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# Convergence in Industrial Relations Institutions: The Emerging Anglo-American Model?


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# Convergence in Industrial Relations Institutions: The Emerging Anglo-American Model?

## **Abstract**

At the outset of the Thatcher/Reagan era, the employment and labor law systems across six Anglo- American countries could be divided into three pairings: the Wagner Act model of the United States and Canada; the Voluntarist system of collective bargaining and strong unions in the United Kingdom and Ireland; and the highly centralized, legalistic Award systems of Australia and New Zealand. The authors argue that there has been growing convergence in two major areas: First, of labor law toward a private ordering of employment relations in which terms and conditions of work and employment are primarily determined at the level of the enterprise; and second, of individual employment rights, toward a basket of minimum standards that can then be improved upon by the parties. The greatest similarity is found in Canada, the United Kingdom, New Zealand, and Australia. Ireland retains a greater degree of public ordering, while the United States diverges in favoring the interests of employers over those of employees and organized labor. The authors explore reasons for the convergence.

## **Keywords**

industrial relations, labor law, employment rights, organized labor

## **Disciplines**

International and Comparative Labor Relations | Labor and Employment Law | Unions

## **Comments**

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CONVERGENCE IN INDUSTRIAL  
RELATIONS INSTITUTIONS:  
THE EMERGING ANGLO-AMERICAN MODEL?

ALEXANDER J. S. COLVIN AND OWEN DARBISHIRE\*

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At the outset of the Thatcher/Reagan era, the employment and labor law systems across six Anglo-American countries could be divided into three pairings: the Wagner Act model of the United States and Canada; the Voluntarist system of collective bargaining and strong unions in the United Kingdom and Ireland; and the highly centralized, legalistic Award systems of Australia and New Zealand. The authors argue that there has been growing convergence in two major areas: First, of labor law toward a private ordering of employment relations in which terms and conditions of work and employment are primarily determined at the level of the enterprise; and second, of individual employment rights, toward a basket of minimum standards that can then be improved upon by the parties. The greatest similarity is found in Canada, the United Kingdom, New Zealand, and Australia. Ireland retains a greater degree of public ordering, while the United States diverges in favoring the interests of employers over those of employees and organized labor. The authors explore reasons for the convergence.

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The elections of Ronald Reagan in the United States and Margaret Thatcher in the United Kingdom heralded a sea change in a conservative direction in the politics of the Anglo-American countries beginning in the 1980s. A central component of the conservative agenda that these leaders ushered in was an effort to reduce the power and influence of labor unions, most famously with Reagan's firing of the air traffic controllers in the 1981 PATCO strike and Thatcher's defeat of the Mineworkers' 1984–85 strike. More broadly, labor union representation density went into a general decline across the Anglo-American countries (in addition to the United States and the United Kingdom, we include Canada, Australia, New Zealand, and Ireland within this grouping) from the 1980s onward, at varying rates, but with a common downward trajectory. In this article we examine to what degree labor and employment law systems changed similarly during

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this period. Do we see a common trajectory of change and, if so, what are the characteristics and nature of this change, and why has it occurred?

The question of how labor and employment law systems have changed in recent decades in the Anglo-American countries is important as a practical matter for understanding the state of employment relations in these countries. Such changes are also important elements in analyzing the broader comparative political economy of labor. Historically, comparative research has been concerned with the question of whether over time there will be a convergence of national industrial relations systems. In their pioneering comparative study, *Industrialism and Industrial Man*, Clark Kerr, John Dunlop, Frederick Harbison, and Charles Myers (1960) argued that national industrial relations systems worldwide were converging on something akin to an American-style model of collective bargaining due to the necessities of managing modern industrial factories, a proposition supported in an early empirical study by Stephen Kobrin (1977). By contrast, Harry Katz and Owen Darbishire (2000) argued that there was a *converging divergence* in which a range of different countries were seeing a similar phenomenon of growth in organizational-level variation in patterns of work and employment practices. At the same time, the Varieties of Capitalism (VoC) literature in comparative political economy emerged as a leading theoretical perspective for comparative analysis of the roles of labor and regulatory systems, arguing that there is a form of dual convergence on two different models (Hall and Soskice 2001).

The VoC framework of Hall and Soskice (2001) distinguished between two paradigmatic capitalist types: the coordinated market economies (CMEs), exemplified by Germany but also including other continental European countries and Japan, and liberal market economies (LMEs), exemplified by the United States and the other Anglo-American countries. Each of these models is characterized by a particular set of relationships among the systems of corporate governance, inter-firm relationships, worker skill development, and labor markets. The LME model is based on outsider governance and financing of corporations, market relations between firms, and, on the labor side, general rather than firm-specific skills, and competitive labor markets with relatively weak regulation.

The dichotomous nature of the VoC analysis has been subjected to important critiques, not least of which relating to the diversity of capitalist forms that exist (Amable 2003; Crouch 2005). Nevertheless, while Bruno Amable argued that greater heterogeneity exists, presenting five models of capitalism, the Anglo-American countries remain identified as a “highly homogenous cluster” (2003: 20), with the exception of Ireland which is categorized as a continental European form. The VoC framework presents a powerful conceptual model and, for Peter Hall and David Soskice (2001) in particular, an internal systemic logic to the nature of labor regulations can be found in the LME model, in which the flexibility and competitive labor markets reinforce a system of impatient capital seeking short-term rewards. Amable (2003) made the important distinction, however, between institutional

complementarities and structural isomorphism, which does not rest on functionalist arguments of a systemic logic. Instead, it allows that socially embedded institutions conform as a result of social norms or cultural disposition and recognizes that institutional designs are political compromises.

A common presumption of the diversity of capitalism approaches is that there has long been a general Anglo-American model of industrial and employment relations, characterized by a liberal market ordering. Adopting a comparative historical approach, we examine to what degree the consistent grouping of Anglo-American countries accurately describes the regulation of labor and employment. The trajectory of change in labor and employment law systems in the Anglo-American countries shows that while some truth is grounded in the VoC analysis, the picture is more complex, contingent, and time-dependent than the initial VoC framework suggested. Connected to this point, we use the term “Anglo-American” rather than “Liberal Market Economies” to describe the countries we are analyzing for two reasons. First, the term allows us to be more precise about the set of countries we are examining. Although the two largely overlap, it is certainly conceivable that non-Anglo-American countries could be classified as LMEs. Second, we avoid the presumption that all of these countries do embody the characteristics of an LME model.

Historically, this categorization was not appropriate, and considerable variation occurred in the industrial relations systems among English-speaking countries. Indeed, three distinct models were in play: a Voluntarist system (with implicit state support) shared between Britain and Ireland; a unique Award system founded on conciliation and arbitration that prevailed in Australia and New Zealand; and the legally regulated Wagner Act framework that was followed in both the United States and Canada. While these models shared some underpinnings, such as their common law foundations, their distinctiveness was most notable, particularly given the many other respects in which these countries form a natural grouping, such as historical links, a common language, and political and economic similarities, including an emphasis on shareholder-focused corporate governance.

We argue that over the past 30 years, however, there has been substantial convergence in the legal foundations of the industrial relations systems in these six countries as the Voluntarist and Award models have broken down and been replaced by new legal frameworks. A common “Anglo-American” model is now emerging, premised on a private ordering of industrial and employment relations practices, rather than the public ordering, which was an important dimension of the Voluntarist and Award models. By *public ordering*, we mean there were institutional mechanisms linking employment practices and terms and conditions across the economy and subjecting them to institutional influences beyond the individual firm or establishment. By contrast, *private ordering* of employment relations emphasizes the independence of individual firms and establishments in determining employment practices, with outside influences limited to competitive labor market forces. The privately ordered mode of regulation is designed to assist managerial

flexibility and to facilitate a divergence in employment practices between firms. This privately ordered model is underpinned by a common structure of basic “fairness standard” individual protections on such issues as dismissal and minimum terms and conditions, but unlike in the public ordering model this minimum basket of protections provides only a residual set of protections on a few specific issues.

### **Dynamics of Collective Representation Systems**

Since the early 1980s there has been much turbulence and change in comparative systems of labor regulation and representation. This instability is most commonly associated with Thatcher and Reagan in Britain and the United States, respectively, though it has been at least as profound in Australia and New Zealand. In contrast to other countries, the framework of labor law in the United States and Canada has exhibited remarkable stability. In both countries, the system of industrial relations was firmly built around a private ordering of affairs, with representation and economic negotiations centered on the firm or enterprise.

#### **The United States and Canada**

In the United States, the National Labor Relations Act (NLRA) remains the statute enacted as the Wagner Act of 1935 and subsequently amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. More than half a century has passed since the last major amendments to the NLRA. Over time there has been some reinterpretation of the NLRA by the National Labor Relations Board, as well as by the courts, yet the basic legal framework of labor law remains the same. As when it was first enacted, the NLRA is structured around the principles of protection of the right to organize, requirement of majority support by employees for union certification, exclusive representation of bargaining units, duties to bargain in good faith with certified union representatives, and use of the economic weapons of strikes and lockouts to resolve impasses in bargaining. Labor laws governing public sector workers largely follow the same model as the NLRA, with some exceptions such as commonly limiting the right to strike and providing for interest arbitration as an alternative.

In the absence of legislative changes, the new uses made of existing provisions of the law and the change in the perceived social contract that occurred during the Reagan administration have been important. A particularly noteworthy example of this type of change in practices is the case of the permanent replacement of strikers, which was first facilitated by the 1938 U.S. Supreme Court case of *NLRB v. MacKay Radio* (304 U.S. 333 (1938)). This decision had limited impact on industrial relations practice until the 1981 PATCO dispute. Although that dispute involved the unusual situation of an illegal strike by public sector workers who were legally barred from striking, the willingness of President Reagan to fire and replace the strikers

sent a signal about the social acceptability of employers taking this type of aggressive stance toward organized labor. Significantly, during the following year in the 1982 Phelps-Dodge mine strike, a private sector employer used a similarly aggressive approach, this time based directly on the *MacKay Radio* precedent, by using permanent replacement workers to eliminate union representation at the mine (Rosenblum 1998). This became a model for aggressive employer strategies in the 1980s and 1990s. While unionization has been declining in the United States for decades, employer attitudes have contributed to the decline from 22% in 1980 to just 11.8% in 2011 (Katz, Kochan and Colvin 2007; Bureau of Labor Statistics 2012).

The industrial relations system in Canada has also been stable and, as in the United States, is based on the Wagner Act model. The Wagner Act provided the template for the initial federal law governing labor relations in the 1940s and also for subsequent provincial legislation in this area (Carter, England, Etherington, and Trudeau 2002).<sup>1</sup> The various versions of Canadian labor legislation incorporated key features of the Wagner Act model, including protection of the right to organize, majority union support required for certification, exclusive representation of bargaining units, duties to bargain on employment-related matters, and the availability of strike and lockout weapons to support bargaining.

At the same time, Canadian labor law has developed some distinct doctrines causing it to diverge from its southern neighbor, including lack of a bar on employer-dominated representation plans, use of card check and snap elections to determine majority representation status, self-enforceability of labor relations board orders, use of interest arbitration as an alternative to strikes for first contracts, and greater limitations on the use of permanent replacement workers in strikes or lockouts, as well as limitations on temporary replacements in some provinces. In general, these differences represent a more pro-labor slant to Canadian labor law compared to the United States. Although there have been a series of amendments to existing labor laws passed in the various Canadian provinces since the 1980s, these represent periodic shifts in power associated with changing provincial governments. Furthermore, these have occurred within a common general structure of regulation of labor relations, rather than entailing a broader transformation. Labor law in the federal jurisdiction in Canada has shown even greater stability over this period. The practice of industrial relations and labor law decision making in Canada also present a relatively high degree of continuity over this period. This steadiness is reflected in the relative stability of union membership rates in Canada, with only a moderate decline from 35.7% in 1980 to 30.8% in 2010 (Godard 2003; HRSD Canada 2011).

The relative stability in the North American countries under the Wagner Act model was reflected in the most recent major labor law reform proposals

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<sup>1</sup>Labor law is an area of mixed legislative responsibility in Canada, with most workers covered by provincial legislation, but workers in certain key national industries, such as transportation, banking, and telecommunications, being under federal jurisdiction.

debated in the U.S. Congress, the Employee Free Choice Act (EFCA), which was ultimately defeated. We see the general focus of potential changes in three key elements of the reforms proposed in EFCA: It would have strengthened remedies for unfair labor practices committed by employers during organizing campaigns, permitted certification of union representation on the basis of membership cards rather than a secret ballot vote, and provided for interest arbitration to determine first contracts if bargaining was at an impasse. The broad thrust was around an enhancement of protections for union organizing, but not a change in the fundamental structure of decentralized, mostly enterprise-level, private collective bargaining. In this respect, the proposed legislation would have moved the United States closer to a Canadian model of labor law, but without rejecting the basic Wagner Act framework.

### **The United Kingdom and Ireland**

In contrast to this pattern of stability in North America, in Britain unions faced a concerted attack from 1979 to 1997 under the Thatcher and Major governments that included substantial labor law changes. From the beginning of the 20th century the industrial relations system had been premised on a doctrine of collective *laissez-faire*. At the same time, however, governments consistently provided implicit support for unions and recognized their place in the economic order (Howell 2005). The result was a distinctive regulatory approach of relying on voluntary collective bargaining to achieve a particular normative outcome (Davies and Freedland 1993). The thrust of the Thatcher reforms was to transform the role of unions and collective bargaining within the economy and society. This transformation was achieved through a rebalancing of power. Among other effects, the Thatcher era legislation significantly narrowed the definition of a trade dispute and prohibited secondary picketing to create a tight private ordering model. Legislation also abolished the custom or requirement to recognize unions and the closed shop, and required compulsory ballots before strikes (Davies and Freedland 1993; Barlow 1997). The redefined place of unions was not only on the margins of the economy but also one of private ordering, particularly with the demise of historically important industry level or multi-employer collective bargaining (Brown and Walsh 1991). Multi-employer bargaining collapsed from covering 30% of the workforce and 18% of private sector workplaces in 1980 to only 3% in 2004 (Brown, Bryson, and Forth 2009), reflecting the confinement of industrial relations to the individual enterprise. Concomitantly, a dramatic drop occurred in the percentage of private sector workplaces in the United Kingdom, where unions were recognized, and a fall in union density from 52.9% in 1980 to 25.7% in 2011 (Brownlie 2012).

The Labour Party elected in 1997 under Blair did not seek a reversal of this underlying philosophy. Rather, it retained the use of labor law to confine collective action to the private sphere of ownership as an end in itself



and to achieve economic goals, with associated objectives of flexible outcomes (Davies and Freedland 2007). A softening of the extremes of Thatcher-era legislation was introduced with the 1999 Employment Relations Act, which provided unions with recognition rights. These rights, however, are intended to operate only as a last resort, with a policy preference for voluntary agreements such that their impact has been largely symbolic (Peters 2004; Dickens and Hall 2010). Furthermore, collective agreements can continue to be reached with non-independent unions supported by the employer, and these can even forestall the ability of unions to use the statutory recognition procedures. The emphasis remains firmly on a private ordering, for which enterprise-level decisions are regarded as key. The 2004 Employment Relations Act did respond (reluctantly) to the 2002 *Wilson* and *Palmer* judgments by the European Court of Human Rights to prevent inducements to employees not to be a member of a union (Bogg 2005). Nevertheless, the model remained one in which it was considered “essential that employers and individuals should retain their freedom to agree individualised contracts” even when collective agreements exist (DTI 2003: 64). Additional collective rights, such as the 2005 implementation of the European Information and Consultation directive, had the potential to extend collective rights in both union and nonunion workplaces at the enterprise level. They were enacted, however, in a minimalist manner and were restricted in scope (Terry 2010), so avoiding challenge to managerial flexibility or the private ordering model.

Ireland has trodden a path different from Britain, despite their common industrial relations heritage. While the constitution provides the right to join a trade union, it does not give a corresponding obligation on employers to recognize or bargain with them. Nevertheless, the role of unions within the public sphere was long accepted, with the 1946 Industrial Relations Act (and amendments in 1969 and 1976) promoting harmonious industrial relations as a key objective (Kerr 1991). The voluntarist foundation of Irish industrial relations without collective bargaining rights has been retained and labor law has been comparatively stable. The 1990 Industrial Relations Act, for example, ultimately avoided introducing a positive right to strike, but retained the “immunities” approach dating from 1906.

What has been unique in Ireland is the great expansion of the role of unions in public ordering of the economy and society, through successive national level “Partnership” agreements from 1987.<sup>2</sup> These agreements have corporatist dimensions and have established pay guidelines, addressed issues of public policy (such as taxation), and progressively expanded to broader social issues involving community and voluntary organizations (Teague and Donaghey 2004). For unions, this partnership approach was introduced to

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<sup>2</sup>Although the 22 years of formal centralized collective bargaining under the national partnerships ended in December 2009 in the face of economic turmoil, both the Croke Park agreement in the public sector and the private sector Protocol on orderly industrial relations agreed between the IBEC and ITUC in 2010 and 2011 have continued, for the time being, national coordination of bargaining.

protect against Thatcherite neoliberalism and to strengthen union legitimacy (D'Art and Turner 2005). This public ordering with respect to pay setting significantly facilitated Ireland's remarkable economic success (Baccaro and Simoni 2007; McGuinness, Kelly, and O'Connell 2010), notwithstanding current economic difficulties.

Even during this period, however, dimensions of private ordering regulations have been evident. The 1990 Act, for example, narrowed the definition of a trade dispute to the enterprise, placed corresponding restrictions on secondary strike action, and required prestrike ballots (Rasnic 2007). Furthermore, social partnership has been restricted in scope and, in contrast to traditional models of corporatism, has not been institutionalized at the enterprise level. Indeed, partnership has largely failed to take hold at the firm level resulting in a system of "truncated social partnership" (Roche 2007: 192). There has been tacit governmental support facilitating greater private ordering of employment practices at the firm level and "organisations have had more or less complete autonomy to pursue corporate strategies of their choosing" (Teague and Donaghey 2009: 67; also see Teague and Hann 2008). Likewise, the public policy of encouraging union recognition among foreign firms was reversed in the mid-1980s as the Irish Development Agency (IDA) adopted a deliberate strategy to attract investment from multinational companies, particularly from the United States. This trend continued with the successful opposition of the employers' associations and IDA to giving unions formal recognition procedures when considered prior to the 2001 Industrial Relations Act, though it gave some rights to refer disputes on terms and conditions in nonunion firms to the Labour Court (Teague 2006). In practice, however, this right is only of significance when terms and conditions fall significantly short of accepted standards. Nonunion collective agreements can also inhibit this, even if (as in the case of Ryanair) they are conditional upon the company remaining union-free (Sheehan 2007).

Traditional pluralist industrial relations has been in retreat as even domestic firms have been increasingly willing to resist the suasion of the Labour Court to recognize unions (Gunnigle, O'Sullivan, and Kinsella 2002), again reflecting the decline in the public ordering of industrial relations. The result has been that "the regulatory system affecting workplaces has become more liberal and permissive of a wider spectrum of employment practices" (Roche 2007: 206), with no restrictions on firms varying employment conditions by individual contract. The implementation of the European Information and Consultation directive also reflected a minimalist enactment seeking to perpetuate a voluntarist model, while facilitating the ability of employers to establish alternative structures at the enterprise level. The impact has, consequently, been minimal (NCPP 2009). Nevertheless, while density has fallen to 34% overall and 20% in the private sector (CSO Ireland 2010), there has also "opened up a rights-based dimension to Irish employment relations" (Donaghey and Teague 2007: 31). Some 14 separate employment laws have been introduced, supporting individual rights, in-

cluding a national minimum wage, protection of part-time employees, working time, and expanded maternity rights (*ibid.*; see also Teague 2006).

### **Australia and New Zealand**

The Arbitration and Award systems that developed in the 1890s and early 1900s in New Zealand and Australia were premised on an understanding of the legitimate public ordering of industrial relations extending into encouraging union membership (through union preference clauses), dispute resolution, and the settlement of terms and conditions of employment such that they were “fair and reasonable” (McCallum 2006). In the 1907 Harvester case, Justice Higgins came to define this through the question “What are the normal needs of the average employee regarded as a human being living in a civilized community?” (*Ex Parte H.V. McKay [Harvester Case] 2 CAR 1*). Relating this to the humblest worker living in a household of five, the social dimension was evident. Progressively, the regulatory system expanded to include detailed industry and occupational awards specifying terms and conditions of employment as well as establishing norms on issues such as working hours, holidays, physical working conditions, and periods of notice. All such employment practices were deemed to be central to the public ordering of industrial relations. A unique feature, however, was that this public ordering developed through the Arbitration and Conciliation system, rather than through legislation, even if the government was frequently an interested party in award decisions as test cases. In both countries, the system was supported by high trade tariffs such that the institutions provided for “social protection and full employment in a wage-based welfare state” (Kelly 1995: 334; also see Castles 1988).

Changes in the Award system began most dramatically in New Zealand in the 1990s. Although the progress of “Rogernomics” in New Zealand in the 1980s had brought much economic liberalization, reform of the labor market with the 1987 Labour Relations Act was more limited and in 1990 almost all registered awards still “contained both blanket coverage and union membership provisions” (Harbridge and McCaw 1991: 6). Against this backdrop, the 1991 Employment Contracts Act (ECA) represented a radical break with the public order model and was premised fundamentally on individual employment contracts in the absence of any concept of an imbalance of power. The ECA pushed all agreements to the enterprise, in spite of some 93% of private sector employees having been covered by multi-employer agreements in 1990 (Honeybone 1997), even if supplemented with second-tier bargaining. The ECA neither mentioned unions nor required recognition, removed the right of unions to represent members or to achieve exclusive representation, and allowed individual, union, and nonunion (whether independent or not) contracts on an equal basis (Hince and Vranken 1991; Dannin 1997). This transformed the system to one of private ordering, leading to a collapse of union membership and density and the determination of conditions at the enterprise level (Lansbury, Wailes, and Yazbeck 2007).

The Employment Relations Act (ERA) 2000 represented a rebalancing of power in an attempt to remove the neoliberal ideology of the ECA, facilitate union recognition, and build a cooperative employment relationship to achieve a high-wage, high-skill economy (Wilson 2010). An explicit objective of the Act was the promotion of collective bargaining, while recognizing the inherent inequality of bargaining power in the employment relationship. As with the Wagner Act, unions gain exclusive bargaining rights, and enterprise agreements can be reached only with independent unions. Good faith bargaining was introduced and, as extended in 2004, requires that employers reach an agreement in the absence of a “genuine reason, based on reasonable grounds” not to (s33, ERA 2000); has the possibility for terms to be imposed in cases of bad faith; and requires that good faith extend to the ongoing employment relationship with employers prohibited from undermining unions or collective bargaining. The ERA also prohibits worker replacement or reassigning existing employees in case of a strike.

Nevertheless, the ERA remains entirely consistent with the private ordering model. Although multi-employer bargaining is permitted, this is not supported by good faith requirements that remain at the enterprise level, while any industrial action has to be authorized independently at every workplace by ballots. Collective agreements cover only union members, cannot be passed on automatically to nonmembers, and individual variation is permitted and prevalent, even against the backdrop of a union agreement. The impact of the ERA has not reversed the decline in union density in New Zealand, which fell from 45% in 1985 to 19% in 2009, with just 9% in the private sector (Blumenfeld 2010: 47).

In Australia, the transformation was more gradual, beginning with the 1993 Industrial Relations Reform Act and particularly the 1996 Workplace Relations Act (WRA). Although enterprises were the historic location for limited over-award bargaining, these acts progressively decentralized and concentrated industrial relations at the workplace. In 1990 awards covered 80% of the workforce with 67% reliant on awards for their terms and conditions (FWA 2010: 59). By 2008 only 17% were reliant on awards. Beyond this, the Acts allowed individual contracts and nonunion collective agreements; outlawed the closed shop, which had covered 54% of Australian workers in 1990 (de Turberville 2007); and did not provide any mechanism for union recognition or good faith bargaining. Strikes and lockouts were legalized, though secondary action and the ability to engage in pattern bargaining were severely restricted under the 1996 WRA. The impact of the Award system and the public ordering declined, though 2,300 federal and 1,700 state awards (Gray 2005) continued to establish the floor to collective and individual bargaining at the enterprise level.

One aspect of this change was an increasing federalization of Australian labor law. In contrast to the earlier system in which state-level laws and awards played a more important role, the federal government asserted its authority to regulate labor relations matters under its corporations power in the Australian constitution (Lansbury and Wailes 2011). After the initial period of more gradual change, in 2005 Australian legislation shifted

dramatically to an extreme private ordering of employment relations with the Work Choices Act (McCallum 2007). This shift effectively ended the arbitration system and the role of awards. It also provided unions no right to recognition, minimal access to the workplace, and promoted nonunion agreements while allowing employers to offer individual agreements on a take-it-or-leave-it basis. Remarkably, Work Choices amended Section 421 of the Workplace Relations Act (WRA) 1996 to prohibit the use of pattern bargaining, with the objective of requiring bargaining and agreements to reflect the “individual circumstances” of each business. Furthermore, in contrast to the distinction between mandatory and permissive subjects in the United States or absence of restrictions in Britain or Ireland, bargaining over issues that were not deemed to be “matters pertaining” to the employment relationship had already been prohibited by Section 869 of the WRA 1996. Such issues included union involvement in the workplace, additional unfair dismissal protections (which were removed from workers in companies with fewer than 100 employees), and the hiring of agency or contract workers. As an extreme imposition of a private ordering model, this Act was designed to weaken unions and to ensure that any bargaining would reflect the circumstances of the individual enterprise. Unions would be obliged to respond to the enterprise-specific proposals of the employer, creating maximum flexibility. While minimum wage legislation replaced the Award system, the legislation imposed significant constraints on the ability of unions to strike while allowing offensive lockouts (Briggs 2007).

With the defeat of the Howard government in the 2007 federal elections, in which industrial relations reform was a major issue, Australian industrial relations policy underwent another shift. In 2009, the Rudd-led Labour Party government passed the new Fair Work Act, which reversed some, though not all, of the changes that had been enacted under the previous Work Choices Act. Most notably, it abolished statutory individual contracts and returned the focus to collective bargaining as the primary mechanism for establishing terms and conditions of employment (Lansbury 2009). Nevertheless, it explicitly retained strong emphasis on private enterprise-level bargaining as exemplified by the continuation of the remarkable symbolic prohibition against pattern bargaining, restrictions on secondary boycotts, and the confinement of bargaining to matters pertaining to the employment relationship (continuing to exclude, for example, constraints on managerial prerogative to hire agency or contract workers).

The legislation includes a mixture of expanded rights for unions and some continued limitations: Employees have the right to be represented in collective negotiations and a “majority support determination” can be granted by Fair Work Australia on the basis of a simple petition, while good-faith bargaining was established (except in cases of multi-employer bargaining in which industrial action is also not permitted).<sup>3</sup> No distinction was

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<sup>3</sup>An exception relates to the low-wage bargaining stream, in which facilitated multi-employer bargaining can be established when no history of collective negotiations exists, inspired by the example of a similar system in the Canadian province of Quebec (Vranken 2010).

made, however, between union and nonunion agreements: All agreements are made between the employer and employees (rather than with the bargaining representative), and employees are free to select their bargaining representatives or to bargain directly provided they are independent of the employer. That is, no exclusive representation rights are in effect, and multiple bargaining agents are permitted, though agreements apply to all in the bargaining unit.<sup>4</sup> The private ordering is evident in that voluntary unionism extends into an individualistic model of collective bargaining in which the union is not regarded as representing the *collective* interests of employees. Union density has remained low, having fallen from 50% in 1982 to 18.4% in 2011.<sup>5</sup>

Overall, the Fair Work Act strengthens the position of unions, including union representatives having rights of access to workplaces even where they do not have existing members, while retaining strong constraints against industrial action. The most significant reintroduction of a public ordering occurred with the 22 Modern Awards, which establish general employment standards and minimum terms and conditions. These have extensive application, such that all collective agreements have to be judged “better off overall” by Fair Work Australia, the regulator (O’Neill, Goodwin, and Neilsen 2008).

### Comparison of Changes in Collective Representation

The changes in labor law systems that we have described for the six countries in this study are summarized in Table 1. The pattern of labor law changes has led to a decline in the public ordering of industrial relations and a convergence in the realm of collective labor rights, albeit with differences across the countries remaining. Union recognition rights are now the norm, though with operational differences. While Canadian labor law facilitates organizing through card check and snap elections, the slow process and aggressive employer campaigning in the United States inhibits the ability of the unions to gain bargaining rights. The British system represents a hybrid with a statutory recognition procedure serving as a legal backstop to a system designed to operate predominantly through voluntary recognition (Dukes 2008). Meanwhile both Australian and New Zealand labor law now feature comparatively easy acquisition of recognition and representation, as well as duties to bargaining in good faith, though without exclusive union bargaining. The dramatic change under the Work Choices Act to curtail recognition or good faith bargaining rights in Australia was extreme, though was ultimately not sustained following the change in government and enactment

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<sup>4</sup>For example, in *Liquor, Hospitality and Miscellaneous Union v Bansley Pty Ltd* (FWA 797) 2011, there were 23 bargaining representatives, including 3 unions and 20 employees, either appointed or self-nominated.

<sup>5</sup>Australian Bureau of Statistics 1982, *Trade Union Members, Australia* Cat No. 6325.0, Canberra; 2011 *Employee Earnings, Benefits and Trade Union Membership* Cat No. 6310.0.

Table 1. Labor Law Systems by Country

Country	Labor law model		Union recognition		Level of bargaining		Agreement coverage (Inclusive or allowing individual variation)		Nonunion collective agreements permitted	
	1980		1980	2010	1980	2010	1980	2010	1980	2010
United States	Wagnerite	Legal certification	Legal certification	Legal certification	Enterprise focused	Enterprise focused	Inclusive	Inclusive	No	No
Canada	Wagnerite	Legal certification	Legal certification	Legal certification	Enterprise focused	Enterprise focused	Inclusive	Inclusive	Yes	Yes
United Kingdom	Voluntarist	Voluntary	Legal certification	Legal certification	Unconstrained: mixed multi-employer and single employer	Enterprise focused	Individual variation permitted	Individual variation permitted	Yes, and non-independent unions	Yes, and non-independent unions
Ireland	Voluntarist	Voluntary	Voluntary	Voluntary	Unconstrained: mixed multi-employer and single employer	Mixed, though strongly centralized	Individual variation permitted	Individual variation permitted	Yes, and non-independent unions	Yes, and non-independent unions
Australia	Award System	Award based	Legal certification	Legal certification	Central awards (federal/state) with enterprise over-award bargaining gains	Enterprise focused, no pattern bargaining permitted	Inclusive	Constrained individual variation permitted	No	Yes
New Zealand	Award System	Award based	Right to bargain	Right to bargain	Central awards and agreements, with enterprise over-award bargains possible	Enterprise focused, multi-employer bargaining possible	Inclusive	Individual variation permitted	No	No

*continued*

Table 1. Continued

Country	Good faith bargaining		Status of strikes		Striker replacement		Pre- or post-entry union shop	
	1980	2010	1980	2010	1980	2010	1980	2010
United States	Yes	Yes	Regulated to enterprise and contract negotiations, no ballots required	Regulated to enterprise and contract negotiations, no ballots required	Permanent	Permanent	Varies by state	Varies by state
Canada	Yes	Yes	Regulated to enterprise and contract negotiations, no ballots required	Regulated to enterprise and contract negotiations, ballots required	Temporary or period of protection in most provinces; no in Quebec	Temporary or period of protection in most provinces; no in Quebec and British Columbia	Yes	Yes
United Kingdom	No	No	Unregulated; beyond enterprise permitted, no ballots	Regulated to enterprise, ballots required, no time period restrictions	Temporary and strikers can be dismissed (though not selectively)	No, period of striker protection	Yes	No
Ireland	No	No	Unregulated; beyond enterprise permitted, no ballots	Regulated to enterprise, ballots required, no time period restrictions	Temporary and strikers can be dismissed (though not selectively)	Temporary and strikers can be dismissed (though not selectively)	No	No
Australia	No	Yes	Strongly discouraged; legal and common law sanctions possible	Regulated to enterprise and contract negotiations, ballots required	Award system and union shop protection	Temporary	Yes	No
New Zealand	No	Yes	Strongly discouraged; legal and common law sanctions possible	Regulated, enterprise ballot required, confined to contract negotiations, though multi-employer strike permitted (if each enterprise ballot supports)	Award system and union shop protection	No	Yes	No



of the Fair Work Act of 2009. This was similarly true in New Zealand with the replacement of the highly individualistic 1991 Employment Contracts Act with the more union-friendly 2000 Employment Relations Act. Ireland stands apart in not having recognition rights or a duty to bargain. The preservation of the Voluntarist model in Ireland has occurred in spite of continuing declines in union membership and the national partnership agreements.

While the United States prohibits nonunion collective representation through 8(a)(2) of the NLRA, this representation is allowed in other countries. In Canada, nonunion collective representation is allowed by the absence of an equivalent to the 8(a)(2) ban in Canadian versions of the Wagner Act model. In Australia, the Fair Work Act of 2009 draws no distinction between union and nonunion collective agreements, although as in New Zealand, bargaining representatives have to be independent of the employer, which is not the case in either Britain or Ireland. Each of Britain, Ireland, Australia and, most starkly, New Zealand allow individual contracts to diverge from any collective agreement. New Zealand has, however, established the strongest good faith provisions, which are absent in only Britain and Ireland.

Britain and Ireland have retained a basic structure of immunities as opposed to a right to strike. By contrast, the introduction of a system of rights to strike in aid of collective bargaining in Australia and New Zealand (which had historically been contrary to the Arbitration and Award system in theory, if not in practice) has meant a formal convergence with the North American model that has always contained this explicit legal support for the right to strike in support of bargaining. Some differences remain in this area as well. In Britain, Ireland, Canada, Australia, and New Zealand, authorization for strikes requires ballots of differing degrees of complexity whereas such requirements are absent in the United States. Permanent replacement of strikers is permitted in the United States, while this is true in most of Canada only for temporary replacements. In Britain, from 2004 onward, workers on strike have received protection from dismissal for 12 weeks. New Zealand has strong restrictions even on internal worker reassignment, though such protections are absent in Ireland. Overall though, in the recognition and regulation of strikes as the primary economic weapon of unions in support of collective bargaining, we see a general trend of convergence across the Anglo-American countries, paralleling the convergence in other areas of labor law and collective representation.

### **Individual Employment Rights**

As in the area of collective labor representation, when we look at individual employment rights regimes we see a substantial shift in the structure of regulation in some of the countries examined, but less so in others. Our comparison here focuses on three basic areas of individual employment rights: minimum wage and hours laws, general benefits and leave entitlements, and unfair dismissal. These three areas of employment rights have been

used previously among comparisons of employment and labor standards (e.g., Block and Roberts 2000). We focus on them in particular because they capture important aspects of legal regulation of the employment contract and relationship, as opposed to more general social welfare systems that may or may not be tied to the particular employment relationship (e.g., health or unemployment insurance).

### **Minimum Wage and Hours Laws**

Minimum wage and hours laws have been a basic component of employment standards regulation in the North American countries since the mid-20th century. In the United States, the Fair Labor Standards Act of 1938 established a national minimum wage and entitlements to overtime pay (time-and-a-half of regular pay) for work in excess of 40 hours a week. This policy has remained a stable part of U.S. employment standards law since that time. The Canadian provinces enacted similar minimum wage and overtime pay regimes relatively soon after the United States, which have again remained the policy though with some expansion to include additional minimum terms of employment such as vacation leave entitlements.

Employment law in the United Kingdom and Ireland was historically shared prior to Irish independence and lacked provisions for a generalized minimum wage, though they had a long tradition of measures that acted as a component of state support for collective bargaining as part of a public ordering framework. These included the 1891 Fair Wage Resolution to ensure government contracts did not undermine terms and conditions in industry collective bargaining and the 1909 Trade Boards Act, which established minimum pay on an industry-wide basis for unorganized workers. In the United Kingdom, the 1945 Wages Councils Act enabled terms and conditions to be set above a basic floor. Together with Schedule 11 of the Employment Protection Act they allowed for a going-rate, often determined by collective agreements, to be extended to unorganized workers. Historically these covered 10 to 15% of the workforce (Katz and Darbishire 2000: 75; Deakin and Green 2009), though the Thatcher governments progressively abolished them by 1993. Under the Labour government of Tony Blair, however, the United Kingdom introduced the general National Minimum Wage Act in 1998, establishing a common minimum consistent with a private ordering model.

The counterparts to Wages Councils in Ireland were the Joint Labour Committees (JLC). Enacted under the 1946 Industrial Relations Act, these have continued to provide protection to pay and core working conditions for vulnerable workers in certain low-paid sectors, such as agriculture, retail, and hotels. The Irish social partnership system has enabled them to survive along with limited Registered Employment Agreements (REA), which can extend “representative” collective agreements to cover sectors, such as construction. In 2010 this had rates as high as the equivalent of US\$20.55 for experienced electrical contractors. Together, the JLCs and REAs protect some 15% of the private sector workforce (Duffy and Walsh 2011). Ireland

complemented these historic, but limited scope, JLCs and REAs by introducing its first national minimum wage law in 2000, which drew upon the United Kingdom's model (Teague 2006).<sup>6</sup>

In Australia and New Zealand, the centralized Award systems went further than the employment standards laws in other countries by establishing generally applicable terms and conditions of employment through awards, including standard pay levels on an industry or occupational basis, at a level that resulted in a wage-based welfare state. While a federal minimum wage in Australia was implemented in 1966 (Stokes 1973), it was the higher federal and state Awards that underpinned wages. With the abolition of the Award system a general minimum wage law was introduced under Work Choices, drawing on the U.K. model. The Fair Work Act partially reversed this trend through the restoration of 10 national employment standards establishing minimum protections in areas such as hours of work, vacations, and redundancy pay. Furthermore, the legacy of the Award system has been restored with 122 Modern Awards that provide a second, higher, and more detailed safety net of regulations on work and employment conditions on an industry or occupational basis for those earning less than AUS\$113,800 in July 2010 (approx. US\$104,500 in 2010 exchange rates). While the minimum wage is high by international standards, reflecting the historic "fairness standard," it has low impact: Modern Awards provide significantly greater vertical coverage as well as providing protections to casual workers through 25% casual worker wage premiums.

New Zealand was one of the earliest adopters of a minimum wage, with legislation dating from 1894 and the Minimum Wage Act from 1945 (Pacheco 2007). The Awards system created a more granulated effect, however: Awards had a coverage of 67% in 1990 (Bray and Walsh 1998: 362) and existed in a multi-tiered system of protections that included the minimum wage, occupational awards, general wage adjustments, collective agreements at the enterprise, and blanket coverage provisions. With the ECA in 1991 the minimum wage protections operated alone. The significant change in both Australia and New Zealand has been the shift in the mechanism for wage regulation away from the establishment of general wage levels and toward a system of minimum wages with most employment relationships typically involving the establishment of higher wage levels, either through direct employer wage setting or through collective or individual negotiations.

Therefore, some significant convergence in minimum wage provisions has transpired. As Table 2 shows, however, the comparative protection given by the minimum wage is what stands out. The rate varies from US\$7.25 in the United States in 2011 to the equivalent of US\$9.88 in Australia.<sup>7</sup> The difference in protection as a percentage of median wages is substantial: In New

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<sup>6</sup>In July 2011 the procedure for issuing Employment Regulation Orders under the 1946 Industrial Relations Act was deemed unconstitutional by the High Court, requiring legislation to rectify this.

<sup>7</sup>All minimum wage rates have been drawn from the U.K.'s *National Minimum Wage: Low Pay Commission Report 2012* (April), Table A3.1, p. 174, adjusted using OECD purchasing power parity rates from September 2011 to U.S. dollars. The data for Canada are a weighted average of provinces.

Table 2. Minimum Employment Standards by Country

Country	Minimum wage US\$	Minimum wage as percentage of median wage (%)	Vacation/Holidays (annual)	Sick leave (annual)	Maternity leave	Unfair dismissal	Employment discrimination
United States	\$7.25	38	None	12 weeks unpaid for serious illness only	12 weeks unpaid	No	Yes
Canada	\$7.54	45	2–3 weeks plus 5–10 public holidays	10–12 days unpaid, longer for serious illness	50 weeks paid (unemployment insurance)	Yes	Yes
United Kingdom	\$7.77	46	4 weeks plus 8 public holidays	Up to 28 weeks paid at £79.15/week	39 weeks paid plus 13 weeks unpaid	Yes	Yes
Ireland	\$8.77	51	4 weeks plus 8 public holidays	Public social insurance illness benefit pay	26 weeks paid plus 16 weeks unpaid	Yes	Yes
Australia	\$9.88	51	4 weeks plus 10 public holidays, plus long service leave	10 days paid	18 weeks paid plus 12 months unpaid	Yes	Yes
New Zealand	\$8.07	59	4 weeks plus 11 public holidays	5 days paid	14 weeks paid plus 38 weeks unpaid	Yes	Yes

Source: UK's National Minimum Wage: *Low Pay Commission Report 2012* (April), Table A3.1 and Table A3.2 for median rates.

Notes: Minimum wage rates are for 2011. They are adjusted to U.S. dollars using OECD purchasing power parity rates from September 2010. For Australia, median rates are calculated using the Labour Force Survey. For Canada most employment laws are set at the provincial level. For minimum wages a provincial weighted average is used. Otherwise, the standards listed are ranges for the provinces.

Zealand this equates to 59% of median wages while Ireland and, in particular, Australia retain multitiered mechanisms of wage support. The United States is the outlier, providing the lowest protection at just 38% of median wages.

### **General Benefits and Leave Entitlements**

Most of the Anglo-American countries also provide basic entitlement to parental leave (Table 2). Indeed, substantial similarities occur in the combinations of part paid leave, with government funding support, and part unpaid leave. The convergence is shown insofar as New Zealand introduced job protection for those entitled to parental leave in 1987 and paid leave in 2002, while in Australia the more limited policy of only unpaid leave evolved first by the addition of a universal AUS\$5,000 “baby bonus” in 2004, and in 2010, 18 weeks of paid parental leave. While Canada has the longest paid leave, the United States stands out for having by far the most limited benefit. It provides only 12 weeks unpaid leave under the Family and Medical Leave Act, which is further limited to larger employers and as a result covers less than half (around 46%) of the private sector workforce (Waldfogel 1999).

A similar pattern holds in the area of minimum standards for vacation or holiday leave. Most of the Anglo-American countries have generally similar minimum vacation and public holiday entitlements enacted in employment law (Table 2). In the United Kingdom, Ireland, New Zealand, and Australia, employees are entitled to 4 weeks of vacation and between 8 and 11 public holidays. Australia also provides for additional extended periods of long service leave (after 7 to 15 years employment with the same employer) under various state or federal awards. In Canada, the amount of leave entitlement varies by province, though with 8 to 10 public holidays and 2 weeks of vacation being a common minimum entitlement.<sup>8</sup> The major exception is again the United States, where no minimum vacation entitlement or paid public holidays are specified in employment law.

### **Unfair Dismissal**

In the area of unfair dismissal, we find across most of the Anglo-American countries the establishment of basic substantive and procedural protections against wrongful termination of employment. In the United Kingdom, employees have had legal protections against unfair dismissal since 1971, enforceable through the Employment Tribunals system, while in Ireland these were introduced in 1977. In Australia, general protections against unfair dismissal emerged first in the states from 1972 and were then included in federal Awards from 1982, before having general effect through legislation in 1993 (Chapman 2003). One of the major features of the 2005 Work

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<sup>8</sup>Leave in some provinces rises with years of service, for example, 2 weeks initially and then 3 weeks after 5 years of service in British Columbia and Alberta.

Choices legislation was the removal of unfair dismissal protections in firms of fewer than 100 employees, excluding 56% of the workforce, though these were restored by the Fair Work Act (FWAEM 2008). In each of these countries the protections extend to rights of compensation in cases of redundancy, and the protection of terms and conditions in cases of the transfer of businesses or contracting out of services. New Zealand provided protection against unfair dismissal from 1973, though only for union members, thus covering 60% of the workforce (Anderson 1997). This provision was extended as a basic individual employment right in the 1991 ECA, though no rights to redundancy compensation are available, and only vulnerable workers have protection in the case of business transfers, which was introduced in 2004 (Walker 2007).

North America presents a contrast in this area. Canadian employment law provides for protection against unfair dismissal through a combination of employment standards legislation and common law rights against wrongful dismissal. Rather than reinstatement, however, the standard remedy for unfair dismissal in Canadian employment law (as in our other countries) is damages equivalent to lost salary or wages for a period equal to what the employer should have provided in reasonable notice before dismissal (Colvin 2006). This can be a substantial amount, as much as one month per year of service under common law rights. In the area of unfair dismissal, the United States is again the outlier. The general employment law in the United States continues to be employment-at-will, under which an employer may dismiss an employee for “good reason, bad reason, or no reason at all,” without any requirement of notice or severance pay. The most important exception to this rule is that U.S. law does prohibit discrimination in employment (in such areas as gender, race, age, and disability). Employment discrimination claims can be pursued through the general court system, commonly involving jury trials with the potential for much larger damage awards than found in other countries. Given concerns over major damage awards if an employment decision is found to be tinged by discriminatory motives, American employers tend to exercise a degree of caution in dismissal decision making that does not reflect the seemingly high degree of flexibility inherent in the employment-at-will rule (Colvin 2006).

### **Comparison of Individual Employment Rights**

What is striking in this comparison of employment laws and standards summarized in Table 2 is the relative similarity in the minimum standards to which individual employees in most of these countries are entitled. Whereas Canada, the United States, and New Zealand had general minimum wage laws before the 1980s, now all countries have adopted them with levels ranging from US\$7.25 to \$9.88. Most countries provide for a minimum paid annual vacation entitlement of around 2 to 4 weeks, plus 8 to 11 days off for public holidays. Maternity and parental leaves are generally around one year with some portion of this paid. All countries provide for legal protection

against discrimination in employment. Almost all countries provide unfair dismissal protection, with employees entitled to compensation if dismissed without notice or cause. In general, an employee could move between two of these countries to take up a new job and expect that the minimum level of employment standards to which he or she would be entitled would be relatively similar.

The major outlier in this area is the United States. Some areas of U.S. employment law do parallel that of the other Anglo-American countries. With regards to employment discrimination, the United States was a leader with the other Anglo-American countries adopting laws paralleling Title VII of the Civil Rights Act of 1964 and subsequent American discrimination laws (McCallum 2007). Employees in the United States have minimum wage protections as in the other countries, albeit at a lower level equivalent to just 38% of the median wage with low levels of enforcement. More significant divergence exists in the continued adherence to the employment-at-will rule in the United States, denying any protection against unfair dismissal or any entitlement to reasonable notice or compensation for dismissal. A further substantial divergence is the lack of entitlement to either annual vacation leave or paid sick leave. Finally, U.S. employment law standards are much more limited than in other Anglo-American countries in maternity or parental leave: only a limited segment of American private sector workers are entitled to just 12 weeks of unpaid leave.

### **Convergence on a New Anglo-American Model**

If we had conducted a similar comparison of the six countries examined in this study in 1980 at the outset of the Thatcher/Reagan era, the analysis would have emphasized the significant variation that existed, with the Anglo-American countries divided into three pairings: the Wagner Act industrial relations systems of the United States and Canada; the Voluntarist system of collective bargaining and strong unions in the United Kingdom and Ireland; and the highly centralized, legalistic Award systems of Australia and New Zealand. Indeed, such a historical perspective contradicts the idea that there has been a long-standing Anglo-American model of liberal market economic ordering as has sometimes been suggested, such as in the varieties of capitalism literature (Hall and Soskice 2001). Looking at the current state of the labor and employment law systems in these six countries, however, we argue that there has been growing convergence in two major areas.

Convergence has occurred in the area of labor rights toward private ordering of employment relations and away from the idea of work and employment being a matter subject to public ordering. By private ordering, we mean the idea that work and employment terms and conditions are primarily determined at the level of the individual organization, whether through collective bargaining between unions and employers at the organizational level, through individual negotiations, or through unilateral employer establishment of the terms and conditions of employment. The shift away from

public ordering of work and employment is most dramatic in the cases of Australia and New Zealand, where the publicly established system of centralized awards has given way to organizational-level ordering of employment relations through workplace or individual agreements. In the United Kingdom, the shift to greater private ordering is most evident in the breakdown of multi-employer collective bargaining and industry-wide standards enforced by strong unions, together with the growth of employer determination of conditions at the enterprise level. By contrast, the much lesser degree of structural change in the labor rights area in North America reflects the historical situation that the Wagner Act model was from the outset a model built around the idea of private ordering. The legal regulation of primarily enterprise-level union organizing and collective bargaining is premised on the idea that the individual organization is the appropriate level for determination of work and employment conditions. The areas where we have seen change in North America, such as the breakdown of multi-employer and pattern bargaining, reflect a deterioration of a superstructure of partial public ordering built on top of the basic Wagner Act model during the 1950s through the 1970s and the decline in unionization rates.

Turning to the area of employment rights, we also see a convergence across the six Anglo-American countries toward a model in which the role of employment law is to establish a basket of minimum standards that are built into the employment relationship, which can then be improved upon by the parties. Again, the shift has been particularly dramatic in the cases of Australia and New Zealand, with the previous Award model involving the establishment of relatively generous general terms and conditions of employment being replaced, in part, by employment laws that establish a more basic set of minimum standards. Although additional wages or benefits could always be provided above the award levels under the old system, now the minimum standards are a more limited set of basic protections rather than a broader foundation to build upon as in the past. In the United Kingdom and Ireland by contrast, the shift has been toward a greater formalization of minimum standards of employment through expanded employment laws, in contrast to the earlier system of voluntarism. Again change in this area has been less significant in North America because the system of employment regulation was historically based on the concept of employment law as establishing a minimum basket of employment standards, through the Fair Labor Standards Act in the United States and its Canadian counterparts.

Within these general trends, we do see some variation in the degree of convergence on these models of labor and employment rights regulation across the Anglo-American countries. The strongest degree of similarity in adoption of the private ordering in labor rights and the minimum standards basket in employment rights is found in four of the countries: Canada, the United Kingdom, New Zealand and, following the replacement of the 2005 Work Choices Act with the 2009 Fair Work Act, Australia. Each of these countries has adopted labor laws that favor organizational-level economic ordering, but with reasonably substantial protections of trade union organizing



and bargaining rights, and a set of minimum employment standards that include minimum wage, basic leave entitlements, and unfair dismissal protections. One interesting indicator of the degree of convergence across these four countries is the relative similarity between them in union representation levels. Whereas in 1980 union representation varied between 30 to 35% in Canada and over 50% in Australia, New Zealand, and the United Kingdom, current overall union representation levels in all four countries are around 20 to 30%, with private sector density ranging from 9% in New Zealand to 18% in Canada.

The first outlier is Ireland for two reasons. First, the voluntarist nature of the system, without union recognition rights, has continued, though the public policy suasion for union recognition has declined and industrial action has been confined to the enterprise level. Second, Ireland has continued to have a significant degree of public ordering of employment relations through the national partnership agreements. Partnership promoted the remarkable success of the Irish economy from 1987 to 2008 and, in turn, was sustained by it. Even during this period, however, it was significant that the system of *truncated partnership* combined central coordination of wage increases with significant leeway for the private ordering of employment relations at the enterprise level. Within that realm, the minimum employment standards play a similar role to those in our other countries, and it is noteworthy that while public sector union density is approximately 80%, that in the private sector is not dissimilar to our other countries at 20%. The question for the future is what will be the extent of the impact of the current deep economic downturn. This downturn brought the formal centralized partnership system to a close at the end of 2009, though informal coordination has continued. Nevertheless, when combined with signs of increasing employer aggression to unions, certainly the potential exists for the system to evolve further toward enterprise-level private ordering.

The other outlier is the United States. Structurally its system is similar to the other Anglo-American countries in emphasizing private ordering in labor law and the role of employment law as being to establish a minimum set of basic standards. This U.S. system, however, has involved a general favoring of the interests of employers over those of employees and organized labor. In the area of labor law, this favoritism is reflected in the relatively weak enforcement of the right to organize and the ability of employers to hire permanent replacement workers. In the area of employment law, the emphasis on employer interests can be seen in the continued use of the employment-at-will rule barring most actions for unfair dismissal and in the limited extent of minimum employment standards, such as the lack of paid sick leave or vacation entitlements and low minimum wage.

### **Factors Influencing Convergence**

A definitive answer to the question of why there has been a convergence across the Anglo-American countries is beyond the scope of this paper,

although we suggest some possible explanations. Note that any explanation must be able to account for both the divergence of systems across these countries before 1980 and the subsequent convergence on the new Anglo-American model.

One natural explanation is the shared political and cultural histories of these six countries that were at one time part of the British Empire. The common linguistic and cultural ties may have facilitated the sharing of ideas in the economic and social policy realm, leading to convergence in practices. More specifically, all six countries retain the common law heritage as the basis for their legal systems, which may in turn encourage convergence. The main limitation of this explanation is that it does not account for the divergence before the 1980s when the heritage was as strong and yet three strikingly different employment relations systems existed. This limitation suggests that while cultural and linguistic ties may have facilitated transmission of common economic and social policy ideas in recent decades, such ties are not as likely to have operated on their own as the driver of change.

Another possible explanation for convergence is a high degree of integration of the economies within the three pairings in question. Canada and the United States are the world's largest trading partnership, and their closely integrated economies became even more deeply intertwined with the 1988 Canada–U.S. Free Trade Agreement and subsequent 1993 North American Free Trade Agreement. Similarly, the United Kingdom and Ireland have long had closely integrated economies, which are now linked through their joint membership in the European Union (EU). Australia and New Zealand are similarly linked by the 1983 Australia–New Zealand Closer Economic Relations Trade Agreement and also have historical economic similarities as export-oriented agricultural economies. These factors do a good job of explaining the strong parallels within the pairings that existed in the era before the 1980s, although they do less well in accounting for the more recent convergence across the broader set of Anglo-American countries. Prior to the entry of the United Kingdom into the EU in 1973 (at the time known as the European Economic Community [EEC]), Britain served as a major export market for both Australia and New Zealand. Since that time the proportion of Australasian exports going to Britain has steadily declined. The primary trading partners for Australia and New Zealand are now East Asian countries, not other Anglo-American countries. This suggests that economic integration is not likely to be the driver of convergence.

Pressures from globalization of product markets may explain some of the convergence. Certainly in the vigorous political debates over reform of the employment relations systems in Australia and New Zealand, the need to enhance competitiveness in an era of globalization has been a powerful argument for moving away from the traditional Award systems. Similarly in the United Kingdom, competitiveness arguments were some of the concerns raised with the earlier, strong trade union–centered Voluntarist system. Furthermore, the extent of product market competition experienced by enterprises has played a significant role in the decline of collective bargaining

(Brown et al. 2009). Even in the United States, which has seen less change in formal laws, the growth of international competition was one of the major factors leading to the shift in labor relations practice toward a more strongly anti-union approach by many employers (Kochan, Katz, and McKersie 1994). Based on the prominence of these arguments in employment relations reform debates across the Anglo-American countries, it would be hard to argue that globalization was not an important element in convergence.

Furthermore, the expansion of minimum employment standards can be viewed as one governmental response to the decline of collective representation in an era of heightened global product market competition. Is it inevitable, however, that globalization should lead to the particular type of convergence on the new Anglo-American model? Interestingly, Ireland is one of our outliers even though it has an exceptionally internationally oriented economy. Indeed, its centralized social partnership system was in part an effort to establish an economic and policy environment that would enhance its international competitiveness and encourage foreign investment (Teague and Donaghey 2004). This largely successful effort has been an important factor in the Irish economic boom since the 1980s. If the social partnership system is unable to survive recent economic turmoil and Ireland begins to resemble the new Anglo-American model, an additional piece of evidence will have been gained in favor of the globalization and international competition explanation for convergence.

A related explanation is that convergence is being driven not by globalization *per se* but rather by the emergence of new systems of work organization and human resource practice that are important for competitiveness. In the period from the 1980s to the present, we have seen increasing arguments that organizations need to adopt new, more flexible forms of work organization to better harness the value of their workforces (Appelbaum and Batt 1994). From an industrial relations system perspective this has led to arguments about the need to decentralize the determination of employment terms and conditions to the organizational level to allow for the flexibility needed under these systems (Katz 1993). When we look at organizational practices, evidence emerges of common trends toward the adoption of a range of different patterns of work organization and human resource management across the countries we are examining (Katz and Darbshire 2000). As policymakers are faced with this common shift toward a set of organizational practices designed to achieve competitiveness, they appear to be engaging in common policy responses of establishing labor and employment law systems that facilitate the decentralized implementation of these practices.

These arguments are consistent with the VoC perspective that institutional complementarities exist and that increasing product market competition has been a catalyst for labor law reform. Indeed, even though three models existed in 1980, these countries did share a presumption of managerial prerogative at the workplace, even if subject to a negotiated order. The growth of a private ordering model remains consistent with this presumption of

managerial prerogative implying a possible path dependency even if not necessarily a functionalist one. One impact, certainly, has been to constrain the ability to generate enterprise-level partnerships: Concerted attempts, most particularly in Ireland and New Zealand, to build high-wage, high-skill relationships have come to little. Nevertheless, significant variation remains in the economic performance among our six countries that is not entirely consistent with the functionalist and systemic logic of the VoC model. Furthermore, we note that in Australia, New Zealand, and the United Kingdom a policy “overshooting” in the form of a more extreme model of deregulated labor markets existed, premised on rationalist economic arguments, before the current models were adopted.

The similarity of policy responses across these countries also displays structural isomorphism (Amable 2003) as a result of the significant interchange of economic and social ideas. Commonality in heritage and political institutions may have facilitated the spread of the specific set of labor and employment practices that these countries adopted in response to the pressures of globalization and the advent of new systems of work organization, while also legitimating political policy preferences. The institutional borrowing has a clear history, as the United Kingdom unsuccessfully attempted to restructure its industrial relations system along the Wagner Act model in 1971 (Gould 1972). Certainly the spread of neoliberal economic ideas in the Anglo-American world received a major boost from the political success of Thatcher in the United Kingdom and Reagan in the United States. The influences were both philosophical and empirical. In the United Kingdom the economic rationalist arguments of Friedrich Hayek were particularly important (Wedderburn 1988), while in New Zealand Richard Epstein held sway (Dannin 1997). The moves toward deregulated labor markets in 1991 with the ECA in New Zealand arguably owed much to the perceived successes of the Reagan and Thatcher programs in the United States and the United Kingdom, while states in Australia such as Western Australia and Victoria drew heavily on the New Zealand experience, further influencing the Howard administration’s goals leading up to the 2005 Work Choices Act.

The retreats from the neoliberal extremes also illustrate the transmission of policy ideas among the Anglo-American countries. The statutory recognition system in the United Kingdom borrows features of the North American Wagner Act model, particularly the more union-friendly Canadian variant, though adapted to fit the voluntarist industrial relations legacy. The experience of New Zealand with the ERA showed significant policy learning with regards to Wagner Act good-faith bargaining provisions. Australia did likewise with the Fair Work Act for recognition and good faith, while seeking to avoid the perceived legalism and employer hostility of the United States (Forsyth 2007). The significance of agency is also illustrated by the case of Ireland, where the principal political parties are not divided on ideological grounds and the partnership approach was adopted at a point of economic

crisis in 1987 with the deliberate attempt to avoid the neoliberal solution then being implemented in the United Kingdom. The success of this move ensured there was no challenge over the next 22 years.

The development of employment laws and minimum employment standards has similarly been influenced by cross-national borrowing among our countries, which is illustrated by three examples: the United Kingdom's minimum wage design influenced both Australia and Ireland; the United Kingdom's paid parental leave policy was an important influence in policy discussions leading up to Australia's first paid parental leave law (Baird 2003); and the United Kingdom's "right to request" flexible working policy has been the model for Australia and New Zealand (Hegewisch 2009). The United States, meanwhile, has served as a model in regard to employment discrimination (McCallum 2007). The proposed Employee Free Choice Act that labor groups in the United States attempted to pass largely involved adopting a set of provisions taken from Canadian labor law, such as card check recognition and first contract arbitration. This suggests that while the heritage of the Anglo-American countries is not an originating cause of the recent convergence, it may serve as an important intermediary variable explaining why there was convergence on a common set of policy responses to a new set of economic pressures.

### **Conclusion**

We have argued that the last three decades have seen the emergence of a new Anglo-American model of employment relations. Whereas prior to 1980 there was substantial divergence across this set of countries, over time there has been growing convergence on a model characterized by two main features. The first aspect is the emphasis on private ordering in labor relations, in which the role of laws and institutions governing collective representation is to support and encourage decentralized determination of the terms and conditions of employment at the organizational level. The second aspect is the emphasis on the role of employment law to establish a minimum basket of standards from which employees and employers can negotiate upward. What is striking beyond these two general principles is the increasing degree of convergence on many of the specific rules and features of labor and employment relations across many of the Anglo-American countries. The incidence of union representation, the level of minimum terms and conditions, and many specific features of the law are similar in the various countries. Within this picture, the relative exceptionalism of the United States is noteworthy in its limited extent of union representation, weaker union rights, and much more limited minimum employment standards. Our discussion of the new Anglo-American model has been descriptive and analytical in nature, rather than normative. To the degree that transmissions of policy ideas across these countries has had a substantial normative role in driving recent changes, however, it is worth considering

whether the policy elements being adopted in the new model in the other Anglo-American countries will begin to feature in labor and employment law reform debates in coming years in the United States.

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