Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics 209-44 (S. Berger, H. Albert & C. Maier eds. 1981).

mits collective bargaining, but only within a framework that invites frequent and pervasive governmental influence.[16] A broad range of working conditions, job security terms, and even wage differentials is determined by law. Even in the area where collective bargaining takes charge, the government is involved. Thus, collective bargaining agreements must be brokered and/or ratified by the labor courts, a specialized branch of the judiciary—injecting a full panoply of rules, standards, and principles into the employment relation.

A fourth, related trait of the corporatist-ideal type is the tight regulation of strike activity. Strikes are a direct threat to the harmonizing aims of the corporatist model: a small-scale version of conflict that can take broader and more dangerous forms. Moreover, the danger is vastly increased by the unitary and inclusive character of the corporatist-union structure. Within this structure, strikes are much harder to confine to a limited part of the labor force. The converse of the strict control of strikes is the relatively close supervision of what employers can do to workers in the course of legally recognized industrial conflict. Of course, the supervision is often selective: it leaves out a huge, indistinct area that is defined as "technical" and which is abandoned to more or less unchecked managerial discretion.

A fifth characteristic of the corporatist model is the emphasis that the procedural framework of industrial dispute settlement places on both the intervention of the government and the primacy of allegedly public interests, embodied in law.[17] This emphasis is reflected in the system of labor courts and judicial mediation, ratification, and revision of labor agreements. It is also apparent in the facility with which the labor courts and the labor bureaucracy (e.g., the Ministry of Labor) serve as agents for the infusion of a constant stream of governmental policies into new collective labor agreements.

A sixth feature of the corporatist model is the overt mixing of the union structure with the welfare system. Unions are used as conduits for the distribution of many kinds of welfare benefits. Not only does the distinction between a private pension and a social security program collapse, but a whole range of more specific, public-financed transfers, such as health, housing, and educational benefits, may be distributed through unions.

These six characteristics of the corporatist-ideal type all add up

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[16] For a discussion of government participation in collective bargaining within a Western European labor system, see V. Helander, A Liberal-Corporatist Sub-system in Action: The Incomes Policy System in Finland, in Patterns of Corporatist Policy-Making 163 (G. Lehmbruch & P. Schmitter eds. 1982).

[17] See id. at 174-87.

to the same practical result. They undermine the force of the contrast between conflict in the national political arena over the mastery and uses of governmental power and conflict in the workplace between employers and workers. Of course, even under the purest contractual regime, organized labor pressures national governments for legal and policy concessions—for tax and tariff laws, and a more favorable union legislation. The difference may be only one of degree, but it is nonetheless a striking one with far-reaching implications.

III. THE TWO LEGAL-INSTITUTIONAL TYPES REALIZED: AMERICAN AND BRAZILIAN EXAMPLES

Most contemporary Western systems of labor organization involve a mixture of the two ideal typical labor regimes with an emphasis most frequently on the contractualist style of organization. Such is the case with the Western European systems. The American and Brazilian examples are especially interesting because they exemplify, in exceptionally pure form, the two main sets of institutional arrangements. Not even these national labor law systems perfectly embody the two ideal types. But together they provide extremely good approximations of the contractualist and corporatist labor-law models.

A. *The American System of Collective Bargaining*

Consider first the American system of collective bargaining as an example of the contractualist type. The pervasiveness of the contractual ideal in the American system of labor relations is relatively uncontroversial. This is what the system of collective bargaining is all about. In the United States, labor organizations are the chosen instruments of the workers they represent. Trade unions are voluntarily formed and independently administered. The financing of labor activities is based on contributions from the rank-and-file, rather than compulsory exactions mandated by law, irrespective of union status.

The contractual nature of the employment relation is reflected in three respects. First, in the scope of the terms and conditions of work left to the joint determination of labor and management. The American institution of collective bargaining ranges far and broad, not only in comparison to corporatist labor regimes, but in comparison to the hybrid systems of Western Europe as well. Everything from work rules and seniority rights to pension plans and fringe benefits are determined through collective agreement. The law, on the other hand, plays a relatively minor role in fixing the terms of the employment relation. Labor legislation in the United States establishes a threshold

of minimum wage[18] and health and safety provisions.[19] But nothing that cuts to the heart of the workplace situation is removed from the private order.

The primacy of collective bargaining in the United States is not just a matter of initial jurisdiction. Together, the prerogatives of labor and management govern the course of negotiations and the methods and procedures resorted to in the case of contractual or economic dispute. American labor law requires that employers deal with the workers[20] through their chosen representatives,[21] and do so in observance of the standard of "good faith."[22] But beyond the obligatory face-to-face negotiation and a minimal showing of bargaining decorum, representatives of each side are at liberty to set their own agenda and insist that the other side agree to the terms it prefers. The unions may press for a substantial wage increase. The employers may demand that the workers abandon fringe benefits earned in the past. But neither party is under any obligation to concede on particular points, however reasonable or central they may be to the other side's position or to the interests of the public at large.[23] Except in extraordinary situations, the government has no authority to impose the terms of a collective bargaining agreement or to require that the parties submit their disputes to arbitration or conciliation proceedings.[24]

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18 Fair Labor Standards Act § 6, 29 U.S.C. § 206 (1982).

19 Occupational Safety & Health Act, §§ 1-26, 33, 29 U.S.C. §§ 651-68 (1982 & Supp. II 1984).

20 Labor Management Relations Act ("LMRA") § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

21 Id. §§ 7, 9(a), 29 U.S.C. §§ 157, 159(a).

22 Id. § 8(d), 29 U.S.C. § 158(d). For a typical definition of the duty to bargain in good faith, see NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943). The court described the duty as "the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . . [A] sincere effort must be made to reach a common ground . . . in the spirit of amity and cooperation." Id. at 686 (citation omitted).

23 The LMRA stipulates that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." LMRA § 8(d), 29 U.S.C. § 158(d) (1982).

24 As part of the LMRA, Congress created a labor dispute resolution agency known as the Federal Mediation and Conciliation Service ("FMCS"). Id. § 202, 29 U.S.C. § 172.

Pursuant to the LMRA, any party desiring to modify or terminate an existing collective bargaining agreement is required to submit written notice of its intention to the other party at least 60 days prior to the expiration date of the agreement, or if the contract fails to provide a date, 60 days prior to when the modification or termination is made. Id. § 8(d)(1), 29 U.S.C. § 158(d)(1). Following notification, a party must offer to meet and confer with the other party in an attempt to reach agreement, and must notify the FMCS within 30 days. Failure to abide by these provisions constitutes an unlawful refusal to bargain collectively within the meaning of the statute. Id. § 8(a)(5), 29 U.S.C. § 158(a)(5) (employer), and id. § 8(b)(3), 29 U.S.C. § 158(b)(3) (employee).

Although the parties are statutorily required to notify the FMCS, they are not required to make use of its services or to abide by its suggestions. "The Service may proffer its services in

The American system of labor relations further adopts the contract model in the play it gives to economic force within the bargaining process. Negotiations and collective agreements are allowed to depend on the pressures of concerted action—activated and engaged in by representatives of both sides. The law regulates the forms and techniques of coercion permitted as bargaining tools. It also regulates the conditions under which such techniques may properly be employed during a labor dispute. Still, the decision to resort to the play of organized force is in the end freely formed and privately determined. The unions themselves call their members out on strike.[25] Employers decide when and how to resist. Indeed, the forms of concerted action permitted the employer are in many ways more potent than those the workers have at their command. Lockouts represent just a single technique in a whole series of wide-ranging weapons.[26] Shifting capital from firm to firm,[27] redirecting production tech-

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any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute," id. § 203(b), 29 U.S.C. § 173(b), but "[the] failure or refusal of either party to agree to any procedure suggested . . . shall not be deemed a violation of any duty or obligation imposed by this chapter." Id. § 203(c), 29 U.S.C. § 173(c).

Direct government intervention occurs only in the rare circumstance that the President of the United States determines that a labor dispute constitutes a national emergency. Id. § 206, 29 U.S.C. § 176. Should the President make such a determination, a board of inquiry may be impanelled.

The board investigates the causes and circumstances of the disputes and reports to the President, but is expressly directed to refrain from making any recommendations. Id. § 206(a)(i)-(ii), 29 U.S.C. § 176(a)(i)-(ii). Upon receipt of the report, the President may direct the Attorney General to petition any district court having jurisdiction over the parties to enjoin a strike or lock-out. Id. § 208(a)(i)-(ii), 29 U.S.C. § 178(a)(i)-(ii). Should the district court determine that the dispute affects all or a substantial portion of an industry involved in interstate commerce, and that the national health and safety are imperiled, it shall have jurisdiction to issue an injunction. Id.

Following the issuance of such an injunction, the parties are under a duty to bargain with the assistance of the FMCS. Id. § 209(a), 29 U.S.C. 179(a).

[25] Union action is not limited to the strike. The NLRA provides, in part, that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Id. § 7, 29 U.S.C. § 157.

[26] See, e.g., American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318 (1965) (employer does not commit an unfair labor practice when, after reaching an impasse in negotiations, she/he temporarily shuts down her/his plant and lays off workers for the sole purpose of creating economic pressure in support of a legitimate bargaining stance); NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 92 (1957) (legislative history of the Wagner Act indicated that there was no intent to prohibit employer lock outs).

[27] See, e.g., Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 213 (Stewart, J., concurring) (decisions concerning the investment of capital are for the employer); International Ass'n of Machinists & Aerospace Workers v. Northeast Airlines, 473 F.2d 549, 556 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (no duty to bargain over a merger which lies at the core of entrepreneurial control); NLRB v. Acme Indus. Prods., Inc., 439 F.2d 40, 43 (6th Cir. 1971)

niques,[28] and hiring temporary substitutes for striking workers[29] are just a few of the alternatives available to the employer. The response of the government is the same in each case. Management and labor share the privilege of "economic" self-defense; each side has the right to support its demands through a liberal display of unbrokered bargaining strength.

The preceding comments address the formation, organization, and activities of unions in the American labor law system. In broad outline, these features are true to the contract ideal. But perhaps the most striking illustration of the contract model in American labor relations is the method of dispute resolution applied to workplace grievances and legal disputes. In the American setting, conflicts between labor and management arising under the collective agreement are resolved through a system of private arbitration. The practice of private arbitration extends the contract ideal to the core of the labor process:[30] for it cordons off workplace grievances from settlement proce-

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(decision to relocate section of employer's manufacturing operations to another plant not a subject of mandatory bargaining); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961) (movement of plant for "valid economic reasons" not mandatory bargaining subject).

[28] See, e.g., Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039 (8th Cir. 1976) (absent anti-union motive, no duty to bargain over decision to partially close plant for economic reasons); International Union, United Auto., Aerospace & Agricultural Implement Workers v. NLRB, 470 F.2d 422, 425 (D.C. Cir. 1972) (change from manufacturer owned to independent franchise at core of entrepreneurial control and no duty to bargain, absent anti-union motive); NLRB v. Dixie Ohio Express Co., 409 F.2d 10, 11 (6th Cir. 1969) ("streamlining" operation requiring partial termination of factory operation not mandatory subject of bargaining).

[29] See NLRB v. Mackay Radio & Tel. Co., 303 U.S. 333, 345 (1938) (although § 13 of the NLRA provides that employers cannot interfere with their employees' right to strike, it does not follow that an employer, who is not guilty of an unfair labor practice, loses the right to protect and continue his business by hiring substitutes to replace striking employees).

[30] The Supreme Court, in a series of cases decided between 1957-1960, established a common law of labor relations, making arbitration the primary method for labor-management dispute resolutions.

In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Court decided that the Labor Management Relations Act authorizes a federal court to grant a union specific performance of an employer's promise in a collective bargaining agreement to arbitrate workplace grievances. The Court declared that the statutory history of the LMRA indicated an intent to promote no-strike clauses in collective bargaining agreements. Id. at 453. According to the Court, it followed that:

> the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way.

Id. at 455.

In a subsequent series of decisions, known as the *Steelworkers Trilogy*, the Court further affirmed the centrality of arbitration as a matter of national labor policy.

In the first case, United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), the Court held that agreements to arbitrate are enforceable, regardless of the merit of the grievance

dures in the outside world. The public courts have jurisdiction to hear labor-contract cases. But the judicial practice is to defer to the arbitral system, both as a forum of first jurisdiction and as the authoritative tribunal for resolving labor disputes. As part of their initial agreement, the parties voluntarily agree to resolve their differences through privately established and administered procedures and without recourse to judicial decree.

This mechanism completes the bargaining regime. Employers and employees go off on their own to settle the conflicts between them. The same forces that contend in the fight for the initial agreement rule again in the subsequent series of contract disputes. Neither the government nor the law acts to bring the parties together or intervene to impose a settlement on their disagreements. Indeed, little in this situation changes when an appeal is made to the public court. Adjudication of labor disputes at law receives no special treatment. Neither the specialized agencies of a labor ministry nor the pressures of a government in power officiate in the contest of wills or dictate the terms of a final decree.

In each of the above respects, American unions and labor-management relations exemplify the patterns of the contractualist model. However, even American institutions are systematically influenced by non-contractualist tendencies. Indeed, labor relations in the United States are subject to an intricate and extensive regulatory apparatus. The participation of the law in the labor system begins with the very first stages in the formation of the labor unions. Unions are formed in accordance with procedures defined by legislation and enforced with the active aid of the National Labor Relations Board ("NLRB"). Organizing drives are subjected to an electoral process imposed by the National Labor Relations Act ("NLRA").[31] Moreover, the role of the government in the process of organization doesn't end with the certification of the victorious labor group. The NLRA further requires that the selection of a single union by a majority of workers brings the contest to an end. The victor in a union election ousts all

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raised; courts are to decide only whether the grievance raised is covered by the collective bargaining agreement's arbitration clause. Id. at 568.

In the second case, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Court established a presumption of arbitrability as it determined that in cases where the breadth of the agreement to arbitrate is ambiguous, doubt is to be resolved in favor of coverage. Id. at 582-85.

In the final case, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), the Court determined that an arbitrator's award will be upheld by courts as long as "it draws its essence from the collective bargaining agreement," id. at 597, and will not be invalidated unless it bears no relationship to the collective bargaining provisions at issue. Id.

[31] NLRA § 9, 29 U.S.C. § 159 (1982).

potential rivals and receives an entitlement to serve as the sole representative for the given complement of employees. As long as the union is certified, all members in the bargaining unit may associate only with that organization.[32]

A similar regulatory framework prevails when the unions and employers come together at the bargaining table. American labor law regulates both the process of negotiation and the range of claims each side can make in the struggle for a bargaining agreement. The NLRA not only imposes a duty of good faith bargaining;[33] it also specifies a list of activities which breach this duty,[34] and endows the NLRB with a range of enforcement powers so it can supervise the bargaining regime.[35]

Regulation extends to the realm of economic conflict as well. Permissible tactics of coercion are defined and constrained by the Taft-Hartley Amendments to the Wagner Act.[36] Under those provisions, the government has the authority in emergency cases to impose mandatory conciliation procedures and to require that the parties temporarily abandon their dispute.[37] Thus, the contest of countervailing powers, like the process of organization, is much more than the rule of the parties alone. Each part of the labor system involves a mixture of consent and constraint; the collective organization of workers is structured and finally tamed by a process of government intervention and by a framework of bargaining rules.

However, little in this statutory scheme undercuts the primacy of the contract norm or the supremacy of the principle of joint determination in the American labor law system. Government and law intervene extensively to shape the process of union formation and the framework of the bargaining order. But such intervention is conceived as a supplement to the contract regime; it aims to establish and to police the bargaining framework and to secure the background conditions required for its use. This is especially true in the NLRA's treatment of the representational campaign[38] and process of contract negotiation.[39] Government regulations have greater force in the area of majority rule and in the realm of economic coercion. But even

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32 Id. § 9(a), 29 U.S.C. § 159(a). See also J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) (presence of valid individual contracts does not waive the obligation of the employer to negotiate the terms of those contracts with a representative elected after the contracts take effect).

33 See supra notes 22-23.

34 NLRA § 8, 29 U.S.C. 158 (1982).

35 Id. § 10, 29 U.S.C. § 160.

36 LMRA § 101, 29 U.S.C. §§ 141, 152-153, 157-167, 171-182, 185-187 (1982).

37 See supra note 24.

38 NLRA § 9, 29 U.S.C. § 159 (1982).

39 See supra notes 21-23.

these departures from the ideal of private rule are marginal from the standpoint of the state-sponsored union type.

From the standpoint of the contractualist model, American labor law and legislation modify the tone of collective bargaining without really altering its essential character or displacing its central orientation. Neither the theory nor the arrangements of the regulatory regime limit the sovereignty of the competing powers in the process of labor relations or place the organization of workplace arrangements under the guidance of the state. In the American system, unions and employers independently adjust their relations and privately administer the contractual agreements that they have crafted according to taste. The government supervises what they do and structures their collective dealings, but for the most part remains outside—a spectator to the labor process.

B. *The Brazilian System of Corporatist Labor Law Institutions*

The purpose of this section is to outline the features of the Brazilian labor law system and to suggest the extent to which it exemplifies a corporatist regime.[40] The reader familiar with variations on contractualist systems needs to see at least one corporatist regime in detail. The detailed discussion pays off. For it reveals connections that remain latent in the earlier typological sketch of the corporatist approach.

1. Organization, Governance, and Financing of Unions in Brazil

Brazilian workers choose whether or not to join unions.[41] There

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[40] The following description of the Brazilian labor law system draws on intensive reading of legal and secondary materials as well as on personal conversations with labor lawyers, activists, and trade union leaders in Rio de Janeiro, Brazil. Special thanks to IUPERJ and Commissao Pastoral do Trabalho, both in Rio. The basic works include:

Consolidação das Leis do Trabalho e Legislação Complementar (70th ed. São Paulo: Editora Atlas S.A., 1986) [hereinafter cited as CLT]; 1-2 E. de Morães, Filho, Introdução ao Direito do Trabalho (Rio de Janeiro: ed. rev. Forense, 1956). C. de Mesquita Barros, Jr., Previdencia Social (São Paulo: Saraiva, 1981); D. Maranhão, Direito do Trabalho (12th ed. Rio de Janeiro: Editor da Fundação Getulio Vargas, 1984); 1-3 A. Sussekind, D. Maranhão & S. Vianna, Instituições de Direito do Trabalho (9th ed. Rio de Janeiro: Livraria Freitas Bastos, 1984) [hereinafter cited as A. Sussekind].

The classic treatment of the historical development of the Brazilian labor law system is E. de Morães, Filho, O Problema do Sindicato Unico no Brasil (Rio de Janeiro: Editora à Noite, 1952) [hereinafter cited as E. de Morães, Filho, Sindicato Unico].

In English, two very helpful studies of the Brazilian labor law system may be found in: K. Erickson, The Brazilian Corporative State and Working Class Politics (1977); K. Mericle, Corporatist Control of the Working Class in Brazil: Authoritarian Brazil Since 1964, in Authoritarianism and Corporatism in Latin America 303-38 (J. Malloy ed. 1977).

[41] See CLT art. 544.

is no principle of compulsory unionization. But for any given geographical unit, only one union may represent each segment of the workforce.[42] The whole workforce is divided up into a set of categories; a distinct part of the union structure corresponds to each part of the national labor force.[43]

Several requirements must be met before any part of the union structure set out by law comes into existence. First, for each distinct category of workers, separate voluntary associations must form at the municipal level.[44] The Labor Ministry must then certify each of these groups so that they may legally represent the given category of workers.[45] The law establishes a number of criteria for certification.[46] However, such requirements are easily met, in fact so easily met that they allow the establishment of inauthentic and manipulable labor unions.[47]

Workers may decide whether or not to join a union. As members, they must vote and they are entitled to the particular social benefits that depend upon union membership.[48] Among these benefits are medical and dental assistance, credit unions, and vocational schools. In fact, the unions directly distribute most of these benefits.[49]

In another sense, however, workers are members of unions whether they want to be or not. Once a union has formed, it represents all workers of its category in its territorial unit for the purpose of collective bargaining and litigation.[50] Thus, the union exercises a virtual representation alongside the explicit representation of its vol-

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42 See CLT art. 576.

43 See CLT arts. 570-577.

44 See CLT art. 515.

45 See CLT art. 518.

46 The CLT provides: "Union recognition will be conferred on the professional association that, in the judgement of the Ministry of Labor, is most representative, this judgement depending on, among other things:

(a) number of associates

(b) funding and provision of social services

(c) value of the union's patrimony."

CLT art. 519 (author's trans.).

47 The wide discretion enjoyed by officials in the labor bureaucracy is noted by K. Erickson, supra note 40, at 40.

48 See CLT arts. 529 (mandatory voting), 544, 592 (benefits of unionization). Benefits include: medical and dental assistance, legal services, vocational training, sport and vacation facilities. CLT art. 592. The benefits are chiefly financed through revenues from the union tax. For a discussion of the union tax, see infra text 1022-23.

49 See CLT art. 514. See also K. Erickson, supra note 40, at 36-41.

50 See CLT arts. 513 (establishing the prerogative of officially recognized unions to represent grievances of their class before administrative and judicial tribunals), 611-613 (providing that collective contracts negotiated by officially recognized labor unions apply mandatorily to all workers within the class for which the unions have been certified).

untary members. This has practical consequences: the workers involuntarily represented must pay compulsory union dues.[51]

All the unions are organized into a single pyramidal structure of locals, federations, and national confederations.[52] This structure is organized along both professional and territorial lines. In each municipality, separate unions for each class of workers are formed. For example, in any given municipality, metal workers will be organized into a single union. Then, all the metal workers' unions throughout the state will be organized together at the state level, and then nationally in a confederation. There are nine distinct confederations, one for each of the major sectors of the economy.[53]

The law allows for no single, all-inclusive union of unions at the apex of this organizational pyramid. In fact, in order to minimize the risk of power accumulating at the top, the organizers of the corporatist system deliberately avoided making place for a unified central.[54] However, such general union organizations have repeatedly emerged at times of political turmoil.[55]

These centrals are neither recognized by the law nor invested with any power to act within the official labor system. Yet, they nonetheless function in a way analogous to national political parties, serving as organizational vehicles for the major political currents within the labor movement. At the present time, two such centrals exist: Central Unica de Trabalhadores ("CUT") and Conferência Nacional da Classe Trabalhadora ("CONCLAT"). The first, CUT, represents the more left-leaning current within the unions: pro-agrarian reform, pro-labor legislation reform, and against all compact between government and labor. On the other hand, CONCLAT represents a more conservative tendency: favorable to government participation in the union system and lukewarm on proposals to alter the existing corporatist organization.[56]

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[51] See CLT art. 579. See also K. Mericle, supra note 40, at 314. For further discussion of the compulsory union dues, see infra text at 1022-23.

[52] See CLT arts. 533-535.

[53] See CLT art. 535. The confederations represent, respectively: industrial workers, workers in commerce, water and air transports, land transports, communication and publicity, workers in financial institutions, the liberal professions, and workers in agriculture and ranching.

[54] See E. de Morães, Filho, Sindicato Unico, supra note 40, at 229-30. The CLT makes provision for only two upper-level union entities: federations and confederations. CLT arts. 533-535.

[55] For a discussion of the recurrence of unauthorized centrals in contemporary Brazilian labor history, see H. Fuchner, Os Sindicatos Brasileiros: Organização e Função Politíca 60, 95-97 (Rio de Janiero: Edições Grãal Ltda., 1980); See also K. Erickson, supra note 40, at 63-64 (treatment of this theme in Brazil in the early 1960's, just prior to the Revolution of 1964).

[56] For an account of the CUT and CONCLAT labor movements, see M. Alvaro, "A Es-

What is the relation between the idea of voluntary unionization and the principle of a unitary, inclusive union structure? The straightforward answer is that, up to a point, workers may choose whether to participate in the structure or not. They are so limited because by not joining, they forfeit certain social entitlements that they would otherwise enjoy.

If enough workers make this negative choice, the result is that a certain piece of the jigsaw puzzle cannot be added: part of the overall plan fails to be executed. But the plan does not change for that reason alone: only the Ministry of Labor and the Congress above it can reclassify workers for the purpose of union representation.[57]

It might seem that the distribution of certain welfare benefits through unions would make union membership virtually irresistible. But the characteristics of the Brazilian social and economic order produce more paradoxical results. Workers in the remote regions of the country or in the huge sector of small industrial and commercial shops find it hard to unionize.[58] Thus, one of the overall effects of the aspects of the union structure now under discussion is to accentuate economic dualism: the contrast between the dynamic centers of the economy and its undercapitalized, underorganized periphery.[59] However, in recent years, agricultural workers have shown that it is possible to beat the odds. They now constitute one of the strongest, most active parts of the union movement.[60]

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The law provides for elections throughout the union structure.[61] At each hierarchical level of the union pyramid, union directories and fiscal counsels are chosen by slate in secret elections, with rival slates competing for office. The law establishes the composition and tenure of the leadership positions. At the local level, union directories and fiscal counsels are chosen for two-year terms by vote of general assembly.[62] Voting is legally required of all members of the union. The

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tratégia de Novo Sindicalismo" Revista de Cultura e Politíca (No.5/6, 1981); M. Alves, Estado e Oposição no Brazil (1964-1984) (Petrópolis: Editora Vozes Ltda., 1984).

57 See CLT art. 570.

58 See H. Fuchner, supra note 55, at 93-95; L. Rodrigues, Trablahadores, Sindicatos e Industrialização (São Paulo: Editora Brasiliense, 1974).

59 Here the concept of economic dualism refers to the distinction between "modern" and "traditonal" sectors of the economy. See S. Berger, The Traditional Sector in France and Italy, in S. Berger & M. Piore, Dualism and Discontinuity in Industrial Societies ch. 4 (1980).

60 See H. Fuchner, supra note 55, at 115.

61 See CLT arts. 520-531.

62 See CLT art. 331.

president of the union is selected from among the directory group.[63]

Elections in the federations and confederations are organized and run in much the same way. Directories and fiscal councils, of three members each, are chosen for two-year terms by a council of representatives, made up of delegations from each of the member unions or federations within the given category and jurisdiction.[64] The council of representatives is made up of equal-sized delegations from each of the member unions or federations, irrespective of the size of the organization's constituency. All unions have the right to elect three members to the council; a federation will send four representatives to the council at the confederate level.[65]

This method of representation skews the election results at the highest levels. Conservative, *pelego* (government lackey) dominated unions in the interior have the same weight as the more massive and politicized unions of the urban industrial centers. Moreover, incumbent officials from the federations and confederations are often able to buy off *pelegos* in the smaller nonrepresentative districts and thereby influence the election results.[66]

Other controls are even more formidable than the skewing of election results. Thus, the Labor Ministry has enjoyed wide-ranging authority to intervene in unions, federations, and confederations.[67] By intervening, the Minister of Labor may replace whole directories by ministerial handpicks. The criteria for these interventions—irregular behavior or conduct dangerous to public safety—are so vague that they have allowed strong-arm governments to dismiss their potential adversaries.[68]

Few aspects of the Brazilian labor law system are so overtly dependent for their practical operation on the particular political environment of the time. In the hands of an authoritarian government, the system permits a ruthless governmental tutelage over the unions. But at times of political opening, a government will be hesitant to use its interventionist powers. Then, independent movements and leaders

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63 See CLT art. 529.

64 See CLT art. 538.

65 See CLT art. 538.

66 A similar point is made in K. Mericle, supra note 40, at 308-09.

67 See CLT arts. 528, 553, 557; Decree No. 74.296 (July 16, 1974) (available through the Ministerio de Trabalho, Esblanada dos Ministerios, Bloco F, 70059 Brasília-D.F., Brasil) (establishing the basic structure and competence of the Labor Ministry) [hereinafter cited as Decree].

68 Government intervention and control of unions was common in the period of the *Estado Novo*. See infra text at 1068-69 and accompanying notes 188-93. Another example is recounted in K. Mericle, supra note 40, at 305 (describing widespread government intervention in unions following the revolution of 1964).

can begin to take over the official structure, part by part, gradually turning the system into an authentic instrument of collective militancy.

Moreover, it is easy to imagine the crude devices of interventionism abandoned without damage to other aspects of the corporatist regime. In fact, the present-day Ministry of Labor has publicly renounced the use of these powers even before their legal revocation.[69] To the extent that these and more subtle forms of tutelage are cast aside, the advantages to the union movement of a ready-made union structure become more apparent. Organized currents of opinion may compete for position within this structure just as political parties compete for a place within the structure of government. Moreover, these organized currents can do so without having to divert energy to the task of forming unions. Further, they can take advantage of a system that goes a long way to politicizing labor disputes by bringing the state into the resolution of every major labor conflict or struggle.

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Unions receive financial support from a federally imposed union tax that applies to workers and employers throughout the economy.[70] The tax is levied in the following manner: the equivalent of one day's wage is collected annually from all workers, through the mechanism of an automatic payroll deduction. Employers are required to contribute a value proportional to a set percentage of the firm's capital. Both the workers' and the employers' contributions are sent by the employers to specially designated bank accounts at several of the state-owned financial institutions. From these accounts, the money is distributed automatically to the entities in the union system, in accordance with criteria set by law.[71] Once again, the Labor Ministry retains supervisory control over the distribution—and ultimately the expenditure—of the money. The bank accounts are supervised by the Labor Ministry; it has power to block the distribution of funds used to finance unauthorized activities. The bulk of approved expenditures have to do with social services: health, dental, maternity, and legal. By contrast, contributions to political activities or support for "illegal" strikes are specifically prohibited by law.[72]

In its current form, the union tax has two nefarious conse-

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69 See CLT art. 513.

70 See CLT arts. 578-591; K. Erickson, supra note 40, at 34-39; H. Fuchner, supra note 55, at 60-62.

71 See CLT arts. 579-593.

72 See K. Erickson, supra note 40, at 34-39.

quences. On the one hand, it benefits established union bureaucracy, especially the leadership of the federations and confederations. Entrenched union bosses achieve, through the tax funds, means with which to govern the gratitude of their rank-and-file following. Moreover, the need to prevent abuses gives the Ministry of Labor an opportunity to intervene frequently in union affairs.[73]

The union tax also has a second more subtle set of prejudicial effects. It was previously explained that many welfare benefits in Brazil are channelled *through* unions. The use of unions as conduits for the distribution of welfare services makes sense in a corporatist regime that treats unions as part of government. But the result of keying part of the welfare system into the union structure is to aggravate the disparity between unionized workers and nonunionized workers—a contrast that coincides roughly with the distinction between the "modern" and "traditional" sectors of the economy.

But there is a further twist that piles inequality on inequality. The unions in fact restrict some of the welfare benefits to the dues-paying members even though all workers must pay the compulsory union tax.[74] Thus, alongside the hierarchy of the represented and the unrepresented, there is a hierarchy of the active, dues-paying and the inactive, non-dues-paying members. This second hierarchy further skews the distribution of welfare benefits.

These and other abuses have prompted many critics of the corporatist regime to advocate a total suppression of the union tax. But union militants and sympathizers have been fearful that such a move would undermine the financial basis of the union movement.

2. Government Participation in Labor Relations

The Labor Ministry participates actively in the whole system of labor relations. The responsibilities of the Labor Ministry include: supervising the organization and administration of the union system, mediating and restraining labor conflict, and presenting and defending the policy of the government in collective bargaining and litigation. Every aspect of union organization requires or permits action by the Labor Ministry. The Ministry certifies the official unions, supervises union elections, regulates the distribution of union financing, and watches over the daily conduct of the unions. The Ministry also elaborates the crucial system of union classifications and administers

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[73] For the main positions in the present controversy over the union tax, see R. da Silva, "Organização Sindical Brasileira: Uma Proposta para Discussão," Coleção Cadernos do CEDEC (No. 5, 1984).

[74] See K. Mericle, supra note 40, at 314-17.

the collection and distribution of the union tax.[75]

The labor laws outline the scheme of labor classification—*the enquadramento sindical*.[76] This scheme establishes how the national labor force should be divided for the purpose of union representation; for example, whether people who work in car factories should be classified together with people who work in steel mills or whether the cleaning staff in hospitals should be classified in a category of cleaning workers or hospital workers and, in either event, what higher-order categories should subsume these more particular classes. It is a direct consequence of the "unitary" aspect of a corporatist labor regime: the commitment to a single, all-inclusive union structure.

Through a special commission, the Labor Ministry adjusts the plan for current changes and modifications in the structure of the workforce and economy, and decides which category or group is relevant in concrete cases.[77] For example, the *comissão de enquadramento* will determine the proper classification for a new business or firm. When it certifies a union, the Ministry of Labor also places it within the classificatory scheme.[78]

In addition to setting the boundaries of the union system and supervising the behavior of the unions within it, the Ministry of Labor acts as an agent of the government at each key turning point of the bargaining process. Thus, the Ministry participates as a mediator in all collective bargaining negotiations that go to impasse.[79] It determines the legality of strikes conducted by workers in "essential activities."[80] It also helps formulate the wage and income policy of the government and it defends this policy in the courts and before other official agencies.[81]

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The labor courts in Brazil are a specialized branch of the judiciary, with exclusive jurisdiction for deciding labor disputes. They play a crucial role in the adjustment and resolution of labor disputes

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75 See CLT arts. 527, 518, 531; Decree No. 74.296 (July 16, 1974). See generally D. Maranhão, supra note 40, at 431-34 (discussing the role of the Ministry of Labor in the organization and supervision of the union system and in the elaboration and execution of the government's salary policy).

76 See CLT arts. 570, 572.

77 See CLT art. 576.

78 See CLT art. 518.

79 See CLT art. 616; Decree No. 74.295 (July 16, 1974); the responsibility of the Labor Ministry for the elaboration and execution of a national salary policy is set out in Decree No. 54.018 (July 14, 1964) (establishing the National Council for Salary Policy).

80 Decree No. 1.632 (Aug. 4, 1978).

81 See Decree No. 74 (July 16, 1974). See also D. Maranhão, supra note 40, at 432-35.

as well as in the implementation of government policy. The courts are organized into a three-level structure: the councils of conciliation and judgment, the system of regional labor courts, and the supreme labor court.[82]

The councils of conciliation and judgment settle individual labor disputes. These courts are composed of three-judge panels having one career judge and two lay members. The lay judges are representatives of the workers and the employers, selected by the regional labor courts from lists of nominees prepared by the local unions.[83]

The regional labor courts have jurisdiction over collective labor disputes. There are eight regional labor courts distributed throughout the country and located in the principal cities. The jurisdiction of these courts is twofold: The regional labor courts have jurisdiction to hear disputes over "law," as well as "interests," disputes over the interpretation and application of existing contracts as well as over the composition and adjustment of interests that arise during the negotiation of new collective agreements.[84]

As interpreters and enforcers of collective labor agreements, the Brazilian labor courts function more or less as do courts in a contractualist labor regime. It is the second of these areas—judicial determination of the norms of the collective contract—that distinguishes the Brazilian system of labor courts and places it at the center of the system of labor relations.[85] The action by which the terms and conditions of the labor relation are judicially set is known in Brazil as the *dissídio coletivo*.[86]

There are two ways a dispute over the terms of a collective bargain can reach the courts for determination through a *dissídio coletivo*. The first is when the *dissídio* preempts collective bargaining by a judicial determination. For a given category of employees, the union has the right to bring an action in the labor courts to decide any new labor contract, whether or not an effort at negotiation has been made or whether the employer or employer's union has been willing to reach a bargain independently of the courts.[87] In this case, the *dissídio* is an

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[82] See CLT arts. 643-648.

[83] See CLT arts. 647-654.

[84] The structure and jurisdiction of the regional labor courts are defined in CLT arts. 674-682.

[85] For a discussion of the *deçisão normativa* of the Brazilian labor courts, see D. Maranhão, supra note 40, at 328-31; see also A. Sussekind, supra note 40, at 1187-91.

[86] The *dissídio coletivo* is discussed in A. Sussekind, supra note 40, at 1160-63.

[87] See A. de Souza, "A Nova Politíca Salarial e As Negociações Coletivas de Trabalho no Brasil, 1979-1982." (Unpublished draft, on reserve at IUPERJ). See also D. Maranhão, supra note 40, at 331-35.

outright substitute for collective bargaining. The second type of *dissídio coletivo* is brought at the prompting of the Labor Ministry and is related to the containment of strikes. Brazilian strike laws impose a number of requirements on legally permitted strike activity.[88] One of these requirements is a mandatory session of conciliation at the labor courts.[89] If, at the end of the conciliation session, no agreement has been reached, the Labor Ministry may institute a *dissídio coletivo* for the judicial determination of the dispute. The *dissídio coletivo* does not then definitely rule out the continuance of strike activity. The unions may call a strike at the end of the conciliation period, whether or not a *dissídio coletivo* is in process. However, the *dissídios* are short, and the judges are allowed to terminate the strikes after they have been decided.[90]

In the *dissídio coletivo*, the court is competent to determine all aspects of the labor relation. The judicial procedure provides a perfect substitute for the process of collective negotiation. During the prior stages of bargaining and conciliation, representatives of labor and business formulate their demands and their offers and counteroffers. The court in the *dissídio coletivo* works from these. It may also conduct audiences with the two sides during the judicial process. But, in the end, the decision is made by the court alone. It creates and affirms the fundamental terms and conditions that govern the labor relation. The court's decree has the same legal force as the collective bargaining agreement that has been duly registered with the Ministry of Labor. The provisions of the judicial sentence determine the legally binding terms of the employment relation for all members of the class in whose name the *dissídio* was brought.[91]

The key point to understand about the *dissídio coletivo* is that the court acts as much more than a mere additional party to a labor negotiation. The court acts primarily as interpreter and elaborator of a supracontractual order—and this wide-ranging initiative dramatizes the imprint of the corporatist regime upon the institutional roles of courts and parties. In setting the primary norms of the relation between business and labor, the court resorts first and foremost to the rules, principles, and policies of public law. But what are the relevant legal materials for deciding the wage structure for a particular part of the workforce? These materials include legal rules, vague standards (e.g., "just salary"), the prior pattern of collective contracts, and even

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88 Decree No. 4.330 (June 1, 1964).

89 Id.

90 Id.

91 See D. Maranhão, supra note 40, at 325-36; A. de Souza, supra note 87, at 16-17.

prevailing government incomes policy.[92] The labor laws have been inflated with detail, to the point that they almost automatically define the terms of the labor relation.[93]

3. The Legal Regulation of Labor Relations in Brazil

The law's influence on labor relations is extensive even where the formation of the wage settlement is left to the process of collective bargaining. Federal law directly sets a very large number of legally binding terms of the employment relation. Much of the workforce earns close to the minimum wage. And even for those who earn considerably more, the minimum wage sets a standard that helps shape the whole salary structure. Frequent decree-laws set forth the government's salary policy.[94]

Equally important are the laws determining wage indexing for inflation and the frequency with which wage adjustments can be made.[95] The government determines the rate of inflation used in making the inflation adjustments as well as the number and timing of yearly adjustments allowed. Currently, wages are adjusted semi-annually at a rate of between 1.2 and .5 of the official index of inflation, depending on the earned salary level, calculated in terms of the number of minimum wages.[96] Not surprisingly, each of these measures has become a focus of heated public debate. Under the leadership of the union centrals, the labor movement has launched a national campaign attacking the present indices and the government's manipulation of the indexing system. The indexing can and has had dramatic redistributive effects. These effects have been almost entirely repressive.[97]

The net effect of such regulation of the wage relation is to narrow the range of terms that remain open to collective bargaining and conflict. In an authoritarian circumstance, the result may be to impose an industrial order from the top. But in times of liberalization, the consequence may be to shift attention to the non-economic, institutional aspects of the wage relation.

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92 D. Maranhão, supra note 40, at 432-44.

93 For a discussion of the pursuit of this strategy by the post-1964 military government, see K. Mericle, supra note 40, at 328-30.

94 Topics of social legislation include: minimum wage, family allowance, guaranteed vacations, and job security. See generally A. Sussekind, supra note 40, at 754-817.

95 Id. at 242-45.

96 For a discussion of these laws and their effects, see K. Erickson, supra note 40, at 160-68; K. Mericle, supra note 40.

97 See M. de Souza Agnian, Ditadura Económica vs. Democracia (Rio: IBASE, Editora Codeiri, 1983).

To be sure, wide-ranging political determination of the wage relation is not a built-in feature of the corporatist labor regime. Other features of society and politics help produce the result. But corporatism creates the opportunity through all the ways in which it meshes together employee-employer and employer-government relations.

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The legal regulation of strikes in Brazil is extensive.[98] To begin with, strikes are allowed only when authorized and undertaken by certified labor unions, and only when directed toward improving the wages and working conditions of employees within the acting union's jurisdiction. Strikes for political, religious, or party-political reasons are legally prohibited. So are strikes launched or developed independently of the official unions or with the aid of unions or workers from neighboring segments of the workforce. Wildcat and sympathy strikes are completely forbidden.

Even this concept of the right to strike is granted to only limited groups of workers. A large portion of the workforce is either totally prohibited from striking or permitted to strike only under extremely limited conditions. Strikes by public sector employees are entirely banned. In Brazil, this sector includes the traditional core of civil servants in the government's direct administration as well as workers throughout the range of state corporations and state-subsidized private entities.[99]

In addition to the ban on public sector strikes, the law distinguishes another category of "essential activities" where the right to strike is severely curtailed. Workers in this category may strike in only two situations—when the employer has withheld workers' salary payments beyond the time specified by law, and when the employer has failed to comply with a judicial order handed down in a *dissídio coletivo*.[100]

Even in the area of permitted strike activity, a number of bureaucratic requirements must be fulfilled prior to any strike activity. A strike must be authorized by a general assembly with a quorum of the unionized workers, in a meeting attended by an agent from the Labor Ministry. A list of specific economic grievances must be formulated before the strike vote is taken. Once the assembly votes for the strike, the union must notify both the employer and the regional department

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98 See Decree No. 4.330 (June 1, 1964); Decree No. 1.632 (Aug. 4, 1978).

99 Decree No. 4.330 (June 1, 1964); Decree No. 1.632 (Aug. 4, 1978).

100 Decree No. 1.632 (Aug. 4, 1978). For a discussion of these rules, see K. Mericle, supra note 40, at 321-23.

of labor. The labor dispute is then subject to the mandatory session of conciliation, which must take place within five days after the notification of the labor dispute. Only at the end of this period may the workers strike.[101]

However, the right to strike remains subject to one final constraint. Even after all the legal requirements have been fulfilled, the strike may be averted or soon curtailed by an action of the government to bring a *dissídio coletivo*. The authority of the Labor Ministry to enter a *dissídio coletivo* is coterminous with the workers' right to strike. If the Labor Ministry decides to resolve the dispute through the courts, the strike may be completely short-circuited. The *dissídio coletivos* are quick, and the judge has the power to order an end to the strike as soon as a judgment in the *dissídio* is rendered.[102]

This accumulation of strike prohibitions may give the impression of a system that allows for almost no industrial conflict. But, in periods of liberalization, the rules restricting the legitimate occasion for strikes and the issues that strikes may address are, in practice, among the first to be relaxed.[103] Moreover, these provisions can be greatly loosened without damaging the other typically corporatist features of the system. Thus, there is nothing in the logic of the corporatist labor law regime that requires the confinement of industrial conflict to economic issues. On the contrary, one of the main points of this article is that under certain circumstances such a regime favors the passage from purely economic demands to broader institutional concerns.

This relation between *dissídios* and strikes has been one of the most criticized aspects of the Brazilian labor law system.[104] For in practice, it has meant that judicial intervention, whether or not prompted by the government, may always trump collective bargaining and industrial action. The law thus creates two contradictory channels for each labor dispute: the system of strikes and collective bargaining and the system of mandatory judicial settlement of the dispute—a settlement that commonly serves as a vehicle for the impo-

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101 Decree No. 4.330 (June 1, 1964).

102 On the tension in Brazilian law between the right to strike and the power of the courts to resolve disputes through the *dissídio coletivo*, see E. Amorin, Sindicalismo Democrático, Emenda Constitucional n. 28, 1981 (Centro de Documentação e Informação, Camara dos Deputados, Brasília, 1981).

103 The present situation in Brazil provides a good example of this. Since the installation of the civilian government in 1984, officials from the Labor Ministry have declined to enforce some of the more authoritarian aspects of the labor law. Prominent among the unused powers is the power of the Labor Ministry to intervene in labor unions and to prosecute workers who participate in illegal strikes. See Statement of Minister of Labor Almir Pazzionotto, Jornal do Brasil (Oct. 12, 1985).

104 See E. de Morães, Filho, Sindicato Unico, supra note 40, at 244-60.

sition of executive policy as well as for the elaboration of judge-made labor law.

It is crucial to understand that these two systems are not ordered in a simple hierarchical fashion. The judicially initiated or governmentally prompted settlement of a dispute overrides the more uninhibited practice of collective conflict and negotiation. But whether courts and bureaucrats decide to override depends on the political circumstances of the day.

The lack of clear-cut rules or stable customs in this regard reveals an element of halfheartedness that runs throughout the Brazilian labor law system. But the point transcends Brazilian circumstances. A corporatist labor law regime veers characteristically between two poles. It may move toward the institutionalization of group conflict and bargaining, with active but subsidiary governmental intervention. Or it may move toward the coercive imposition of a set of governmentally ordained rules and terms for the employment relation. The initial choice of a corporatist regime already reflects an inability or an unwillingness to choose clearly between the two directions, or a belief that they can be reconciled. It is hardly surprising to see the initial hesitation reproduced in the detailed workings of the system.

Where strikes are permitted by law, the law protects the execution of the strike by restricting the economic weapons available to the employer. Employers are denied recourse to the most potent forms of economic coercion: lockouts are forbidden, firing strikers is forbidden, and (most shocking to American eyes) the employer is prevented from hiring strike replacements.[105] Thus, when the workers can strike legally, their action is doubly formidable. The law denies the employer the most obvious instruments of resistance.

The employer is not legally barred from continuing to operate the business while employees are on strike; but whether this opportunity has practical effect depends on the economic conditions in each industry. Workers also enjoy a number of specific, affirmative strike guarantees. The law guarantees payment of their salaries for the duration of the strike so long as at least some of their demands are eventually accepted by employers or the labor court judge. Strike leaders are also provided special safeguards: during a legally permitted strike, public detention of strike leaders is banned absent a serious crime or a flagrant violation of a judicial order.[106]

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[105] Employers can neither fire nor replace workers (by hiring temporary strike substitutes) engaged in legally permitted strike activity. Decree No. 4.330 (June 1, 1964).

[106] Id.

The consequences are telling. When the strike prohibitions are relaxed in practice, or in law, the workers achieve a double gain; for the additional power to press their demands is accompanied by a series of extra disabilities imposed upon the employers. The particular form of this tilt effect may be surprising, but the rapid passage from the repression of militancy to its encouragement seems to be a pervasive characteristic of corporatist labor law regimes.[107]

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The preceding outline of the Brazilian labor law system as an example of the corporatist regime deals only with the surface of rules and institutions. It should be supplemented by observations that suggest how the system really works in its distinctive political and economic setting. These more interpretive and controversial observations go beyond mere description. They anticipate one of the central themes of this essay.

The corporatist regime seems, at first blush, to function merely as an instrument of governmental and employer control of the labor movement. It seems to design and execute a blueprint for enforced industrial peace. But once we go beyond appearances, we see that this consequence represents only half the story, although it is this half that has remained of most concern to Brazilian critics themselves. In the hands of a strong-arm regime, the corporatist system helps co-opt or repress workers and union leaders. But in a setting of aggravated group rivalry over income shares and broader ideological conflict over institutions, the corporatist regime serves the cause of militancy. It even eases the passage from a merely economistic style of union agitation to one concerned with a reorganization of the workplace and the economy.[108] Thus, it serves as a veritable multiplier of *both* the coercive exclusion and the cumulative expansion of a politically conscious labor militancy.

This fact would remain of only limited importance if the implication were merely that broader political circumstances determine the mobilizing or demobilizing effects of the corporatist regime. But the descriptive analysis of this regime, as worked out in a particular country, begins to suggest that *different* features of the corporatist approach lend themselves more easily to repressive or mobilizing uses.

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[107] Case studies of this passage from repression to mobilization may be found in: H. Spalding, Jr., Organized Labor in Latin America (1977); and M. Poblete Troncoso & B. Burnett, The Rise of the Latin American Labor Movement (1960).

[108] Recognition of the politicizing tendency of corporatist labor law arrangements has been a minor, though noticeable strand in current controversy over labor law in Brazil. See, e.g., A. de Souza, supra note 87.

From this view—which is borne out further by an historical interpretation of the Brazilian experience with corporatism—authoritarian regimes and labor agitators make greater use of distinct traits and capabilities of the corporatist system, although they also use the same features of the system to different effect. If we then add the further assumption that the elements of the corporatist regime are severable—that we can preserve some and replace others—we reach a conclusion of great political significance. On this assumption, we can design a labor law system that dispenses with the central aspects of corporatism while developing the mobilization aspects. The feasibility of this operation is the single most important issue latent in the debates about labor law reform in Brazil today.[109]

Consider, first, the issue of pluralistic conflict within the union system. Remember that Brazilian labor law calls for regular elections at the ground level of union organization and that these local unions elect representatives to state-level federations that represent all workers in a given sector of that state's economy. In practice, as this article has pointed out, these elections have been widely manipulated. Discouraged by the obstacles to effective militancy and frightened by the multiple threats to violence and joblessness, workers have often boycotted the union elections en masse or acquiesced in the election of leaders who are mere stooges of the employers, local political bosses, or the Ministry of Labor and its representatives.

In principle, there is nothing in compulsory representation of each group of workers by a single union, occupying a predefined place in the national union structure, that makes this result unavoidable. Competing slates, divided among ideological, tactical, or personal lines, may stand for office in these elections. No one argues that the current forms of representative democracy are not free because political parties compete for positions within the same governmental structure rather than being at liberty to set up alternative governments. On the contrary, the establishment of a single union structure, with offices open to electoral competition, prevents the dispersion of effort in union organization and interunion rivalries. Conflict focuses on what to do with union power. There is less need to make the prize before it can be won.

Repression comes from a combination of features of the broader political environment, and the characteristics of the corporatist labor law system itself. The wide-ranging powers of the Ministry of Labor to qualify or disqualify unions, to intervene in them, and to punish

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[109] See Forum de Debates: Estrutura Sindical. Pamphlet published by Confederação Nacional dos Profissionais Liberais, Brasília (1985). See also R. da Silva, supra note 73.

their leaders have often been used to crush or chill union militancy and electoral competition for union office. The system of governmental union classification (*enquadramento sindical*) can and has been used to draw lines in ways that strengthen pliant unions and undercut resistant ones, in a kind of ongoing, immense gerrymandering.[110] The control of the compulsory union tax and its lopsided distribution to the upper rungs of the national union hierarchies serves to render grassroots unions underfinanced and top-level union bosses subservient. And the extensive possibilities of strike activity enable officials to declare illegal all but the most innocuous strikes and to prosecute their planners.[111]

The broader political environment has been even more crucial than these particular legal instruments of control. During the worst years of the Brazilian military regime (1970-1978), there was little occasion and little incentive to fight for union office; little occasion because police and employer intimidation or assault prevented organized resistance and engagement; little incentive because the repressive salary controls then written into the labor laws, the restrictive definitions of issues appropriate to collective bargaining, and the inclusive strike prohibitions left little to fight for or with.[112]

It is striking that in the two most recent periods of political opening in Brazil—the years just before the 1964 military coup and the period since January 1985—union politics began to take fire. In fact, from the time of the 1978 elections when the military regime began to show signs of weakening, new, independent union movements began to take over larger parts of the union structure through union elections. The takeover has occurred not only in the heavily capitalized industries of São Paulo, but in sectors of the economy—such as rural unions—far removed from the traditional scene of labor militancy.[113]

Such upswings in union democracy and labor militancy have taken place even without replacing parts of the Brazilian labor law system that do serve clearly repressive purposes. Imagine the interventionist role of the Ministry of Labor cut back, the *equadramento sindical* modified, to allow workers to change by vote the lines of classification; the union tax put beyond the control of the Ministry of Labor and funnelled primarily to the grassroots unions themselves; the extensive strike prohibitions lifted; and the agenda of issues open

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110 H. Fuchner, supra note 55, at 54-57.

111 K. Mericle, supra note 40, at 321-22.

112 See K. Erickson, supra note 40, at 158-59.

113 See M. Alvaro, supra note 56; L. Vianna, A Classe Operária e a Abertura (São Paulo: CERIFA, 1983).

to bargaining broadened. All this could be done compatibly with the maintenance of other features of the corporatist regime, including the existence of a single union structure. The stage would then be set for an inclusive experience of independent worker mobilization, from the bottom up.

IV. THE PARADOXICAL LOGIC OF LABOR LAW REGIMES

This article argues that the corporatist and contractualist types of labor regimes influence the style of labor and union militancy in two very different directions. The corporatist type favors either an extreme of labor passivity, with little employer-directed militancy and political agitation, or an opposite extreme of politically-charged militancy, in which the economistic claims of workers become inseparable from efforts to change the basic institutional structure of society.

The contractualist type encourages a moderate, intermediate level of union activism. While allowing, or even inciting, economistic militancy directed against employers and efforts to pressure national governments to grant specific favors to the labor movement, it discourages the escalation of economistic militancy into an all-out struggle over the basic institutional arrangements of society and the state.

The argument develops in two stages. In this section, I return to the ideal types of the corporatist and contractualist regimes and attempt to bring out the consequences of their institutional logic for labor militancy and politicization. The argument, at this point, deliberately avoids historical illustration in order to clarify the nature of the claims. In the next section, I allude to historical experiences in Brazil and the United States that may corroborate ideas about the influence of institutional regimes presented in this section.

Within the severely confined limits of this paper, I cannot claim to demonstrate the power of this line of explanation: only to show that it is at least compatible with a well-known historical story. In other words, rather than undertake an historical analysis of what happened to labor movements in the course of the twentieth century, I propose to show how certain general ideas about institutional arrangements can suggest an unfamiliar perspective on a familiar historical experience.

Nothing in this analysis is meant to suggest that institutional regimes are the sole or even primary influence upon labor militancy and politicization, only that they are a significant, understated, and misunderstood influence. Many other political, economic, and cultural factors are at play; some will be mentioned in passing.

Before beginning the discussion of the inner dynamic of contrac-

tualist and corporatist regimes, it may help to restate the definition of the key concepts of economistic militancy and politicization or politicized militancy. Economistic militancy refers to conflict between organized or unorganized laborers and their employers over wage terms and working conditions. It can include pressure brought by national labor movements against national governments to grant favors to the labor movement. The favors may come in the form of favorable tax and tariff policies or even of legal rules that facilitate unionization. But the crucial point is that they imply no claim to change the basic institutional forms of governmental power and capital allocation, or of production and exchange. The characteristic social climate of economistic militancy is one in which labor unions are perceived, and perceive themselves, as a distinct interest group rather than as bearers of a program of society-wide transformation.

In contrast, politicized militancy crosses the line into situations where economistic and institutional demands are treated as inseparable. Beyond wage demands, the workers also fight for changes in the organization of their workplace, and in the larger organization of the government and the economy.

These definitions clearly distinguish between sheer confrontation on the one hand and challenges that specifically call into question society's basic economic and political arrangements. The premise underlying the distinction is that there is no necessary connection between the two types of organized conflict. High levels of economistic militancy are perfectly compatible with low levels of politicization. Alternatively, politicization can first be accompanied by a relatively low level of economistic militancy, though its development will tend to intensify economistic demands. Once politicized, militancy cannot so easily be satisfied and contained by a discrete series of concessions. It is more likely to escalate and to perpetuate escalation.

A. *The Corporatist Regime and the Dynamic of Politicization*

The most glaring aspect of the corporatist regime is the extent of government involvement throughout the labor system. The contours of this involvement have already been sketched in section II. In this section, the scope of the state's relation to the institutions and activities of organized labor is again of crucial importance. My argument here is that the link between unions and the state establishes a fulcrum for the swing between the extremes of politicization and complacency.

The contribution of corporatist arrangements to the creation of a totally depoliticized labor force is perhaps easiest to see. The extreme

of depoliticization is encouraged by the very scope of the relation between the unions and the state and the opportunity this provides for the total elimination of unauthorized labor militancy. Nothing in the arrangements themselves requires that they be used as instruments of oppression. A benevolent political regime could ignore the apparatus of control and allow the autonomous formation of activist labor unions. But in the hands of an authoritarian government, the corporatist institutions provide potent means for stifling labor militancy and excluding all independent efforts of mobilization and collective protest.

The government's panoply of repressive techniques allows it to maintain control over all stages of the labor process. The simplest way to avoid the dynamic of militancy is to regulate strictly shows of collective force. The government—through its Labor Ministry—can deny laborers the means of protest by closely guarding the right to strike. Since strikes must first be authorized by officials within the Ministry, this is quite easy to do. Alternatively, the government can enforce the ban through more blunt and expedient measures. It can always rely on direct intervention to crush unauthorized strikes.

Strike regulation is the most visible instrument of state control. The corporatist ground rules for trade-union leadership tighten this public stronghold by setting up standards of accountability and avenues of intervention into the union's internal affairs. The legal charter of the local trade union insures its autonomy as long as it "toes the line." But conditions of "internal discord" activate emergency regulation. Authoritarian governments can respond to any signs of agitation by imposing a limit on the union's self-rule. In the exercise of its supervisory powers, the government can decapitate a protest movement by removing militant leaders from the official structures and conferring power on a more docile group.

These are the tactics of direct repression. The state can also work its will more modestly through the various channels of co-optation. Here, state-guaranteed financing of union activities and state supervision of union affairs provide the primary instruments of worker demobilization. The dependence of the official unions on the federally established labor structures and on the federally allocated union funds creates the perfect occasion for a division in union loyalties and the development of a conciliatory attitude to the representatives and policies of the existing political regime.

The principal targets of these various pressures are often the union leaders themselves, for, as holders of official power, they directly depend on the favors and patronage of the state. The formal

privileges of the leadership position are secured from outside control. But the actions of the leaders in office are limited by federally determined financial constraints. Since only a portion of union financing is fully guaranteed, the remainder lies in the discretion of those who administer the public funds. Rewards to obedient officials create an obvious incentive—not just to support the status quo but also to identify in a wider sense with the prevailing political winds.

The trade unions' reliance on publicly measured and administered funds is made all the more important by the restrictions placed on the creation of unofficial organizations. The principle of single unionism together with the portioning out of exclusive jurisdictional grants means that opposition or militant groups are also denied any outside or autonomous base. Thus, the encouragement of free and open expression of collective demands is muted on all sides. It is muted from without by force of law, and from within by the transformation of the union leadership into permanent clients of the state.

A second form of co-optation involves the direct channelling of organizational activity. Perhaps the greatest safeguard against the escalation of labor militancy and discontent is the state-specified list of activities that the unions are compelled to pursue. The task of distributing social welfare goods has an obvious strategic advantage. It redirects the ordinary routines of labor away from struggles over workplace demands and into the far less explosive area of health and human services. Neither the funding of collective goods nor the union's distribution of these goods to its members need be directly compelled. But the reliance of the rank and file on these supports and the conditioning of union financing on their provision give the labor organizations little room to maneuver.

A third form of control operates through governmental regulation of contract provisions and settlement of labor disputes. In contrast to either restraint or co-optation, here the end is achieved through elimination of the concrete occasion for conflict and struggle. Removal of the primary terms of the labor relation from the process of joint determination is the first aspect of this method. The government's specification of minimum wages and its legal regulation of work rules and related arrangements effectively narrows the field for contract disputes over the terms of employment. On the other hand, the state's tribunals of dispute resolution narrow the remaining field of disagreement by referring the small band of surviving claims to mandatory settlement.

Each of these three techniques—repression, co-optation, and mandatory arbitration of labor grievances—tends to lead to the same

result—the reduction of allowable struggle over wage conditions and workplace relations and the establishment of a trade union movement institutionally subordinated to the state. The likely outcome of a government policy that incorporates these three techniques is not difficult to imagine. In the hands of the proper political regime, the corporatist controls easily lead to a thoroughly demobilized labor movement. The union structure may include laborers throughout the workforce; but the institutions of organized labor would serve to stifle all dynamic potential. Workers would be pressured into compliance with the "powers that be" through the corporatist levers of state tutelage and financial support.

Indeed, this is the side of the corporatist model that its critics most often note. Yet the very same institutions that may, under one form of government, render the labor groups prostrate and passive, also lead, under different conditions, to the opposite extreme. This is because each repressive aspect of the corporatist model depends on the activation by an outside force, and these tight controls can break down.

The first great advantage for politicized struggle once the controls have slipped away is the fact that there already exists a fully established trade union system. Not even the corporatist institutions come fully equipped with a radicalized leadership. But militant leaders can penetrate the official structures and take them over from within. In the hands of a militant group, the corporatist structures do more than provide a base. They provide a highly integrated and rationalized institutional framework capable of sparking and then sustaining a militant labor campaign.

The second aspect of the corporatist setting that encourages a more militant and politicized labor activity is the blatantly political character of the labor situation. The repressive use of corporatist controls demonstrates this truth in a particularly dramatic way. The arrangements over which laborers and employers struggle are visibly and directly connected to the use of governmental power and society's broader institutional frame. Extremely repressive conditions might momentarily stifle all thought of fighting back. But liberalized conditions of labor and politics produce just the opposite effect. Then, even the simplest economic claim may engage labor in a struggle for state power. The fact that the government is involved in every aspect of the labor regime makes it a relevant and contending force in any conflict over the employment and work situation. Precisely because the government controls the tools, the terms, and the possible benefits of economic warfare, contests over employment conditions must always

involve something more than the economistic terms of a private bargain.

There is irony in this reversal. Wage regulations and the legalization of workplace arrangements were cornerstones of the original corporatist plan for solidarity and national integration. Government control of the wage relation was meant to be simply that—a way of entirely eliminating agitation and worker militancy for the sake of material demands. This is the situation that a liberal political climate turns around. Once organized labor is freed from the fetters of public control, a collective and politicized militancy becomes the natural course. Indeed, the government's wage-setting policies provide just one among many occasions for the escalation of union claims. The corporatist institutions encourage government-oriented labor struggle over every feature of the labor regime; over the character of the union structure and the controls on the use of strikes; over the legal specification of contract terms and the arbitration of disputes in the courts. In every aspect of the work situation, change must be won at the hands of those in political power, through the medium of the government and the apparatus of public law.

The final aspect of the corporatist system that encourages a politicized labor movement stems from the character of the framework itself. The pre-existing union structure facilitates the development of an especially violent and far-reaching militancy. The sheer wealth of the labor unions is fuel enough for an enduring protest effort. But the organization of the trade-union system vastly amplifies the effect of the resource base. This highly centralized union structure establishes a unified chain of command from within the labor movement. It also concentrates and orders into a single coherent net collective energies needed to stage a general protest and forcefully confront the government with a platform of labor demands.

Thus, the paradox of government control and runaway politicization under a corporatist labor regime becomes clear. The union institutions that serve a repressive regime may, under favorable conditions, encourage the emergence of a vital, powerful, and, above all, politicized labor movement. For the structures of freedom are exactly symmetrical to the structures of constraint. In the one case, a pervasive public presence in labor-management relations together with a highly centralized labor structure works to promote escalation at the touch of a militant command. In the other, the lines of authority are simply reversed. The unions are subjected to both centralized labor structures and direct political control. What makes each of these scenarios likely within the corporatist labor system is an identi-

cal reliance on the underlying institutional base. The extremes of militancy and complacency are rooted in the logic of the corporatist regime. Each represents a different side of the same internal dynamic.

The corporatist institutions cannot, by themselves, determine the direction of the swing between the extremes of prostration and of intense, politicized militancy. The single most important influence upon the direction of this swing seems to be the strength of the central government—the authoritarian powers at its disposal; the relative cordiality of its understanding with the established business, bureaucratic, and military elites; the degree of economic pressure on the unionized workers; and the relative force of radical partisan movements and grassroots organizations in society. Typically, the corporatist labor law regime becomes fertile ground for politicized militancy in periods of troubled political transition when an authoritarian regime is disintegrating. As this article later suggests, these are circumstances that contemporary Brazil has experienced more than once. But to pursue the analysis of those influences on the direction of the swing would lead to a world of considerations far beyond the scope of this article.

B. *Economistic Militancy and the Contractualist Labor Law Regime*

The theory underlying the contractualist model of labor organization is the same as that underlying the general contract norm—labor and management determine for themselves the content of their relation through a process of bargaining and compromise and eventual reconciliation. Work rules and work arrangements are supposed to result from a private order of impersonal relations established on a basis of free and equal exchange. The theory recognizes that labor agreements differ from ordinary market transactions—labor unions and collective bargaining are required as correctives to the power advantage that employers would otherwise wield. The government must intervene to set up ground rules for negotiation, and sometimes supervise the bargaining process, to insure that what goes on is procedurally fair. But neither the institutions of collective bargaining nor their supervision by the state imply a departure from the contract ideal. They are simply the form the model takes under the special conditions of the labor setting.

The system of labor relations adjusted through countervailing powers nonetheless permits, and even encourages, collective mobilization over the basic terms of the employment situation. Indeed, the escalation of social conflict is built into the very structure of the con-

tractualist regime. The most obvious spur to concerted action occurs at the organizational stage. In principle, the unions are voluntarily arranged simply on the basis of worker consent. But the practice typically involves a sustained and often militant struggle between workers and employers over the form their relation will take. The institution of free unionization eliminates all legal impediments to the creation of labor unions. But the organization for any group of employees must still be fought for and confirmed through victory in a union drive.

The unionization drive required by the contractualist framework provides only the first occasion for collective struggle over the terms and conditions of work. The second great spur to labor militancy comes after the establishment of union rule. The successfully formed labor organization has more than the right to agitate on behalf of its members. The collective bargaining mechanism gives the union both the instruments and the opportunities to fight. The contractualist theory may place a premium on the reconciliation of labor and business through formation of a collective agreement. But militancy and concerted action lie at the heart of the bargaining process. Ultimately a contract is set through negotiation. However, the working arrangements defined through collective agreement result from the clash of opposing forces and themselves contribute to the structure of future disputes.

The very primacy of the bargaining process within the contractualist labor law regime suggests that the contests between workers and employers should be especially fierce. If the agenda for collective decision were limited to secondary issues or rigorously controlled by state regulation, agreements would be of little significance and the bargaining process alone insufficient to stimulate significant conflict. But the placement of the primary features of the work situation within the scope of collective bargaining creates an entirely different situation. It turns the dealings between the parties into relations that count and are worth struggling for.

The third way in which the contractualist arrangements foster militancy in the labor movement involves the opportunities for collective action beyond the workplace. The autonomous union structure provides organized labor with a base from which to fight in the broader political setting. This is not just another front. It permits the struggle over labor relations and workplace arrangements to take an entirely different form. Not only can the trade unions direct their collective efforts to powers beyond the firm, they can do so in larger numbers and with greater coordination. The unions can confederate

and mount a national effort to press the government with a platform of collective demands.

These three arguments suggest that the arrangements of the contractualist regime are always more than a mere framework for the creation of collective agreements. They also provide a distinct set of imperatives and opportunities for the escalation of conflict over matters directly and indirectly concerned with the terms and conditions of work. The contractualist unions and bargaining order encourage a flurry of militant action inside and out of the bargaining regime. This tendency to escalation arises from the combination of two factors: the range of worker interests promoted within the framework of collective bargaining and the multiple paths for collective action institutionalized by the contractualist regime. The ordinary routines of the labor unions facilitate a degree of labor militancy beyond that identified with collective bargaining.

However, although the contractualist regime permits economistic militancy in all the ways just described, it also has features that discourage a politicized militancy. The effort to organize groups of employees around wage terms and workplace demands is the classic first step to broader programs of confrontation. But in the contractualist setting, these struggles implicitly confirm, rather than call into question, society's basic institutional frame. And because labor militancy rarely becomes either intense or chronic unless and until it is politicized, the discouragement of politicization ends up being a stimulus to moderation in union activism.

The first barrier to politicization within the contractual regime is also labor's first lever of militancy and mobilization. The process of organization is sometimes the most violent part in the whole union struggle. It can also serve as a crucial turning point in the development of a collective consciousness and sense of group solidarity. But the struggle for union formation exacts an enormous price. The downside of consciousness raising is the toll taken in organizational strength. The weakness of voluntarism in unionization is the dispersion of energy required just to fuel the organizational drive.

The framework of contractualism makes this burden especially great. The commitment to rule by consent turns the task of union formation and the commitment to self-organization into a permanent feature in the life of the labor movement. The organizational structure must be established—not once and for all by general decree or acclamation—but over and over again in each workplace setting, in each particular firm where any number of employees are found. The task is laborious and time-consuming not just because it subtracts

from the efforts available for more serious campaigns, but also because the process of piecemeal union formation encourages an especially hostile reaction by employers. Organization on a plant-by-plant basis gives the employer both the opportunity and the incentive to mount an aggressive defense. Unionization will always raise the cost of a wage agreement. But the cost is particularly high when competitors are allowed the comparative advantage of an unorganized labor force.

The problem of union formation suggests a second depoliticizing aspect of the contractualist labor regime. This is the fragmented quality of the union structure that results from the random and disconnected sequence of grassroots organizational drives. The labor movement formed on contractualist foundations is divided along two dimensions. The union system is initially divided from within by the existence of crisscrossing and multiple jurisdictions. The organized workers are also set off more generally from the unorganized labor force. Each of these divisions undermines the solidarity needed for broad scale political action.

The factional character of the union structure creates the occasion for organizational wrangling between rival and competing groups. As a result, intralabor bickering can easily overshadow a common struggle against employers or the government. The division of the labor force into organized and unorganized segments reinforces this initial break. It also deprives the labor movement of one of the most traditional catalysts to politicized militancy; the unorganized workers who most badly need social welfare guarantees. A divided labor movement creates the occasion for the making of special deals. Elite workers who belong to the structure can ignore broad scale efforts to improve their lot and focus instead on particular pacts sealed and secured at the workplace.

Together, the burden of organization and the tattered union structure that results check the potential of the labor movement to pursue a politicized course by reducing its capacity for cooperative and concerted force. A third and perhaps greater obstacle to politicized militancy is the orientation to collective action inherent in the contract process. This point is commonly made. The process of bargaining over economic demands in the limited setting of the workplace encourages a narrow range of preoccupations and a focus on particular employment conditions rather than on the organization of production in general. Specific work rules and production techniques are often bitterly contested. Any introduction of new technology must be pressed through the frame of the existing collective agree-

ment. However, these issues are ordinarily treated in a piecemeal and ad hoc fashion. The fundamentals of the organization of work are raised no more frequently as a topic for negotiation than the fundamental institutional arrangements of the economy or society at large.

The depoliticization of the ordinary workplace dispute is reflected as well in the absence of any public presence during the bargaining session. The government remains in the background, relatively indifferent to the settlements achieved or their subsequent implementation in the ongoing organization of work.

The preceding considerations suggest the depoliticizing influence of the contractualist regime. The key to understanding this influence lies in the combination of a ruling vision with a set of practical institutions. The view of society and work that most readily justifies the contractualist regime is predicated on the depoliticized notion that the most serious issues affecting the worker qua worker (rather than qua citizen) can be resolved by an endless series of fragmentary deals among limited groups of workers, organized or not, who fight for the defense of their own interests. The very fact that they can organize, and thereby reduce what would otherwise be an inequality of bargaining power in relation to the employers, is supposed to demonstrate that no legitimate worker interest could possibly require a change in the basic institutional arrangements of society. But the theory would not be influential unless it were embodied in a set of practical institutions that constitute the contractualist labor regime. In all the ways discussed earlier, these institutions help fragment labor militancy (e.g., the fight to unionize, the rivalries among unions and among segments of the labor force that they represent) and deflect it from broader political concerns (e.g., the focus on bargaining, the relative distancing of the government from the bargaining arena, the modelling of rules for collective defense on the example of the isolated, self-interested economic agent). More generally, the contractualist regime gives tangible form to the idea that labor issues are one thing and political questions another. Thus, when organized labor acts on the national political scene, it is perceived as just one more special-interest group.

Of course, politicized militancy is nonetheless possible even within the constraints of the contractualist order. Each economistic pursuit is capable of being projected beyond its original borders. Each union organization can join forces with the next and establish a unified front for pitching conflict at an industry level or against the national government. But within the contractualist model, political escalation would require more than a heightened level of ordinary agi-

tation. The labor movement would require a vision of possibility not provided by the labor system itself.

V. THE SURPRISES OF LABOR HISTORY: AMERICAN AND BRAZILIAN EXAMPLES

This section discusses how the contractualist and corporatist logics of moderation and militancy, economism and politicization, can be seen at work in modern American and Brazilian labor history. The aim is neither to sketch the labor history of these two countries, nor to confirm empirically the arguments presented in the previous sections. It is merely to show that a great deal of familiar evidence is at least compatible with those claims. To show this compatibility is also to suggest how promising this neglected approach to thinking about labor history and institutional reform may turn out to be. For I see this article less as the summation of an historical inquiry than as the formulation of a research agenda.

A. *The American Experience: The Unnatural Triumph of Economism and Collective Bargaining*

This section discusses the development of the American labor law system as an historical phenomenon that illuminates the thesis of this article. The discussion has two parts. The first is a schematic periodization suggesting the main turning points in American labor history and summarizing characteristics of the times that those turning points mark off. The second part is a more detailed view of two sequences of events encompassed by the broader scheme.

The main theme of both parts of this historical analysis is straightforward. Though aware of how recent American collective bargaining institutions are, we are accustomed to thinking of the United States as having set out very early on a contractualist approach to the organization of labor.[114] The institutional settlements of the years following World War II seem, in this view, to be the natural culmination of a long and predictable course of events. But it

[114] See, e.g., Bok, supra note 9, at 1400-09, 1417-25 (contrasting the contractualist style American labor law regime to the more corporatist systems of Western Europe). Bok implicitly assumes that American labor institutions have always been more or less imperfectly modelled on contractualist principles. He then explains the contractualist model in the United States as largely the result of a long-standing "distaste for government intervention and a marked distaste of paternalism" on the part of Americans as well as the "accent in our culture on individualism—the widely stated conviction that individuals should be left largely to their own resources once they are given adequate training and sufficient opportunities to advance on their own merits." Id. at 1419. The plausibility of the explanatory thesis depends on the initial, overly simplified statement of fact.

suffices to crack the surface of this historical cliché only a little to uncover a very different picture.

A survey of the laws and institutions governing labor in the United States in the generation before the Civil War shows a juxtaposition of many different solutions, ranging from the outright coercion of slavery,[115] to genuine forms of contractual cooperation among small producers,[116] and passing through many varieties of quasi-corporatist arrangements.[117] The intellectual and institutional building blocks that later went into the edifice of collective contractualism were fashioned slowly. They coexisted with other elements, discarded only late in the day, and were overshadowed by many conflicting proposals about what the general labor law regime ought to be.[118] Serious threats to what became the contractualist or collective-contractualist model continued to reappear throughout American history and persisted until our day.

As the contractualist approach developed and moved toward the contemporary collective bargaining system, it came to favor a style of labor militancy marked by what this article has called the economistic style. The predominance of this style in turn encouraged the further elaboration of contractual and collective bargaining approaches to the prejudice of their rivals.

Through much of American labor history, however, economistic militancy occurred side by side with other attitudes within the labor force—prostration, corporatist cooperation, and a more politicized,

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115 See, e.g., Dred Scott v. Sandford, 60 U.S. 393 (19 How.) (1857).

116 For a discussion of producers' cooperatives in the pre-Civil War era, see J. Commons, Labor and Administration 219-64 (1913) (discussing the evolution of cooperatives among American shoemakers from 1648 through the Civil War period); P. Foner, History of the Labor Movement in the United States 178-81 (1947); S. Perlman, A History of Trade Unionism In the United States 30-34 (1950); P. Taft, Organized Labor in American History 22, 38-39 (1964); N. Ware, The Labor Movement in the United States 1860-1895, at 320-33 (1929).

117 Guild-like organizations recalling the labor organizations of early Europe were common during this period. The European guilds were placed under the direct supervision of the state. In America the association of craftsmen and apprentices resembled the European prototype, only here the firm was detached from the state. For discussions of these quasi-corporatist arrangements in nineteenth century America, see D. Gordon, R. Edwards & M. Reich, Segmented Workers, Divided Workers 64-67 (1982) [hereinafter cited as D. Gordon]; J. Commons, supra note 116, at 210-64 (discussing guild-like organizations among shoemakers in the pre-Civil War period).

118 See, e.g., P. Taft, supra note 116, at 46-49. Taft discusses the variety of labor philosophies debated in the years preceding the Civil War, including those of Charles Fourier and his followers Albert Brisbane and Horace Greeley (organization of society into cooperative labor colonies), Josiah Warren (society based on anarchism and extreme libertarianism), Stephen Andrews (individual sovereignty through the issuance of labor notes), and George Henry Evans ("vote yourself a farm" plan for land distribution). See also S. Cohen, Labor in the United States 75-80 (1960).

institutionally aware style of activism. Even the contemporary, full-blown form of collective bargaining cannot ensure the triumph of economism and of its attitude—at once narrow and contentious, unpolitical and uncooperative—toward the relation between labor and capital.

1. The Pre-History of Collective Bargaining: A Schematic Periodization

For the purposes of this essay, modern American labor history can be divided into five main periods and two shorter, war time hiatuses. The first period covers the generation before the Civil War. The chief characteristic of American labor organization at this time was its extremely fragmentary quality.[119] Many different forms of the labor relation existed then, and no single form was clearly predominant. For example, unions of skilled workers existed, especially in the New England trades. However, in the early decades of the nineteenth century, these unions represented only a single strand in the developing pattern of labor organization. Many workers remained either slaves, indentured servants, or apprentices. These workers had little access to the existing market economy and its individualistic or corporate legal instruments. Moreover, even where workers associations did exist, the form of the association was both primitive and unprotected. The earliest unions lacked recognition in fact or law. They relied on the solidarity of their members alone and acted collectively only at the very margins of the labor market.[120]

Labor relations of this period were marked by a relative absence of labor militancy. Strikes of any kind were rare, struggles over the labor relation short-lived. On the other hand, workers in the early nineteenth century were easily mobilized to participate in the reformist social and political movements of the Jacksonian Democracy.[121]

A second period in the development of the American labor system extends from the Civil War to 1890. Two main tendencies char-

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[119] Several different forms of the labor relation coexisted at this time, with no one form dominating. Some work relations were based on coercion (slavery and indentured servitude), others were based on an exchange between independent producers (producers' cooperatives), and others were based on contract (contracts for hire between employees and employers mediated by the "market"). Voluntary unions of the modern type existed, and could exist, only among this latter group. See D. Gordon, supra note 117, at 48-94; S. Perlman, supra note 116, at 3-41.

[120] See S. Cohen, supra note 118, at 70-76; S. Perlman, supra note 116, at 3-41; P. Taft, supra note 116, at 12-33.

[121] For discussions of the interaction between labor movements and the Jacksonian Democracy, see P. Foner, supra note 116, at 143-66 (1947); S. Perlman, supra note 116, at 9-18; A. Schlesinger, The Age of Jackson 149-51, 165-67, 192-96, 201-05, 229-30 (1953).

acterized the development of the labor system at this time. One tendency was the collective-contractualist form of labor organization.[122] In the decades immediately following the Civil War, voluntary and self-organized labor unions grew up throughout the United States. The unions were still largely unrecognized within the employment relation. Yet, they were increasingly active in the elaboration and defense of common wage terms and hiring conditions. The unions organized workers into craft-conscious groups, seeking, for example, general payscale standards.[123]

At the same time, courts and legislatures developed legal rules limiting collective labor organization. Unions had come close to achieving legitimacy under the common law by the start of the Civil War.[124] But in the decades that followed, the courts molded legal precedent in ways that narrowly limited both the scope of permitted union activity and the range of economic weapons available to unions. Thus, toward the end of the nineteenth century, a whole body of developing law denied these organizations the prerogatives and the weapons needed to operate in the labor market.[125] The courts also developed new legal remedies which could be used to break both unions and strikes.[126]

The labor movement that took shape within this legal and institutional setting was increasingly militant and aggressive. Strikes and other forms of labor protest were common throughout the period. The unions themselves were still fragile and short-lived.[127] But dur-

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122 For a thorough discussion of the American labor scene between the Civil War and 1890, see N. Ware, supra note 116; P. Foner, supra note 116, at 370-524; and S. Perlman, supra note 116, at 42-129.

123 On the activities of American labor unions during the decades immediately following the Civil War, see P. Foner, supra note 116, at 370-453; D. Gordon, supra note 117, at 91-99; S. Perlman, supra note 116, at 42-129; N. Ware, supra note 116, at 1-72.

124 See Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842) (a Supreme Judicial Court of Massachusetts decision, authored by Chief Justice Lemuel Shaw, holding that the formation of an association by journeymen was not in itself an illegal act, and that the objects of such an association, as delineated in its constitution and during concerted action, determined its legality or illegality). Although *Hunt* advanced the cause of labor by granting unions a degree of legal recognition, recent scholarship has demonstrated the limits of Shaw's opinion. See C. Tomlins, The State and the Unions: Labor Relations Law and the Organized Labor Movement in America, 1880-1960 (1985). For further discussion of the limits of Shaw's opinion, see V. Hattam, Unions and Politics: The Courts and American Labor, 1806-1896 (unpublished Ph.D. dissertation, on file at the Department of Political Science, Massachusetts Institute of Technology, 1986).

125 See infra note 149.

126 For thorough discussions of the use of labor injunctions as anti-union devices during the last decades of the nineteenth century, see F. Frankfurter & N. Greene, The Labor Injunction 1-46 (1930); C. Gregory, Labor and the Law, ch. IV (1946).

127 The labor movement of this period followed a cyclical pattern marked by the regular evisceration of unions during periods of economic depression. See, e.g., S. Perlman, Upheaval

ing their brief life span, the militancy in which they participated often went beyond economistic demands to broader concerns with the framework of relations among government, business, and labor.[128] Indeed, the 1880's produced a number of populist, reformist, and utopian movements which challenged the existing socio-economic and political arrangements and offered a variety of proposals for the alternative structuring of society.[129]

Relations between different segments of the working class were also more fluid then. Some unions adopted a relatively limited form of employer-directed economistic militancy. However, even in these instances, no sharp lines were drawn between union members and nonmembers. Organized workers often sought the help of the unorganized and unskilled laborers. In addition, mainstream unions were frequent participants in the broader, more politicized efforts.[130]

A third period in modern American labor history runs from the 1890's to the 1920's. This period was one of the most violent of modern times.[131] The most distinctive feature of this period, however, was the development of business unions—frameworks for union-business cooperation.[132] Such unions were organized on a firm-by-firm basis and were manipulated by employers; they developed in some of the growing mass-production industries. Because these business unions formed part of a broader network of welfare benefits and supports, and because they sought to co-opt and control workers' movements, they can be seen as a nearly proto-corporatist development.[133]

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and Reorganization, in 2 History of Labour in the United States 472 (J. Commons ed. 1966) (commenting that the labor movement of the nineteenth century "centered on economic or trade union action during prosperity and then abruptly changed to panaceas and politics with the descent of depression").

128 See infra text 1058-61 and accompanying notes 156-70 for a discussion of the Knights of Labor and their political activities of the period.

129 For discussion of populist, reformist, and utopian movements of the 1880's, see, e.g., J. Rayback, A History of American Labor 178-84 (discussing the populist movements of the period); S. Perlman, supra note 116, at 106-29 (discussing reformist union movements of the period), 2 S. Ahlstrom, A Religious History of the American People 257-68 (1975) (discussing utopian socialism of the period).

130 See supra note 129.

131 See J. Brecher, 53-140 (1972) (discussing, inter alia, the Homestead Strike of 1892, the Pullman strike of 1894, and the Steel Strike of 1919); S. Lens, The Labor Wars: From the Molly Maguires to the Sitdowns 67-219 (1976) (discussing, inter alia, the Homestead Strike, the Western miners' strikes of the 1890's, and the activities of the Industrial Workers of the World); S. Yellen, American Labor Struggles 72-291 (1936) (discussing, inter alia, the Homestead Strike, the Western miners' strikes, the Lawrence Textile Strike of 1912, and the Steel Strike of 1919).

132 For a discussion of the business union or company union "movement," see Nelson, The Company Union Movement, 1900-1937: A Reexamination, 56 Bus. Hist. Rev. 335 (1982).

133 See, e.g., id. at 339-42 (discussion of the Filene Cooperative Association (instituted by a Boston department store), the welfare program of the National Cash Register Company, and

The continuing development of contractualist forms accompanied the emergence of these business unions. Organizations such as the American Federation of Labor ("AFL") began to gain recognition and collective bargaining became an accepted practice in certain sectors. However, these advances were limited by a backdrop of increasing hostility toward unions. Anti-labor activity intensified among the institutions of both state and civil society. Courts and private organizations brutally repressed all activity considered beyond the pale of contractually authorized and institutionally legitimated collective action.[134]

As in the post-Civil War period, labor militancy at the turn of the century was far from homogenous. The labor movement that grew up in the period from the 1890's to the 1930's experimented with numerous styles of collective action. Three distinct tendencies developed. First, within the new group of developing business unions, a cooperative style of labor relations encouraged organization and participation without either the struggle of the contractualist forms or the ready susceptibility to politicization still characteristic of the unorganized sector. A second tendency was equally foreign to the doctrine of business unionism. Several explicitly politicized labor movements grew up both inside and outside the AFL. Many unions in the east coast trades were led by socialists and other radicals.[135] These groups often engaged in bargaining and strikes. But they also demanded more, often challenging the basic economic, social, and

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company unions introduced by H. Porter, a proponent of "Taylorism"). The company unions offered a variety of benefits including medical and insurance plans, banks, libraries, and social and athletic events and "were designed to elicit cooperation from employees, not to engage in collective bargaining, to settle grievances . . . [and to] insure against labor unrest." Id. at 340-41.

134 For examples of the hostilities unions faced in the courts during that period, see F. Dulles & M. Dubofsky, Labor in America 187-89 (1984); H. Hoagland, Humanitarianism (1840-1860), in 2 History of Labour in the United States 501-09 (J. Commons ed. 1966); C. Tomlins, supra note 124, at 60-67; Casebeer, Teaching an Old Dog Old Tricks: *Coppage v. Kansas* and At-Will Employment Revisited, 6 Cardozo L. Rev. 765, 765-83 (1985).

For a discussion of the movements by private organizations, see, e.g., P. Taft, supra note 116, at 136-58. Taft comments on "the determination of the growing industrial giants to rid themselves of any second power in their plants and their willingness to use their full resources to effect their plans." Id. at 136. For specific discussion of the use of Pinkerton Detectives to infiltrate and suppress unions, and the imposition of martial law during the Homestead Strike, see F. Dulles & M. Dubofsky, supra, at 157-74.

135 For a discussion of radical labor unions of the period, most notably the Industrial Workers of the World, see F. Dulles & M. Dubofsky, supra note 134, at 200-14; 2 P. Foner, History of the Labor Movement in the United States 279-99 (2d ed. 1975) (discussing socialists and the labor movement); R. Hoxie, Trade Unionism in the United States 139-74 (1924); S. Lens, supra note 131, at 151-219.

political arrangements of society.[136]

The development and concentration of a more narrowly economistic style of militancy constituted the third main tendency of the time. Within the AFL-led group, the earlier mix of politics and economy was increasingly disavowed. Indeed, an important tendency within the AFL pleaded the doctrine of "single unionism" (e.g., the adoption of a single-minded focus on the attainment of material gain within the structures of collective bargaining).[137] However, even within the context of experimentation with broader forms of collective bargaining, economistic militancy was not the only AFL line. Many within the unions pressed for other non-economistic ends. Indeed, given the prevailing legal limits and restraints, even the most diehard advocates of economism were forced to mount legislative campaigns to win legal opportunities for the focussed style of activism they favored.[138]

The years immediately preceding and immediately following

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[136] See J. Raybeck, supra note 129, at 226-49. The more radical tendencies within the labor movement linked their protests at work to programs for the transformation of the existing social order. "Anarchistic" unionists, perhaps best represented by the Industrial Workers of the World ("I.W.W."), worked toward the abolition of the state and governmental machinery. They envisioned an "anarcho-syndicalist" organization of society in which unions or one big union would be the government. Having displaced the state, government, and politics as they existed, the "one big union" would abolish private ownership and privilege.

Anarchistic movements such as the I.W.W. denounced electoral politics and legislative lobbying, believing that such efforts failed to challenge the basic order of society and led only to degenerative reforms which, at best, maintained the status quo. In place of "bourgeois politics," anarchists advocated "direct action" believing that the transformation of society could be accomplished solely through strikes, demonstrations and, inevitably, violent confrontation.

Socialist unionists, unlike the anarchists, believed in the necessity of maintaining an organized state and governmental machinery, at least as a transitional phase of organization on the road to the creation of a classless society. This would be accomplished by worker takeover and control of the state machinery, which would allow for the abolition of private control of the means of production and collective ownership by the workers.

Although more left leaning elements of the socialist "movement" believed that the takeover required violence and revolutionary struggle, mainstream socialists, represented by the Socialist Party and its leaders such as Eugene Debs and Norman Thomas, believed that these ends could be attained through peaceful means, via electoral politics on national and local levels and also through legislative lobbying.

For more elaborate discussions of radical union philosophies of the period, see, e.g., W. Foster, History of the Communist Party of the United States 62-260 (1952); I. Howe & L. Coser, The American Communist Party, A Critical History (1919-1957), at 1-40 (1957); R. Hoxie, supra note 135, at 139-74 (contrasting the philosophies of anarchistic and socialistic movements during this period).

[137] See, e.g., 2 P. Foner, supra note 135, at 280 (comparing the "pure and simple" unionism of the AFL to the trade unionism of the Socialist Labor Party).

[138] "AFL leaders began to demand a 'voice in management,' by which they meant a publicly recognized right to participate through collective bargaining in the making of all managerial policies affecting the 'interests and welfare' of workers; and

World War I represent a veritable hiatus, a break from tendencies that developed before and after. During World War I, the strategy of privatist struggle and public repression was temporarily suspended. Instead, the government led and encouraged semi-corporatist labor arrangements. Under the government's wartime strategy, government, business, and labor became partners in a mixed public/private venture. Unions and big business collaborated through planning commissions, under the aegis of a government created war board.[139] In some respects, this partnership served as a spur to the development of the contractualist model: The government policy advanced during the War relied on semivoluntary negotiation between business and labor through the form of collective bargaining. However, there was more than a touch of proto-corporatism in this brief interlude of American labor relations. The contractualist aspects took shape within an overall framework of cooperatively determined guidelines and standards, and on the basis of a system of modified rights of economic conflict and warfare. The federal government sponsored mediation and settlement of wartime disputes. Both labor and business participated in government bureaus and in commissions which served these ends.[140]

These wartime arrangements were meant to sustain a practice of controlled mobilization. The government actively encouraged the organization of labor unions, but only on the tacit condition that the unions promote harmony and collaboration rather than conflict or class struggle. This promise was only partly achieved. Within the newly unionized areas, labor militancy was even more explosive than it had been in the prewar era. Strikes of increasing scope and dura-

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the 'representation [of organized labor] on all [governmental] agencies that . . . determine public policies . . . .' "

Hurvitz, Ideology and Industrial Conflict: President Wilson's First Industrial Conference of October 1919, 18 Lab. Hist. 508, 510 (1977) (quoting AFL, Report of the Proceedings of the Annual Convention, 1917, at 137 (Washington, D.C., 1917).

"This change in the perception of the nature of industrial conflict was reinforced and shaped by attempts to solve labor disputes through litigation and legislation." Id. at 511.

For a discussion of AFL legislative lobbying campaigns during this period (including the push for anti-injunction and general antitrust legislation), see S. Perlman, supra note 116, at 198-207.

139 See infra note 172.

140 For example, unions were given representation on all boards dealing with national defense; Samuel Gompers was made a member of the Advisory Commission of the National Defense Council; President Wilson appointed a National War Labor Board, composed of both labor and management, to "serve as a final court of appeal to settle all industrial disputes which could not be resolved by other means." F. Dulles & M. Dubofsky, supra note 134, at 215-20. See also F. Grubbs, Samuel Gompers and the Great War: Protecting Labor's Standards 51-55, 72-73 (1982); H. Livesay, Samuel Gompers and Organized Labor in America 175-78 (1978).

tion marked labor relations in America both before and after the War. Furthermore, the militancy of the period often had an explicit institutional orientation. The reform proposals of organized labor included national planning on a peacetime basis and nationalization of some of the war industries. The AFL platform of 1919 included the call for nationalization and state planning.[141]

A fourth period in the development of the American labor system spans the years from the New Deal to those immediately following World War II. This period is rightly recognized as a watershed in the history of American labor relations. However, the character of this watershed is often misunderstood. One feature of the period was purely negative: the dismantling of the semi-corporatist forms that had emerged in the previous period. The Wagner Act simply outlawed the "company union."[142] Another feature is more frequently commented upon: the statutory delineation and enactment of a collective-contractualist framework for unionization and collective bargaining. By guaranteeing the right to voluntary "self-organization"[143] and by placing the support of government behind "the practice and procedure of collective bargaining,"[144] the Wagner Act gave a definitive push to the contractualist tradition of labor relations. This push continued with the enactment of the Taft-Hartley amendments. These amendments contributed to the extention of the contractualist tendency by casting the individual firm or plant as the fundamental unit of labor relations and by prohibiting recourse of unions to the economic weapons required for broader forms of industrial action.[145]

However, not even the combination of the Wagner Act and the

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[141] The AFL called for the conversion of the quasi-corporatist emergency regulatory bodies established during World War I, such as the National War Labor Board, into permanent governmental bodies that would allow for federal regulation of the economy and union participation therein. The AFL also proposed government ownership of national industries, such as the railways. See F. Grubbs, supra note 140, at 133-51; S. Perlman, supra note 116, at 245-61; Hurvitz, supra note 138.

Samuel Gompers, the leader of the AFL, was quoted as stating at the time that "[labor] shall never again go back to prewar conditions and concepts . . . there must be established a new understanding of the relations of man to man . . . in industry; we demand a voice in the determination of the conditions under which we give service; . . . we demand that the workers shall have that voice not only as supplicants but by right." Proceedings of the First Industrial Conference 116 (Oct. 6-23, 1919) (Washington, D.C., 1920).

[142] NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982).

[143] Id. § 7, 29 U.S.C. § 157.

[144] Id. § 1, 29 U.S.C. § 151.

[145] See LMRA § 8(b)(1),(3), 29 U.S.C. § 158(b)(1),(3) (1982) (unions may not "coerce" workers into union membership and prohibiting unions from organizing certain secondary boycotts). For a general summary of the Taft-Hartley amendments and their effects upon unions, as well as their social, economic, and legislative background, see S. Cohen, supra note 118, at 504-27.

Taft-Hartley amendments conclusively defined every feature of the emergent system of collective bargaining. Many details—such as the form of arbitration or the role of the government in the adjustment and administration of collective agreements—remained open notwithstanding the New Deal arrangements and would only be settled during the course of and immediately following World War II.

Nonetheless, compared to the options and the institutions that existed earlier, the system enshrined by the New Deal legislation marked a turning point in the development of American collective bargaining. On the basis of these arrangements, the industrial union movement took form. The style of militancy practiced by the new industrial unions was more organized, persistent, and aggressive than anything that had come before. At the time, such militancy might have appeared revolutionary. But this was only an appearance that hid the greater stability now embedded in the institutions of the labor system. The labor struggles unleashed by the New Deal arrangements ultimately proved very modest. The framework encouraged an organized and enduring conflict within legalized bargaining channels, for particular benefits and for particular groups of workers. Such militancy would come to share few of the broader aspirations that had marked earlier traditions of labor struggle.[146]

However, the defeat of this earlier tendency occurred only after one further interlude of militancy beyond economism. The period during and immediately following World War II provided a second hiatus from the emergent system of collective bargaining. This time, governmental supervision of labor was even more pervasive. The World War II arrangements provided for mandatory nationwide government controls over all aspects of the labor relation. A system of regional panels and labor boards—now organized on a tripartite basis—was established to monitor and impose the government's comprehensive wage guidelines.[147] To soften the blow, a new emphasis was placed on contractual provisions providing for a variety of fringe benefits.[148] Finally, labor disputes were strictly controlled. Through the Smith-Connally Act of 1943 (The War Labor Disputes Act) strike rights were temporarily suspended or severely curtailed and takeovers were contemplated in any war-related plant where production had halted due to a labor dispute.[149]

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[146] See supra notes 135-36 and accompanying text.

[147] For a discussion of the organization and functions of the regional boards, see P. Taft, supra note 116, at 552-53.

[148] See S. Cohen, supra note 118, at 235-38; P. Taft, supra note 116, at 559-60 (discussion of fringe benefits granted during this period).

[149] War Labor Disputes (Smith-Connally) Act § 701, 5 U.S.C. § 903 (1982 & Supp. II

These semi-corporatist arrangements moderated labor militancy during the War. The moderation was achieved through a combination of consent (voluntary no strike pledges) and coercion (anti-strike legislation). However, this wartime calm was ambiguous for it concealed an implicit exchange of labor's wartime support for benefits and bargaining concessions. It is no wonder that the aftermath of the War brought both militancy and frustration.

There was a second important tendency, also ambiguous. The wartime helped develop and deepen earlier ideas about the cooperative planning of industry and about the participation of labor in the administration and extension of state encouraged welfare programs. Had these plans been successful, collective bargaining in the postwar era would have developed in ways that encouraged the involvement of government in labor affairs; and the unions might have won the institutional bases for a more politically oriented labor militancy. However, for reasons not totally clear, the elements necessary to this style of militancy were quickly discarded or defeated. One turning point was the public reaction to strike waves. This included amendments to the Wagner Act, limiting the right to strike and the acceptable forms of collective action.[150]

A fifth period in the development of the American labor system thus begins where the events discussed above end—the years following World War II to the present. The major features of the postwar model of labor relations resulted from the series of laws, struggles, and institutional innovations realized in the preceding period.[151] The distinguishing character of this model was not simply government encouraged collective bargaining. This, in itself, as this article has already noted, could have taken a number of forms, each of them yielding diverse implications for the style of labor activism. What was distinctive, however, was that the government encouraged collective bargaining scheme involved a system of totally privatized and contractualized labor agreements. The postwar system celebrated the orderly, internal negotiation and administration of private agreements.

1984). For discussion of the Smith-Connally Act of 1943, see S. Cohen, supra note 118, at 144; P. Taft, supra note 116, at 557; G. Taylor, Government Regulation of Industrial Relations 164-71 (1948).

150 See supra note 145.

151 For an analysis of the relationship between prewar structures and innovations and the postwar model of labor relations, see M. Piore & C. Sabel, The Second Industrial Divide 91-104 (1984). Piore and Sabel describe the legal framework of postwar labor relations as "the residue of successive uncoordinated programs of vast social experimentation undertaken in the Depression years . . . fused into a single, more or less coherent institutional structure only during and immediately after World War II . . . ." Id. at 91 (citation omitted). For a general discussion of labor relations in the postwar period, see Stone, supra note 9.

Grievances and disputes would be limited and handled by reference to these individual deals, through the mechanism of private, contract-based arbitration.[152]

Indeed, the use and propaganda of private arbitration in contemporary labor relations is in many ways the perfect emblem of the contractualist bargaining system. Proponents of the institution argued that the procedure of private arbitration provided an ultimate forum for the voluntary and democratic determination of labor grievances and disputes. With its help the state could be largely excluded from the employment relation. Disputes between labor and management would then be resolved in a private manner, with the rights of each side determined by reference to the collective agreement and applied as both benchmark and ultimate guide in the resolution of daily disputes. However, such a system made sense only within the framework of an economistically oriented labor unionism. Rights could be specified only if labor willingly renounced all claims to broader forms of control. Private arbitration could function in the way intended only if unions and the workers they served oriented thought and practice to a series of individualized bargaining deals, each having only the slightest relation to the fights fought in other workplaces.[153]

In the postwar period, this ad hoc set of arrangements has often been attributed a logic all its own.[154] However, the logic of these arrangements is no more self-generating now than it was in the past. The limits of this strategy of extreme economism have become apparent through the experience of labor in the postwar period. Though carefully managed to secure the best organized segments of the labor movement, economism today has come to mean the continued weakening and reduction of union forces. The most striking characteristic of the past two decades has been the dramatic decline of American unionism; membership numbers have drastically fallen and, one by one, individual unions have been forced to reduce their demands, make concessions, and struggle just to preserve their place in the existing economic structure.

The retreat of American unionism is only partially explained by

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152 For a discussion of the role played by arbitration in the postwar labor system, see R. Fleming, The Labor Arbitration Process 21-30 (1965); P. Hays, Labor Arbitration 3-75 (1968); Stone, supra, note 9, at 1523-25, 1559-65.

153 See Stone, supra note 9, at 1559, noting that in the postwar system of private arbitration "there is no room for any outside considerations," i.e., the public interest or broader political questions.

154 See, e.g., Bok, supra note 9, at 1399 (arguing that our labor laws "must be linked to certain enduring characteristics in our pattern of labor relations").

the decline of the mass-production industries.[155] A tradition of privatized collective bargaining and individualized bargaining struggles has left the labor movement excessively dependent on the fortunes of particular mass production businesses. It has also denied the labor movement both the practical opportunities and the intellectual incitement to question institutional arrangements as well as do battle for economic benefits. The unions that have settled into the routines of collective bargaining and arbitration cannot easily regain the role of bearers of a society-wide program of transformation.

2. Some Important Episodes in the Development of Collective Bargaining: The Forgotten Openness of an Historical Record

As stated in the preceding schematic narrative, the institutions of American labor did not emerge full blown in the 1930's. They can be seen instead as having evolved more gradually over the course of a century or so. A similar claim can be made about the form of unionism generally associated with labor in the United States. It was during this longer period that the characteristic tendencies of the contractualist type achieved preeminence in the labor movement. Economistic militancy was absorbed into the routines of organized labor. Resort to collective action became increasingly disassociated from any broader political mission.

Much of modern American labor history reveals a recurrent pattern combined with a secular drift. Labor militancy periodically increased in two main historical situations: national economic crises that threatened the strategies of self-seeking individualism, or wartime conditions that gave labor exceptional privileges, or markedly raised expectations, in exchange for significant sacrifices that workers were expected to make. The period of militancy would often be met by a reverse Mutt and Jeff routine: a period of outright repression, followed by a series of institutional reforms. The main effect of these reforms is clear—direct advance toward the contractualist regime depicted in this article's characterization of the ideal type of contractualist labor relations. The chief surprise in the course of this advance is that because of the way the common law of contract was interpreted, it was necessary to perfect the contractualist regime by creating, by statute, institutions that seemed to go outside contract—the collective bargaining system.

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[155] See C. Craypo, The Decline of Union Bargaining Power 113-66, in New Directions in Labor Economics and Industrial Relations (M. Carter & W. Leahy eds. 1981), discussing the causes of the decline of unionism, including the decline of mass-production industries.

Each step in the development of the contractualist framework seems to have discouraged politicization by the very same devices through which it encouraged economic militancy. The key historical hypothesis implied by the discussion of the inner tendencies of a voluntarist labor law system is that the primacy of economistic militancy was as much the result as the cause of the emergence of the system.

a. *The Knights of Labor*

Politics and utopian ardor have never been the stock-in-trade of American labor unions. Yet there have been moments in American history when organized labor rose up in protest against existing practices and engaged in collective struggle over the basic social and political arrangements. Some of the most radical bursts of militant activity occurred in the nineteenth century. As a general rule, nineteenth century labor militancy was neither frequent nor prolonged. The periods of great agitation were usually inspired by economic crisis or collapse. Yet, during these periods of crisis, labor disputes were more than a matter of wage and employment demands. Economistic protests would merge with broader, more fiercely fought struggles over the terms of social life.

The "Great Upheaval" of the 1880's, together with the rise of the Knights of Labor, well illustrate this theme.[156] Like the militancy of the 1830's, the heightened strife of the 1880's was prepared by financial panic and a serious business depression.[157] The strike waves and boycotts that spread first in 1883 were protests against economic hardship. Workers mobilized to defend themselves against rapidly falling wages and increasing unemployment. But the quickening of agitation surged through other channels as well. Local trade unions and national associations joined forces in a national labor movement caught up in a far-reaching struggle for fundamental political change.

At the head of this national movement stood the Order of the Knights of Labor.[158] The Knights of Labor was a national labor organization, dedicated explicitly to the idea of a unified labor movement and a politicized labor struggle. Some of the Knights' most

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156 For a detailed discussion of the "Great Upheaval," a period of intense labor agitation, see S. Perlman, Upheaval and Reorganization (Since 1876), in 2 History of Labour in the United States 356-94 (J. Commons ed. 1966) [hereinafter cited as S. Perlman, Upheaval]. For a discussion of the relationship between the "Great Upheaval" and "repoliticized associationalism" on the part of the Knights of Labor, see L. Fink, Workingmen's Democracy: The Knights of Labor and American Politics 18-37 (1983).

157 See supra note 156.

158 For general accounts of the Knights of Labor, see L. Fink, supra note 156; G. Grob, The Knights of Labor and the Trade Unions, 1878-1886, in Readings in Labor Economics and Labor Relations 108-19 (R. Rowan rev. ed. 1972); P. Taft, supra note 116, at 84-122.

noted victories came in employer-directed contests over ordinary wage-and-hour demands.[159] But the dominant emphasis of the organization centered on a radically politicized brand of unionism.[160] The Knights were committed to the creation of a new economic system—one in which small-scale cooperatives and self-employed producers would replace large-scale industrial concerns.[161] Strikes and boycotts were fine in the short run for marginal material gains; but for the Knights of Labor, the real remedy to low wages and unemployment could be found only in the elimination of the system of wage labor.[162]

The politicization of the Knights was manifest—not just in its espousal of radical aims, but also in the strategies it adopted to pursue those aims. Strikes, boycotts, and particular industrial disputes were treated as sideline ventures on the way to the central task. The Knights adopted a strategy of mobilization throughout the workforce and agitation for institutional ends through direct political action.[163] The structure of the organization of the Knights of Labor reflected this strategic principle. Workers from all ranks in life would unite in a single cooperative effort. Trade assemblies and craft locals, the traditional constituency of American organized labor, mixed with self-employed artisans and groups of unskilled immigrant workers.[164] The ideal of the labor organization made the meaning of these efforts clear: the workers as a whole would join forces and transform their situation by fundamentally altering the social arrangements that determined their collective lot.

The fate of the Knights of Labor and the brand of unionism it espoused is instructive. For the very platform that permitted the emergence of a national movement and politically militant labor organization would subsequently engage an equally violent and broad-scale anti-labor backlash.[165] Within the legal and political setting of late nineteenth century United States, these bursts of agitation could continue only so long as they did not get out of hand; only so long as they did not press too hard against the margins of public opinion or governmental self-restraint. In nineteenth century America, these margins were relatively narrow. Many factors contributed to the de-

159 See S. Perlman, Upheaval, supra note 156, at 362-86; P. Taft, supra note 116, at 97-106.

160 See L. Fink, supra note 156, at 18-37, 219-33.

161 Id.; P. Taft, supra note 116, at 84-88.

162 See L. Fink, supra note 156, at 6-8; G. Grob, supra note 158, at 108.

163 See L. Fink, supra note 156, at 26-35; P. Taft, supra note 116, at 84-91.

164 For discussion of the "mixed assembly" philosophy of the Knights, see L. Fink, supra note 156, at 26; G. Grob, supra note 158, at 108-09; P. Taft, supra note 116, at 84-88.

165 See infra notes 166-67 for references to discussions of anti-union violence of the period. For a description of the effects of this anti-union backlash upon membership of the Knights of Labor, see S. Perlman, Upheaval, supra note 156, at 422-23.

cline of the Knights of Labor in the years following the "Great Upheaval." But among these clearly must be included outright repression by the state. The Haymarket riot was just a token of the public hostilities directed against politically militant labor activity.[166]

The repression of labor militancy operated at two levels. At one level, police power was deployed against the extremes of political agitation and economic disruption. Activities of the Chicago police during the Haymarket riot and President Cleveland's use of troops during the Pullman strike of 1894 provide two poignant examples of this.[167] At another level, the common law of contract was used as the general, residual legal regime of labor relations. Thus, the flurry of judicial injunctions used to check the formation of unions and to break up industrial disputes.[168]

There was no inherent conceptual reason why the common law of contract could not be understood to include a right to defensive association by workers. The prohibition of labor organizations could be justified in the language of the doctrine of tortious interference with contract.[169] But this justification was convincing only so long as the tort of interference remained confined to the employment situation. As developments in contract and property theory subsequently made clear, a general doctrine of tortious interference with contract was simply inadequate in a world of private commercial transactions. Legal analysts would gradually realize that every system of market competition implies both a willingness to accept and a commitment to limit the pervasive interference with contractual relations.

If the right to unionize and to strike had been widely recognized as part of the common law of contract, the contractualist regime of labor relations would have exercised the full panoply of influences

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166 For descriptions of the Haymarket riot, see S. Yellen, supra note 131, at 39-71; S. Lens, supra note 135, at 55-65. For more general discussion of public hostility toward labor militancy during this period, see P. Taft, supra note 116, at 136-58.

167 For discussion of police activity during the Haymarket affair, see S. Yellin, supra note 131, at 50-59. For discussions of President Cleveland's deployment of federal troops during the Pullman strike, see id. at 101-35; P. Taft, supra note 116, at 152-54.

168 See, e.g., *In re* Debs, 158 U.S. 564 (1895) (upholding the use of an injunction to halt the strike, boycott, and picketing during the Pullman strike); Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) (enjoining union members from establishing a peaceful picket in front of employer's business); Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888) (upholding use of injunction to curb activities of a labor "conspiracy").

169 See cases cited supra note 168; Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort, 93 Harv. L. Rev. 1510, 1532-37 (1980) (discussion of the doctrine of tortious interference with contract as justification for anti-union injunctions). See also S. Perlman, supra note 116, at 153-60 (discussing "the totally new use made of the doctrine of conspiracy by courts when they began to issue injunctions in labor cases"). Id. at 155.

upon militancy and politicization discussed in the preceding section. It would have permitted and even favored economistic militancy while depriving this militancy of the reasons to be politicized. In any event, the main line of doctrine and precedent simply refused to recognize a common law right of association,[170] whatever the cost in doctrinal coherence, while the police power was mobilized against the more disruptive forms of labor agitation.

So long as it remained in this state, the contractualist regime could not truly display the institutional logic I described earlier. On the one hand, the regime effectively proscribed even a moderate economistic militancy. On the other, for that very reason, it left the labor movement prey to politicization as soon as the extremes of economic crisis or prosperity, or the growth of wartime sacrifices and expectations produced a congenial environment. As a result, the collective bargaining system—an apparent corrective to traditional contract law in labor relations—had first to be developed for the institutional logic of contractualist labor relations to operate. The apparent critics of the contractualist regime had to save the regime from the permanent instability to which its apparent friends had left it exposed. Only then would the institutional conditions for moderation and economism be fulfilled.

b. *The Eve of Collective Bargaining: War, Crisis, and Containment*

The nineteenth century constraints on union activity did not in themselves produce the style of labor militancy represented by the Knights of Labor. However, vigorous opposition from both public and private sources to the practice of politicized unionism did indirectly contribute to the spread of a more pragmatic orientation among American labor. It did this in two different ways; first, by restricting labor's access to the tools of agitation and organized struggle and, second, by drastically improving the comparative advantage of following the less radical course. The collapse of the Knights of Labor was a boon for Samuel Gompers and the cautious collective bargaining approach preached by the AFL.

The continuing development of contractualist forms during the first third of the twentieth century further advanced this cause. By virtue of the hostile legal setting, American organized labor found itself in the paradoxical situation just described. Even the more moderate form of unionism openly embraced by the AFL required concerted political action in order to secure its institutional condi-

[170] See supra notes 168-69.

tions. But the political program of the AFL and the political orientation of American labor were destined to fade for the same reason; the institutional goals were narrow and self-limiting. Once the rights to organize and collectively bargain were legally achieved, nothing would stand between organized labor and its commitment to the task of achieving economic gains for its members at the bargaining table.

The achievement of these institutional guarantees occurred during the periods of stress and national crisis between the two World Wars. In each of these periods, the pattern earlier recounted clearly emerged. Labor militancy experienced a resurgence, first during World War I, and then later during the Great Depression. Each time, contractualist institutions advanced, while the style of organized labor more completely perfected the form of moderate economistic unionism.

Consider first the situation of labor during World War I. Wartime conditions and the pressures for industrial production gave labor just the strength it needed to intensify its attack. Unionization and strike activity surged in 1914.[171] Several adjustments in the labor system followed in the wake of these pressures. The government, through its War Labor Board,[172] outlined a program of organizational rights and publicly endorsed the policy of collective bargaining. The Clayton Act was passed, freeing labor from the fetters of antitrust legislation and administration by judicial injunction.[173] Employers

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171 For general discussions of the relation between wartime conditions and the rise in unionization and labor agitation during this period, see J. Brecher, supra note 131, at 101-43 (focusing on the strikes and anti-union violence of the period); S. Perlman, supra note 116, at 226-44; P. Taft, supra note 116, at 309-40; L. Wolman, Ebb and Flow in Trade Unionism 21-32 (1936).

172 See S. Perlman, supra note 116, at 238-40; P. Taft, supra note 116, at 317-19 (descriptions of the activities of the National War Labor Board).

173 See Clayton Act § 20, 29 U.S.C. § 52 (1982).The Clayton Act provides:

> No restraining order or injunction shall be granted . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right . . . .
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> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceable assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the

more readily agreed to recognize and deal with the Unions.

These measures encouraged a dual shift in the orientation of American labor. First, by securing the institutional conditions of unionization and collective bargaining in many of the war-related industries, the measures greatly extended the capacity of labor to struggle and press its demands with the weapons of organized force. Governmental policies and legal protections gave the unions the freedom they needed to expand their numbers and accelerate their claims both in and out of the bargaining process. Labor activity through the rest of the decade, and the proliferation of industrial contests during this time, support this contention.

Yet the character of the unionism that followed these accommodations operated at a different pitch. Gone were the violence and hostilities that initially roused the fears of the Wilson Administration. Gone were the radical pleas for cooperative forms of production and for government reorganization of large-scale industry. The preoccupations of the labor movement focused increasingly on strengthening an emerging union system and on achieving gains within it. The creed of the AFL stressed worker self-organization and the realization of concrete gains through bargaining and negotiation.[174]

The example from the Great Depression casts the tendency in even clearer light. The crisis of the early thirties once again unleashed a torrent of labor militancy and agitation. Strikes and boycotts—and other less organized forms of popular protest—broke out in record numbers in the early part of the 1930's. Once again the government

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absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

[174] The change in outlook is reflected in Industry's Manifest Duty, a report issued by the AFL's Executive Council in 1923. According to the report:

> [i]t is not the mission of industrial groups to clash and struggle against each other. Such struggles are the signs and signals of dawning comprehension, the birth pangs of an industrial order attempting through painful experience to find itself and to find its proper functioning. The true role of industrial groups, however, is to come together . . . to find the way forward in collaboration, to give of their best for the satisfaction of human needs.

Industry's Manifest Duty, in Report of the Proceedings of the 43rd Annual Convention of the American Federation of Labor 31 (1923); C. Tomlins, supra note 131, at 78.

Christopher Tomlins has described the change in philosophy by the AFL during this period as "sloughing off its old associational ideology for a redefined voluntarism which drastically downplayed the radical political connotations of associationalism and identified collective bargaining as a means to institutionalize a given distribution of economic power through the promulgation of written agreements . . . ." C. Tomlins, supra note 131, at 77. For a discussion of the transformation of the ideology and practices of the AFL during this period, see id. at 74-82.

responded with a series of institutional reforms.[175] New Deal labor legislation enacted into law the apparatus of collective bargaining. New Deal welfare legislation reinforced this regime through a program of social insurance.

Like the wartime innovations, the New Deal labor legislation encouraged two distinct tendencies among American labor. First, the new set of legal protections facilitated the extension of the union structure and the intensification of those forms of militancy institutionalized by the bargaining process. Unionization spread as never before in the years immediately following passage of the Wagner Act. And the unions that were organized during these drives could now turn to the instruments of collective action as a matter of right and find protection against employer interference in the provisions of the statutory labor regime.

However, at the same time, the New Deal measures favored the decline of politicization and the triumph of economistic dispute. The pulse of labor now surged into the channels legally recognized and protected by the New Deal arrangements. Trade unions formed in areas of the economy where organized workers could amass greatest strength—capital-intensive mass production industries, where large numbers of unskilled laborers were concentrated and most easily allied. The focus of organizational activities turned inward just as these unions achieved their power: collective bargaining and the struggles it spawned triumphed as never before. Strikes and labor militancy coalesced around these concerns.[176]

The Wagner Act can be seen as the crystallization of the contractualist labor regime in the United States, a crystallization accomplished by earlier traditions of legal thought and social militancy, but never fully solidified until the passage of the Act. The contrast between the individualist focus of traditional contract theory and the

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[175] For a description of these institutional reforms, see M. Piore & C. Sabel, supra note 151, at 91-99 (discussing the National Industrial Recovery Act, the Agricultural Adjustment Act, the Wagner Act, and the Fair Labor Standards Act); P. Taft, Organized Labor and the New Deal 3-30 (1942) (discussing the National Industrial Recovery Act and the Wagner Act); P. Taft, supra note 116, at 416-23 (discussing the National Industrial Recovery Act); C. Tomlins, supra note 131, at 119-40 (discussing the Wagner Act).

[176] For discussion of strikes and labor militancy of the New Deal era, see J. Brecher, supra note 131, at 144-216 (describing, inter alia, the International Longshoremen's Association strike of 1934, over the issue of hiring practices, the AFL-led Toledo Auto-Lite strike of 1934, over the issue of wage and hiring policies, and the United Auto Workers' sit-down strikes, to compel recognition and collective bargaining); S. Lens, supra note 131, at 244-321 (discussing, inter alia, the Minneapolis Teamsters Strikes of 1934, concerning lay off and hiring policies, miner agitation under John L. Lewis, and the U.A.W. sit-down strike); P. Taft, supra note 116, at 515-22 (describing strikes for union recognition in the steel industry); S. Yellen, supra note 131, at 327-58 (describing the 1934 Longshoremen's strike).

collective character of collective bargaining obscured the deeper contractualist similarities that only stand out in the light of comparative analysis. The New Deal setting of the legislation contributed to the impression that a great victory had been achieved, further deflecting the labor movement from more politicized demands.

B. *The Brazilian Experience: A Study in Extremes*

The Brazilian example is easier to interpret, in part because the corporatist framework that continues to govern Brazil's system of labor relations was enacted in one fell swoop during the time of the *Estado Novo*.[177] The fortuity of radical transformation allows us to identify distinct epochs in the history of labor. The task of interpretation is also aided by the tradition of political instablility in Brazil. Since the establishment of the corporatist system, the Brazilian government has alternated—in relatively enduring swings—between authoritarian and liberal regimes.[178] The experience of labor under these two quite different forms of government provides the material for an analysis of the contrasting tendencies of the corporatist approach to labor organization.

The claim of this section is that the pattern of political extremes suggested by the earlier analysis is supported by much of modern Brazilian historical experience. The periods of quiet and agitation in the affairs of labor and the struggles over labor relations have been far more sharply pitched since the 1930's than anything comparable in the American scene. On the one hand, great tides of collective protest have swept the country.[179] On the other, there have been moments of disorganization and passivity, when the labor movement has seemed

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[177] The foundations of the contemporary Brazilian labor law system were established through a series of executive decrees adopted in the years of 1931-1939. Three main laws stand out: Decree No. 19.770 (March 19, 1931); Decree No. 24.694 (July 12, 1934); Decree No. 1.402 (July 5, 1939). The CLT represents the unification and coordination of the rules and institutions set forth in these earlier laws. See generally E. de Morães, Filho, Sindicato Unico, supra note 40; see also V. Barbosa, "Law and the Authoritarian State: The Modern Roots of the Authoritarian Corporative State in Brazil, 1930/1945" (1980) (unpublished S.J.D. dissertation available in Harvard Law School Library).

The term *Estado Novo* refers to the period of dictatorial rule by Getulio Vargas (1937-1945). Vargas and an inner circle of counselors and jurists sponsored the creation of the corporatist arrangements in Brazil. See E. de Morães, Filho, Sindicato Unico, supra note 40.

For a discussion of the continuity of the labor law system in the post-Vargas era, see H. Fuchner, supra note 55.

[178] For a discussion of the major swings in contemporary Brazilian political history, see H. Jaguaribe, W. dos Santos, F. Comparato & B. Lamounier, Brasil, Sociedade Democràtica (Rio de Janeiro: Jose Olympio Editora, 1985); T. Skidmore, Politics in Brazil, 1930-1964 (1967).

[179] See infra text 1069-71 for a discussion of the labor protests of the 1960's in Brazil.

hypnotized and blindly obedient to the policies of the state.[180] Moreover, the material suggests that the experience of labor in Brazil has been much more than the natural product of indigenous social forces. Brazilian labor institutions seem intimately and directly linked both to the style of labor activity characteristic of each major period and to the tendency to extremes that has linked one phase to the next.[181]

1. A Vocation for Prostration and Politicization

Brazil's corporatist labor arrangements were established in the 1930's under the dictatorship of Getulio Vargas. The dictatorial period of Vargas' rule ended in 1945. But the labor institutions he created have continued in force to the present day.[182]

Since the formation of the corporatist system, labor activity in Brazil has exhibited two distinct orientations. In certain periods, Brazil's unions have been quiescent and apolitical, caretakers of an organization rather than partisans in a struggle against employers or the state. These periods have been marked by a virtual absence of mass agitation or industrial conflict. During these times, the unions have downplayed labor militancy and concentrated instead on the distribution of welfare benefits to their members.[183]

This style of union activity has been the dominant tendency among organized labor in Brazil. However, such spells of utter prostration have been punctuated by periods of openness and intense confrontation.[184] In these periods, labor militancy has not always reached a crescendo. Yet, the periods of militant activity have been militant to an extreme. The struggles launched by the labor movement have been common and concerted, uniting into a single whole different sections of the working class. The orientation of working class grievances has been both ideological and institutionally charged. The unions have directly confronted the state and struggled over fun-

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180 See infra text at 1068-69 for a discussion of the periods of labor quiescence.

181 Recent writers on Brazilian labor history have tended to emphasize only the first part of this swing, e.g., the link between corporatist labor law arrangements and the demobilization of the working class. See, e.g., R. Maranhão, Sindicato e Democratização (São Paulo: Editora Brasiliense, 1979); A. Troyano, Estado e Sindicalismo (São Paulo: Edições Simbolo, 1978); L. Vianna, Liberalismo e Sindicato no Brasil (Rio de Janeiro: Paz e Terra, 1978) [hereinafter cited as Liberalismo e Sindicato].

182 See E. de Morães, Filho, Sindicato Unico, supra note 40; H. Fuchner, supra note 55.

183 The tendency is discussed in many of the works dealing with particular periods in Brazilian labor history. See, e.g., V. Barbosa, supra note 176 (discussing cooperative and assistentialist character of unions in the period 1930-1945); K. Erickson, supra note 40 (special reference to the post-1964 situation).

184 See M. Alves, supra note 56; K. Erickson, supra note 40; H. Almeida, Tendéncias Recentes da Negociação Coletiva no Brasil, 24 Dados (No. 2, 1979).

damental arrangements. No hard and fast distinction has separated political contests in the larger society from politicization in labor relations.

The tides of politicization and complacency in the contemporary history of Brazilian labor have clearly been influenced by the character of the government in power. Each of the two extremes has tended to emerge during a characteristic phase of Brazilian politics. Politicized labor militancy has flourished during periods of pluralist competition in the political system under democratic political rule. Conversely, labor has approached the extreme of passivity during the tenure of authoritarian regimes.[185]

However, the explanation of the two tendencies among Brazilian labor also seems closely linked to Brazil's corporatist labor law system. In each of the contrasting periods, the corporatist structures have decisively influenced both the style and extent of union activity and the nature of the government's participation in labor relations. The centralized union structure, the public financing of union activities, the legal regulation of employment conditions—all have been instrumental to the staging of militant labor campaigns.[186] Alternatively, corporatist instruments for the control of labor unions and the regulation of labor disputes have proven equally significant to the government's repression of the labor movement during times of authoritarian rule.[187]

2. The Extreme of Depoliticization: The Period of the *Estado Novo*

The period of the *Estado Novo* under the Vargas dictatorship (1939-1945) illustrates well the extreme of depoliticization. Labor relations and organizational activity during the era appear in sharp contrast, not just to subsequent periods of intense agitation, but also to the periods of sporadic struggle directly preceding the enactment of the corporatist regime.[188] The labor movement came late to Brazil. But by the early decades of the twentieth century, trade unions in the most advanced industrial sectors had gained in strength and size.

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185 The correspondence between political forms and styles of labor militancy in Brazil is discussed in F. Cardozo, Authoritarianismo e Democratização (Rio de Janeiro: Paz e Terra, 1975). See also G. O'Donnell, supra note 13, at ch. 2.

186 See infra text 1069-71 for a discussion of the relation between Brazilian labor militancy in the early 1960's and the corporatist style of labor organization.

187 See infra text 1068-69.

188 For a discussion of the distinctive character of Brazilian labor relations both before and after the creation of the corporatist regime in the 1930's, see L. Vianna, Liberalismo e Sindicato, supra note 181. See also A. Troyano, supra note 181.

Strikes and protracted labor disputes had become common in the urban centers. Moreover, labor unions under the direction of left-wing leaders increasingly engaged in agitation for radical political reform.[189]

The establishment of the corporatist labor system beginning in the early 1930's had an immediate impact both on the character of the labor movement and on the level of organized conflict displayed in the course of economic affairs. Struggles for recognition and over contract demands were either eliminated or displaced by new laws (making trade unions and collective contracts compulsory) and by regulations (giving government authority to intervene in cases of "disturbance"). Strikes were generally prohibited and militant labor leaders removed. Trade unions established prior to the corporatist system were forced to disband and to reorganize in compliance with state-specified charter arrangements.[190]

Under the state's supervision, the labor unions were transformed into instruments of conciliation and social peace. The political strategy of controlled mobilization, familiar to the fascist dictators during World War II, led to compulsory and inclusive unionization.[191] The unions, organized into a centralized, pyramidal structure, under the close supervision of the Ministry of Labor, were deprived of any autonomous bargaining power or capacity for self-directed mobilization. Even as representatives of labor in labor disputes, the unions had little independent leverage to press their demands.[192]

Quiescence in the labor movement was assured, not just by imposing severe limitations on recourse to the instruments of concerted action, but by direct and compulsory reorientation of union activities away from the contest over labor-management relations. Under the welfare decrees that accompanied the labor code, the unions were required to provide and to adminster a whole host of social-welfare services.[193]

The decision to use the union structure as a network for the distribution of welfare benefits had two depoliticizing effects. First, it

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189 For a discussion of the upsurge in labor militancy in the major cities during the decade of the 1920's, see E. de Morães, Filho, Sindicato Unico, supra note 40, at 197-216.

190 On the reconstruction of the unions and the labor movement during the time of the *Estado Novo*, see A. Troyano, supra note 181.

191 E. de Morães, Filho provides an elaborate account of the influence of fascist ideology and institutional models on the jurists who drafted the laws establishing the corporatist framework in Brazil. See E. de Morães, Filho, Sindicato Unico, supra note 40, at 243-50.

192 See A. Troyano, supra note 181; V. Barbosa, supra note 177, at 191-94.

193 On the link between union structure and the welfare system during the time of the *Estado Novo*, see J. Malloy, Politíca de Bem-estar Social no Brasil, 10(2) Revista de Administração Pública Rio de Janeiro (Âbril/Junho, 1976).

subdued pre-corporatist clamoring for more radical social and ecomomic reform. Second, it tamed and transformed the unions into key institutions of the newly organized and highly centralized Brazilian welfare state.[194]

3. The Extreme of Politicization: Labor in the Early 1960's Under the Goulart Administration

During the period of the Vargas dictatorship, implementation of the corporatist apparatus was tantamount to imposing a system of labor controls. Yet, these same institutional arrangements would prove positively congenial to a radically politicized labor movement under different political conditions. A good example of this occurred during Brazil's period of democratic political rule. Under the Goulart administration of the early 1960's, trade union militancy erupted as never before in Brazil's history.[195]

The strike waves that wracked the country from 1960-1964 were foreshadowed in many ways by developments in the 1950's. Against a backdrop of liberal democratic government, an autonomous labor movement had begun to form and slowly gain control over parts of the official trade union structure. In the hands of the more militant leaders, corporatist instruments and procedures were readily turned to more threatening use. The corporatist institutions provided the militant leaders with two immediate advantages. First, they could use the tools of concerted action provided by the unions to mobilize for radical programs. Second, they could use the official structures as a scaffold from which to build parallel organizations. Labor activity from the mid-1950's onwards reflects the strength of both of these tools. In the more open political climate, public rallies were easily organized to articulate class-wide grievances. Strikes against broad measures of public policy occurred throughout the end of the decade.[196]

The strikes of the 1960's and the radical thrust behind them would have been impossible had there not already existed a unified structure of labor unions and a set of ongoing and obvious interrelations between the unions and the state. Massive political strikes set the tone in national affairs for a period of more than four years.[197]

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[194] On the co-opted and prostrate character of the reorganized unions of the 1930's and 1940's, see L. Rodrigues, supra note 58.

[195] For the best in-depth study of Brazilian labor militancy in the early 1960's, see K. Erickson, supra note 40. For a discussion of the broader setting of popular political agitation at the time, see F. Weffort, Populismo na Politíca Brasileira (Rio de Janeiro: Paz e Terra, 1978).

[196] See E. Carone, Movimento Operario no Brasil, (1945-1964) (São Paulo: Difel, 1981).

[197] The major strikes of the period are treated in id., and K. Erickson, supra note 40, ch. 6.

The content of the workers' strike demands betrayed a clear economistic dimension. Prominent among their protests was a call for the national adjustment of wage and benefit levels. But such claims formed only a small part of a much larger reform agenda. The unions contested a series of basic institutional arrangements. They called for the reorganization of agrarian production, the restructuring of the civil service bureaucracy, and a role in the direction of economic policy. Together, these demands amounted to a general program for social change. For its sake, the workers engaged in political struggle in and out of the workplace: institutional demands became the condition they placed on cooperation with society and state.[198]

The labor agitation of the 1960's had several sources. First, a populist left-leaning government was tempted to strengthen the union movement through economic concessions, favorable legislation, and outright propaganda in order to create allies for itself in its struggles against its conservative enemies. But it could do this only because a unified corporatist labor system already existed, ready to be manipulated for this purpose. And manipulated politicization could easily become the point of departure for a more autonomous and authentic politicization.

Second, the corporatist labor system provided a protected haven for the formation of an inner band of union militants and leaders. Special leverage was provided by the use of unions to channel welfare benefits and by the sinecures that union leaders were given in the labor bureaucracy. Toward the end of the Goulart regime, these leaders began to recognize their own strength. They had both money to influence votes and close and continuous contact with politicians. They could also press controversies within the government to their own advantage, and form an alliance with the leftist faction headed by the Minister of Labor, Almino Afonso.[199]

Third, the basic structure of the corporatist regime guaranteed that as unions and union leaders began to feel their own power, militant pressure in the government (for what were known at the time as fundamental social reforms) could be easily mixed up with more traditional economistic militancy against employers.[200] Because government wage-setting policy played so important a role, every strike had two targets: the employer and the government. Further, because so much in the life of the worker was bound up with rules and policies so clearly central to the national political debate, the question of gains

198 See E. Carone, supra note 196; K. Erickson, supra note 40.

199 See K. Erickson, supra note 40, at 77-93.

200 See H. Fuchner, supra note 55, at 199-217.

for the working class was hard to separate from the question of transformation in the country as a whole.

4. Current Developments

Brazilian labor's present situation reveals paradoxical development that confirms more clearly than any previous experience of Brazilian history the potential of the corporatist labor regime to encourage politicized militancy in the right historical circumstances. On the one hand, the centralized, compulsory union structure has been extended. For the first time, the great majority of small-holders and agrarian laborers have been unionized.[201] Moreover, a union movement has emerged that is more truly independent of the state and more politically resolute than anything seen even at the highpoint of labor agitation during the Goulart years.[202]

Remember that union elections are regularly held at the municipal level as well as at higher levels of the pyramidal union structure. With the incitement and support of Church and opposition groups, union activists have contested and won large numbers of elections. As a result, a large part of the union structure in the industrial heartland of the country—the state of São Paulo—has fallen into activist hands. Similar events are occurring frequently on a smaller and more fragmentary scale, throughout the country.[203]

The politicized character of this new labor movement shows in several ways. First, within the employment relationship, these activist unions have given as much importance to institutional demands as to wage and benefit claims. The unions have battled for new forms of representation within the plant—union delegates and factory committees, with powers to intervene in the daily life of the plant as well as to negotiate new collective agreements. These new additions to the union structure have become common in the last few years, both in private and in public employment. They have strengthened the ground level of labor organization and served as vehicles of mobilization among the rank and file.[204]

Second, the unions, though often anchored in the best paid sec-

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201 The statute governing unionization among rural workers was enacted in 1963, during the presidency of João Goulart. See H. Fuchner, supra note 55, at 147-50.

202 See M. Alvaro, supra note 56, and H. Almeida, As Novas Tendencias do Movimento Sindical, in Helgio Trinidade (org.) Brasil em Perspectiva: Dilemas da Abertura Politíca (Porto Alegre: Ed. Sulina, 1982).

203 See J. Lopes, Mudança Social no Nordeste (Rio de Janeiro: Paz e Terra, 1979).

204 See M. Alvaro, supra note 56; B. Lamounier, Direito, Cidadania e Participação (São Paulo: T.A. Queiroz, 1979). For a discussion of the formation and legalization of factory councils within industry, see A. de Souza, supra note 87.

tors of the labor force, have maintained a consistently high degree of solidarity among potentially competing segments of the labor force. Unions based in the mass-production industries of São Paulo have regularly aided rural workers and agrarian unions in everything from strikes against the landowners and forceable seizures of land, to struggles in the national political arena in support of agrarian reform. Shows of solidarity have also spanned urban and industrial divisions. For example, sympathy strikes have been common among different categories of public functionaries. Unions have attempted to flatten the existing wage structure through negotiations in collective bargaining.[205]

Third, and most significantly, the unions have denounced traditional strategies of accommodation with the government in power. Many of the unions now focus their efforts on programs of immediate structural transformation and on the spread of grassroots social militancy as the central vehicle for social change. Leaders of the new labor movement continue to meet with government officials to debate plans for economic and institutional reform. But labor now participates in these discussions as a truly critical and independent third voice. CUT—the more powerful central confederation—has repeatedly rejected government efforts to launch a "social pact" and to contain growing worker demands for the sake of a national incomes policy. Union leaders have also withdrawn their support for a centrist-conservative version of agrarian reform. They now demand a wide-ranging program of expropriation, together with price supports for small landholders to be administered by the workers themselves.[206]

None of this could have happened without the gradual erosion of the authoritarian regime and the illicit collaboration of the lower rungs of the governmental bureaucracy. Yet the corporatist labor law system has also turned out to be an unexpected and invaluable legacy. It has provided left-leaning union militants with a fully developed, fully financed, and all-inclusive union structure, ready to be taken over from within. And not the least element in this legacy is an intangible assumption rather than a social practice: the assumption that there is no neutral, contract-like framework of labor relations waiting

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[205] The high degree of solidarity among the different segments of the contemporary labor movement in Brazil has been chronicled in Brazilian newspapers throughout the past two years. Perhaps the most striking example: the concerted efforts of (industrial based) CUT and CONCLAT (the confederation of rural unions) in support of land struggles in the interior and a program for agrarian reform at the level of national politics.

[206] See CONTAG, Camphanha Nacional Pela Reforma Agraria (Rio de Janeiro: Editora CODECRI, 1983); E. Bastos, As Ligas Camponeses (Petrópolis: Vozes, 1984).

out there to be established, if only the ideological struggle over the basic structure of social life could stop.

CARDOZO LAW REVIEW

VOLUME 7 SUMMER 1986 NUMBER 4