Deregulating Labour Markets and Industrial Relations in British and United States Construction

Stephen Evans
Roy Lewis

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol6/iss1/5
DEREGULATING LABOUR MARKETS AND INDUSTRIAL RELATIONS IN BRITISH AND UNITED STATES CONSTRUCTION

Stephen Evans* and Roy Lewis**

Anglo-American comparison of industrial relations and labour law in the construction industry reveals many similar and parallel experiences. The policies of state, construction clients, employers and unions have developed in distinct but comparable ways in the two countries.1 In both Britain and the United States the construction industry has a strategic 'balance wheel' position in the wider economy, providing infrastructure and employment.2 Moreover, the market for construction projects is becoming increasingly internationalised, with both British and American companies operating across international boundaries. Less recognised perhaps is the extent to which construction labour relations have featured in the development of state labour market and industrial relations policies, including the recent drive for deregulation in both countries.

In terms of prevailing trends in labour relations, the British and American construction unions have found it increasingly difficult to organise workers. The union share of construction employment fell below one third in both countries by the mid-1980s. This is consistent, of course, with the wider pattern of union decline, though certain special features should be mentioned. In the UK, the gradual but progressive marginalisation of construction unions dates from the early 1950s, when they already had a weaker base than their United States counterparts, whose own decline began in the early 1970s and accelerated rapidly from the end of that decade.3 At the same time

* Lecturer in Industrial Relations, University of Wales College of Cardiff.
** Professor of Law, University of Southampton.

collective bargaining has tended to give way to more individualised, casual and non-standard forms of employment regulation. In the UK, labour-only subcontracting and self-employment have increasingly replaced direct employment; in the United States, open shop (non-union) firms now predominate in many sectors of the industry.

These changes have been actively promoted by construction clients and contractors as ways of reducing labour costs, raising productivity and achieving a competitive edge in face of the massively reduced demand for construction work. While such economic forces provided the primary force, the law and deregulation have nevertheless exerted a significant secondary influence on the restructuring of construction employment.

The Thatcher and Reagan governments shared a number of common objectives. They believe in the capacity of deregulation to restore the spirit of private enterprise and to promote the capital investment needed for economic revival. The policy involved privileging the interests of multinational over domestic capital, reducing and re-directing public expenditure and welfare, and expanding the base for private accumulation. The policy also involved reconstituting the state in the interests of organised business and marginalising labour’s influence, and changing the relationship between the state and autonomous systems of social regulation, such as collective bargaining and trade unions, which were deemed obstructive to the free operation of labour markets.

‘Freeing up’ labour markets and restoring managerial prerogatives has had a number of strands. In the USA, the Reagan administration ‘reversed the growth of the social safety net that much of business had come to view as a financial burden, a disincentive for workers to work, and a leg-up for labour’s bargaining power’. Changes in eligibility rules for unemployed insurance benefits led to a fall in the percentage of unemployed insured from forty-four in 1980 to twenty-nine in 1984. Anti-employment discrimination and occupational safety measures received diminishing support from government agencies, and the National Labor Relations Board (NLRB) produced a string of decisions that helped business to reduce or eliminate union power and influence over labour costs and over the conduct of workplace relations, notably in relation to the right to organise, the right to bargain over plant closures and transfer of work to

non-union facilities, and the right to strike.\textsuperscript{5} Much of this shift in policy towards deregulation was accomplished without new legislation by building upon established case law unfavourable to unions, and by organisational and personnel changes within government agencies.

In Britain, the Conservative government’s priorities were four-fold. First, the priority given to free trade bolstering internationally competitive sectors of the economy meant accepting the logic of domestic de-industrialisation and destruction of jobs. The corollary of abolishing exchange controls and deregulating financial institutions was to attract inward investment by guaranteeing a regulatory environment favourable to business. Second, publicly-owned enterprises and services were to be privatised, as much to raise revenue and undermine the power of public sector unions as to increase competition and efficiency. Third, this privatisation required reorganising the balance of power within the state itself, with the abandonment of tripartite bargaining and policy-making arrangements and the subordination of public authorities to the central state apparatus through cash limits and legal controls. Fourth, labour market policies were premised on creating the conditions for employment growth by lowering the cost and risk of hiring or, alternatively, by releasing the enterprise of skilled workers through encouraging them to set up in business on a self-employed basis. This complimented the policy shift from universal public to individual private welfare provision, supported by tax changes and other administrative measures to foster small firm growth.

One strand of labour market policy has been the trend towards deregulation. This involved a partial withdrawal from statutory regulation of the labour market and employment relationship—reducing the scope and extent of social security benefits and state pensions, weakening statutory employment protection, and dismantling auxiliary legislation supporting the extension of collective bargaining and minimum wages. The other strand has been increasing legal restriction of trade unions to compliment the “direct attack upon the economic conditions which create union strength.”\textsuperscript{6} Legal restraint has involved narrowing the scope for lawful industrial action, regulating internal union affairs ever more tightly and, in particular, undermining unions’ ability to rely on the economic purchasing power of pub-

\textsuperscript{5} Id.
lic authorities to extend collectively bargained employment standards via labour clauses in government contracts.7

THE STATE AND EMPLOYMENT RESTRUCTURING IN CONSTRUCTION

Among the common characteristics of the British and United States construction industries is the major influence of public spending on the level and type of demand, on the degree of market competition, and on the vital role of large firms. The period from 1945 to the mid-1970s was characterised by strong public sector demand, averaging forty-five per cent in Britain and around twenty-five per cent in the United States. In Britain, around ten per cent of all work was undertaken by public authorities through their own direct labour organisations (DLOs). Both British and United States governments promoted measures aimed at stabilising demand flow, mitigating competition and guaranteeing markets and profits through, for example, select tendering, serial and cost-plus fee contracts.8

The post-war expansion of new construction took off in Britain in the early 1950s, but not until a decade later in the United States. However, in both countries, employment and workload became more concentrated among the largest contractors. Their business strategies emphasised maximising turnover, and their labour policies a mixture of labour hoarding and high wage rates to secure ready supplies of labour in tight labour markets.

Project management and work organisation during this period typically involved a client hiring a general contractor through competitive ‘lump sum’ bidding, with subcontractors for certain specialist trades either hired by the general contractor through competitive bidding or, mainly in the mechanical trades, appointed after negotiation between the general contractor and the client or client’s representative, such as the architect. Dual lines of managerial accountability tended to undermine management co-ordination and cost control.9

Craft unions’ strict enforcement of jurisdictional demarcations helped to shape and sustain this pattern of relations between general and specialist trade contractors in the United States. High construction wages embodied in legally enforceable collective agreements

8. See supra note 2.
helped to secure wider adoption of new technologies, and contributed to comparatively greater investment in managerial skills and technological training among subcontracting firms, and to their tighter integration into the design and execution stages of construction. But in time the union wage became a prime reason for United States clients trying to break decisively with collective regulation.

In Britain, by contrast, unions and specialist trade subcontractors' organisations were weak. British collective agreements were not legally enforceable, and contractors were not contractually obliged to unions to comply with them, or put the appropriate pressure on their subcontractors to do so. Contractors took advantage of relative union weakness and the looser regulation of labour markets and labour processes. They encouraged narrow task specialisation and pursued a low wage policy relying on raising productivity in the short term by temporary supplements ('spot' payments) depending on the state of trade. This had the longer term effect of retarding the diffusion of new technologies, hindering the modernisation and integration of management organisation, and contributing to the lack of investment in training and severe cyclical fluctuations in the supply of skilled labour.

By the late 1960s, the underlying pressures for change were mounting. In the United States, with its smaller scale of public sector activity compared with Britain, the main initiative came from private business interests, concerned that wage militancy in construction was raising the cost of new plant to the point where it could undermine their international competitiveness and was threatening to spread wage militancy to other unionised sectors. Government introduced guidelines for restricting wage increases in construction and attempted to promote the voluntary reform of collective bargaining structures. But of more lasting significance were the pressures for improved cost effectiveness from the largest private construction clients, organised through the Business Roundtable. Reform of collective bargaining and elimination of trade union controls became priorities, along with systemic encouragement of the open shop, and these policies had increasing impact over the next decade.

In Britain, government rather than private clients took the lead.

The stimulus was provided in the 1960s by shortages of labour, materials and managerial expertise together with escalating construction costs. Unofficial militancy on larger sites threatened to undermine the government’s incomes policies and contradicted the prescriptions of the Donovan Royal Commission for ‘orderly’ industrial relations. Nevertheless, construction wage rates remained below the industrial average throughout this period, and construction employers persuasively argued that their use of the “lump”, self-employed labour-only subcontractors secured higher productivity and allowed the direct regulation of wages by market forces without any form of trade union intervention. As the economic boom peaked at the start of the 1970s, coinciding with the growing crisis of state expenditure, government pressures for long term productivity growth in construction and for restraint over the industry’s labour costs diminished. In any event, the most consistent form of state intervention in Britain was to reduce the amount of public expenditure on construction. Even before the election of the Conservative government in 1979 construction became a central target for public expenditure cuts. After 1979, expenditures were halved and the private sector was encouraged to take over increasing provision.

The ascendant role of the private sector was just one aspect of Anglo-American convergence. Another was the increasing reliance on subcontracting. Subcontracting spreads the cost and risk of tying up working capital in plant, materials and labour. After falling by almost half, from forty-four per cent to twenty-five per cent between 1967 and 1972, the proportion of gross value subcontracted in the United States rose in commercial contracting, at least, to as high as eighty per cent in 1980. Comparable developments occurred in the UK.

Another point of convergence has been the way in which major projects are financed and managed nowadays, with much more detailed contractual arrangements and liabilities, “parcelling” of work programmes among different contractors, and more unified management organisation. These have enhanced control over work at site level. Production has increasingly become a process of assembling...
standardised components, transforming the skill requirements of the labour force and allowing for more effective allocation and co-ordination of labour.

In the United States, in particular, such trends undermined the high degree of craft exclusivism and the productivity advantage of union labour. Open shop labour policies were premised on freedom to engage and retain key skilled workers on a long term basis, to use skilled workers flexibly across craft boundaries, and to hire greater numbers of semi-skilled helpers and pay them sub-union rates. Before the 1970s, because of the limited pool of non-union labour, open shop contracting was restricted to small-scale work and particular geographical areas. In the main centres there were only spasmodic instances of clients or contractors trying to use open shop firms, though industrial action by construction unions to resist such practices led to a large number of successful applications to the NLRB for orders to restrain unfair labour practices.

The onset of declining union coverage in the United States occurred around 1970, continuing to the present, with the sharpest accelerations between 1977-78 and 1981-84. The initial stimulus was the growth in the union/non-union wage differential in the period of peak commercial and public construction and high wage militancy between 1967 and 1973, a significant element of which was the rising level of union fringe benefits. But the real breakthrough came with the recession and high unemployment which forced many union members to work in the open shop sector, thereby allowing open shop contractors to reduce the union/non-union productivity gap, widen their expertise, and secure an increasing share of work in all market sectors. This, in turn, encouraged many contractors to go 'double-breasted', operating in both open shop and union sectors.

In Britain, broadly comparable developments in contracting and management organisation were enhanced by the more liberal regime of employment regulation, epitomised by labour-only subcontracting. Savings over direct labour of twenty to thirty per cent were claimed. Labour-only workers, it was said, worked faster and

17. See supra note 15.
20. S. Evans & R. Lewis, *Destructuring and Deregulation in the Construction Industry*, in *MANUFACTURING CHANGE: INDUSTRIAL RELATIONS AND RESTRUCTURING* (S. Tailby & C. Published by Scholarly Commons at Hofstra Law, 1988
earned more than direct workers, motivated by a simple incentive calculated on an all-in basis, sometimes by the piece and sometimes by the hour or shift, and enhanced by attractive tax advantages for the self-employed. Moreover, since the price of labour is fixed only for the duration of the particular task or contract, employers were able to avoid consolidation under collective agreements.

Legally, many of these workers occupy a "twilight zone between employment and independent status." Since most lack a contract of employment they automatically lose statutory rights to notice, redundancy pay and protection from unfair dismissal. Employers avoid obligations to pay for 'stamps' under the industry's various holiday pay schemes and for national insurance contributions, and they are subject to less onerous obligations in respect of accident compensation and insurance.

The number of labour-only workers increased dramatically in recent years, to an estimated half of the manual labour force in the contracting sector. The facility which labour-only subcontracting offers contractors of increasing the level of output from existing labour resources clearly made a major contribution to recent improvements in completion speeds, cost control and labour productivity in UK construction, which is now comparable with United States levels. As in the United States, however, it seems likely that these productivity gains would have occurred as they did without the shock effect of slump and massive job loss, when the national average unemployment rate in British construction rose to twenty-four per cent in 1982. This helps explain why British contractors, under the intensified competitive conditions of the 1980s, pressed so hard for the government to legislate for their continuing freedom to hire labour casually, free from interference by public authorities via labour clauses in government contracts.

**DEREGULATION IN UNITED STATES CONSTRUCTION LABOUR RELATIONS**

The model of collective bargaining in United States construction occurs predominantly between a union organising a single craft and employers of that craft represented by a specialist association.

---

Whitston eds. forthcoming).


22. See supra note 9.

Agreements apply whenever and wherever an employer belonging to a multi-employer bargaining unit works within the area of that agreement's jurisdiction. The agreement covers wages and conditions, training and hiring practices. 'Pre-hire' agreements linked with recruitment through union referral systems are the basic institution for maintaining unionisation and collective bargaining.

However, the methods by which construction unions seek to organise and bargain have always been problematical areas of legal regulation. The historical development of the National Labor Relations Act's (NLRA) application to the construction industry has been described as 'laissez faire under the Wagner Act, total regulation under Taft-Hartley, and accommodation with the passage of Landrum-Griffin.'

During the period of laissez faire, the NLRB declined to assert jurisdiction over construction and the pre-entry closed shop became deeply entrenched. Taft-Hartley's protection of the non-unionised worker and its restrictions on strikes were, however, clearly targeted at the industry and at the unions' ability to maintain their closed shops and engage in picketing and secondary boycotts. The Landrum-Griffin Act's provisions authorising 'pre-hire' and 'hot cargo' agreements to some extent recognised the need in the industry for 'top-down organising' through employers at the expense of the individual worker's freedom of choice.

In general, the law as interpreted by the NLRB and the courts both reflected and structured union organising methods and, in turn, helped ensure that contractors, too, were organised largely along lines set by product markets and craft union jurisdictions. However, the law has failed to prevent the spread of the open shop sector. For the past decade and a half, collective bargaining in United States construction has been in continuous retreat. Large construction clients and their associations, organised through the powerful Business Roundtable, have forcefully promoted the competitive advantages of open shop construction. The open shop Association of Builders and Contractors (ABC), in particular, has made effective use of legal tactics to defeat union strikes and boycotts against the open shop. Most recently, the legal enforceability of pre-hire agreements has been questioned; the application of collective agreements has been curtailed, and the support given to the extension of collectively bar-

---

gained pay rates and conditions in the Davis-Bacon Act has been diluted.

The general principle of the NLRA is that an enforceable collective agreement may be negotiated only with a 'majority' union, that is, a union freely chosen as the bargaining agent by a majority of employees in a bargaining unit. But NLRA, Section 8(f), expressly allows a construction employer to enter a pre-hire agreement with a minority union, that is, an agreement that is applicable prior to the recruitment of labour. However, the NLRB and the courts have set broad limits on this provision, though there has been a major shift in NLRB policy. On one hand, in "Higdon," following the ruling in R.J. Smith, it has been held that an employer party to a pre-hire agreement may repudiate it during its term if it was made with a minority union. This meant that a minority union was unable to strike lawfully or use NLRB procedures in order to ensure an employer's adherence to an agreement. On the other hand, in Deklewa the Board ruled that an employer could not unilaterally terminate a pre-hire agreement during its currency. But in what has been described as a move towards 'deregulation' in the area of recognition rights at the expiration of an agreement, it also held that the employer was under no obligation to continue the relationship with the union on the expiry of the agreement, and that a signatory union could no longer convert to majority status without an election.

The application of collective agreements in construction has been further undermined by a line of NLRB and court decisions on 'double-breasted' or 'dual shop' companies—two companies under common ownership, control or management, one operating under a collective agreement, the other on a non-union, open shop basis. Typically, a unionised contractor acquires or establishes a related non-


union firm. In some instances, all the work formerly done by the
union company is undertaken by the non-union firm, while in others
both companies operate concurrently. The significance of the NLRB
and court decisions lies in the extent to which they have allowed the
non-union wing to escape from the obligations of pre-existing collective
agreements. Double-breasting was stimulated by *Kiewit*, in
which the parent company’s admitted aim in bringing in a non-union
subsidiary was to achieve greater competitiveness and profitability
by evading the obligations of the collective agreement. Emphasising
the test of the employees’ ‘community of interests’, the Supreme
Court upheld the Board’s decision that the employees of each subsid-
iary had distinct interests and therefore constituted separate bar-
gaining units. Therefore, it was lawful for the open shop company to
ignore the collective agreement.

Despite a variety of legal counter-strategems pursued by con-
struction unions, the well-advised employer can avoid the main legal
pitfalls of double-breasting, with the exception perhaps of some not
inconsiderable financial liabilities following withdrawal from a multi-
employer pension plan. The basic rule after *Kiewit* remains that
common ownership and control may be maintained—especially if the
labour relations functions are kept separate—without the application
of collective agreements to the non-union wing. The law has thus
encouraged double-breasting.

Traditionally, the Davis Bacon Act gave legislative support for
collective bargaining in construction. Under this Act, contractors
were obliged to pay their employees in specified job categories wages
and fringe benefits not less than those prescribed by the United
States Department of Labor as ‘prevailing’ for similar types of con-
struction in a particular locality. In practice this meant that the
union rate and union job demarcations formed the basis for bidding
for government contracts. In this way Davis-Bacon supported wage
levels and union recruitment, notably in highway construction. Em-
ployers argued that the legislation inflated the cost of public con-

30. Peter Kiewit, 206 N.L.R.B. Dec. (CCH) ¶ 25, 865 (1973), vacated and remanded
sub nom Operating Eng’rs Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), aff’d in part
and remanded in part sub nom, South Prairie Constr. Co. v. Operating Eng’rs Local 627, 425
U.S. 800 (1976), on remand Kiewit Constr. Co., ___ N.L.R.B. Dec. (CCH) ¶ ___ (1977), aff’d
595 F.2d 844 (D.C. Cir. 1979).

31. See H. R. NORTHRUP. OPEN SHOP CONSTRUCTION REVISITED at 334-340, 629-632

32. See Thioblot, Prevailing Wage Legislation: The Davis-Bacon Act, State “Little Da-
Wharton School 1986).
struction, gave the unions an unearned and unfair bargaining weapon, and prevented open shop contractors from competing fairly for public work. The open shop ABC secured amendments to Davis-Bacon in 1984-85, which make it harder for the union rate to prevail, encouraging open shop contractors to exploit their lower labour costs when tendering by enabling their use of helpers at semi-skilled rates, a practice traditionally prohibited by union rules.\textsuperscript{33}

DEREGULATION IN BRITISH CONSTRUCTION INDUSTRIAL RELATIONS

Unlike in the United States, collective agreements in British construction tend to be multi-trade and cover whole sub-sectors such as building or civil engineering. Trade-specific agreements apply in certain mechanical trades such as electrical. These agreements are formally negotiated at national or industry level. They set national minimum rates, as well as specifying special payments and fringe benefits, and other conditions relating to hiring. Several impose duties on contractors to ensure subcontractors comply with agreements, until recently including prohibiting self-employment.

In practice, collective bargaining has become increasingly marginal. Employers' adherence to collective agreements vary, and the disciplinary authority of their associations from sector to sector. Wages and conditions are determined largely at site level, according to prevailing local labour market conditions. National bargaining was undermined in the 'boom' as large national contractors favoured decentralised bargaining in order to compete for labour and avoid the constraints of statutory income policies. Incentive bonus schemes enabled employers to evade 'standard' rates and legitimised widespread adoption of traditional 'spot' or 'piece' rates, and alternatively labour-only subcontracting, as a means of raising productivity.

As British contractors formally resisted recognising the closed shop, securing union membership and enforcement of collective agreements depended on the use or threat of industrial action, orchestrated largely informally at local or site level. But it was only in the late 1970s that construction unions tried to stem the accelerating loss of membership and revenue brought about by slump, extensive casualisation, and the weakening of public sector DLOs through the tactic of pressing local and central government clients as well as large, unionised private manufacturing firms to introduce union labour-only clauses into their commercial contracts.\textsuperscript{34}

\textsuperscript{33} See supra note 15.
\textsuperscript{34} Evans & Lewis, Labor Clauses: From Voluntarism to Regulation, 17 INDUS. L.J.
Enforcement of these clauses was patchy and inconsistent. But contractors were concerned about two particular possible effects. First, they regarded such clauses as imposing unfair competition on private firms so as to protect DLOs from loss of work which should have followed from compulsory competitive tendering introduced in the Local Government Planning and Land Act 1980. Second, some contractors saw the risk of being forced to recognise a 'hostile' union outside the collective agreement thereby allowing it to build an enclave from which to force a closed shop. Consequently, construction employers were prominent in demanding legislative restrictions on union organising tactics which were designed to secure union membership and recognition among contractors.

Sections 12-14 of the Employment Act 1982 prohibit two categories of labour clause in contracts for the supply of goods and services; namely, union labour-only and union recognition-only. A union labour-only clause as envisaged by the statute requires work to be done by union members only (or, for the sake of a purely formal equality, non-union workers). A recognition-only clause requires recognition of or negotiation or consultation with a trade union or union official. Such clauses in contracts for the supply of goods and services are rendered void. Moreover, contractual requirements for either union labour-only or recognition-only can give rise to an action for breach of statutory duty if a person is not allowed on to a list of supplies, or has a contract terminated, or is otherwise denied a contract. This duty is owed not only to actual and potential suppliers of goods and services, but also to any other person who may be adversely affected. In addition, Section 14 (as subsequently amended by the Employment Act 1988) withdraws immunity from the organisers of industrial action taken to uphold union labour-only and recognition practices.

The Employment Act 1982 left untouched a wide variety of labour clauses. For example, it was still open to public authorities, despite rescission of the Fair Wages Resolution, to stipulate to their contractors adherence to the appropriate collective agreements or membership of the appropriate employers' association. A key element in most construction collective agreements (until very recently) was their restriction on the use of self-employment. Although enforcement of this principle was always difficult, the threat of exclusion from public sector approved tender lists for non-compliance became an important consideration for contractors in the depressed
conditions from the mid-1970's.

Thus, the provisions of Sections 12-14 of the Employment Act of 1982 were insufficient for the construction industry employers. Their persistent lobbying eventually resulted in the Local Government Act of 1988 Part II, which imposes a statutory duty on local authorities making contracts for the supply of goods or services to exclude 'non-commercial matters' from consideration in the selection of contractors. The list of 'non-commercial' matters includes the contractor's terms and conditions of employment; the composition of the workforce and promotion and training opportunities; whether the contractor uses self-employed labour; the contractor's involvement in irrelevant fields of government policy, record and role in industrial disputes, foreign business connections and source of supplies, and political, industrial or sectarian affiliation. The only express permitted exception is contract compliance to secure racial equality. It is noteworthy, however, that private clients and contractors remain free to set their subcontractors' employment practices.

As well as legal restrictions against labour clauses, 'freeing up' construction labour markets also involved a range of measures aimed at dismantling statutory support for collective bargaining and joint regulation. The repeal of Schedule 11 of the Employment Protection Act of 1975 in 1980, and the rescission of the Fair Wages Resolution in 1983 both had the aim of frustrating the wider application of recognised terms bargained at national level or, where these were absent, of general terms equivalent to the 'going rate' in the locality or trade. Self-employment was encouraged when government withdrew support for direct employment as the preferred form of engagement by its contractors, and the Treasury introduced tax changes reducing the insurance liabilities of self-employed labour-only subcontractors.

 Strikes and picketing to achieve economic or organisational goals have also been severely restricted by the law. The decline of the relatively high post-war strike rate in construction coincided with the onset of recession in 1974.35 The overwhelming majority of strikes were wage-related. Industrial action over the closed shop or 'lump' labour was used or threatened only occasionally, although it remained a potent if diminishing deterrent in some well-unionised trades and localities. A number of important cases arising from the

---

35. From 1947-1973 construction was the most strike-proof industry after coal mining measured by the number of strikes. See J. Duncan, W.E.J. McCarthy & C.P. Redman, Strikes in Post-War Britain: A Study of Stoppages of Work Due to Industrial Disputes, 1946-73 (1983).
construction industry demonstrated that even prior to the 1980's legislation, unions could be exposed to civil liability if they took industrial action to induce a firm to break a 'commercial' contract with a labour-only subcontractor, or engaged in picketing outside the narrow statutory definition of lawful picketing, for example, by impeding vehicles. Furthermore, violent tactics by construction workers led to some expansion in the use of the criminal law against picketing, anticipating subsequent developments involving coal miners, which ultimately resulted in the Public Order Act 1986.

The 1980's legislation—Employment Acts of 1980, 1982 and most recently 1988, and the Trade Union Act 1984—restricting strikes, picketing and industrial action taken to uphold union labour only and recognition practices—was targeted more widely than construction. But the industry's employers were prominent in certain parts of its drafting. Notwithstanding the very small number of cases in construction where employers invoked injunctions against secondary picketing and strike action called without a ballot, the law nevertheless played an important role in ensuring that such industrial action as did occur received little official union encouragement.

CONCLUSION

A number of developments can be discerned in construction labour relations and their interaction with legal policy in Britain and the United States. The principal methods of 'top down organising' and collective bargaining used by United States construction unions—exclusive jurisdiction, union hiring hall, pre-hire agreement with permitted 'hot cargo' clauses—cut across the longstanding general principle that a bargaining agent ought to be selected in accordance with the preference of individual employees, normally after an election supervised by the NLRB. Much later, in Britain, too, the similar orientation of construction unions' top-down organising and collective bargaining via contract compliance, though more weakly enforced, came into conflict with the legislative principles introduced only in the 1980s protecting freedom of association, that is, individual freedom of choice of union, the right to dissociate from unions,

39. John Laing Ltd. v. Higgins (no cite or date given); McCarthy & Stone, Ltd. v. TGWU, UCATT (no cite or date given); see Evans, The Use of Injunctions in Industrial Disputes, May 1984-April 1987, 25 BRIT. J. INDUS. REL. 419-435, 433-434 (1987).
and the specific ban on union labour-only and union recognition clauses in commercial contracts. But whereas the construction industry in the United States is exempted from the prohibition of hot cargo clauses, Section 8(e) of the NLRA, there is no exemption for labour clauses in commercial contracts in British construction. Indeed, the policy of statutory restrictions on harnessing contracting power to influence labour standards has been pursued much further in Britain through the Local Government Act’s prohibition of non-commercial matters in local authorities’ contracting and tendering.

Further points of convergence in legal policy in the two countries can also be seen in the increasing range of legislative restrictions over strikes and picketing. Most recently, deregulation has been promoted in both Britain and the United States, aimed at reducing the capacity of unions to extend the coverage of collective bargaining: for instance, by undermining the legal enforceability of pre-hire agreements in the United States, and by rescinding EPA Schedule 11 which facilitated the spread of the ‘local going rate’ in a trade in Britain. Other measures have been targeted directly at auxiliary statutory support for collectively agreed terms and conditions of employment as such: for example, weakening Davis-Bacon in the United States, and rescinding the Fair Wages Resolution and banning labour clauses in contracts for the supply of goods and services in the Local Government Act 1988, in Britain.

Construction industrial relations may have had a more direct influence on the development of deregulation policies in Britain than in the United States, which can be explained in large part by differences in the character of the two states and the timing of ‘key’ legal interventions in the reconstruction of industrial relations. Both countries have relatively weak states, that is, they were traditionally characterised by their industrial self-regulation and their limited degree of state economic intervention. In Britain, the state encountered deep-rooted difficulties in intervening to reconstitute industrial relations in response to the growing crisis from the mid-1960s onwards. The British economy was fragmented and undercapitalised, and the state and representative organisations of capital and labour weak and divided. This was particularly noticeable in policy-making, where finance capital interests typically predominated over those of the various fractions of manufacturing capital.

was thus acutely political as well as economic, nowhere more so than in industrial relations, extending over two decades of attempts at both restrictive legal and ‘corporatist’ reforms.

The persistence in Britain of the voluntarist ethos, shared by many employers as well as unions, necessarily implied a more interventionist approach when it did finally arrive. ‘Welfareism’ and ‘tripartism’ had expanded state involvement in economic and social organisation, so ‘deregulation’ paradoxically required a more centrally orchestrated reconstruction of the state apparatus across a broad front, through, among other things, privatisation and a legal framework more favourable to both business and central government. As far as the construction industry was concerned, it was rarely far from the centre of economic and labour law policy, however. From 1979 onwards, construction figured prominently in the Conservative programme for privatisation and reducing public expenditure. Industrial relations in construction were an important source for the new labour law regime introduced to accompany these economic policies.

In the United States, where the tradition of voluntarism had already been more effectively qualified through the New Deal legislation of the 1930's, the development of state regulation policy, in particular where it affected industrial relations, was more clearly defined. The predominance of large-scale manufacturing capital within the state was a major reason for this, enabling this particular interest grouping to impress its more generalised anti-unionism upon the policy-making process after 1945, so as to achieve a regulation of industrial relations consistent with its own aims. This helped destroy the tradition of craft self-government and progressively made the unions more dependent upon support from the state and the law.

The traditional model of construction industrial relations was a notable survivor—but only until the state’s concern focused on the threat posed to the stability of the wider economy by the industry’s wage militancy in the early 1970s. Notwithstanding the capacity of United States unions generally to bargain very successfully from an economistic point of view within this regulatory framework, their effective subordination became manifest when United States employers were able to dominate the political and legislative agenda.42 With many of the legal restraints on union bargaining power already in place, the need for direct state intervention was limited to certain

heavily regulated sectors such as transportation and, to a lesser degree, construction. Deregulation could largely be entrusted to new personnel within the rule-making agencies themselves.

The context and timing of specific legal interventions clearly affect their impact on industrial relations. The United States construction unions established their organising methods securely even before the extensive resort by construction clients and contractors to injunctions and anti-trust law at the turn of the century. Wagner and Taft-Hartley were super-imposed on a mature system of industrial relations. Nevertheless, the sustained boom from the early 1960s and rising strike activity only served to obscure how the law influenced unions’ organising tactics and collective agreements, notably their increasing reliance on locking employers into the system of top-down organising through legally enforceable pre-hire agreements and permitted hot cargo clauses. As the economic and political forces in the United States closed off the autonomy of construction industrial relations from the early 1970s onwards, the tighter legal framework encouraged employers either to stay in or to stay outside multi-employer bargaining units. This reinforced the distinctive division between open shop and union sectors. But when this legal prop was removed with the growth of double-breasting and employers’ evasion of pre-hire agreements, and “traditional” picketing and secondary strike action were increasingly restrained by employers, successful recourse to a sympathetic NLRB, construction unions retreated in the face of the open shop assault on their heartlands, just like their counterparts in manufacturing.

In Britain, employers had far greater choice over whether to bargain with unions or not from one job to the next. In the absence of effective collective bargaining or legally enforceable collective agreements, legal tactics such as double-breasting were not needed. Labour militancy in construction had been in decline since the onset of recession in the early 1970s, so there was less need and opportunity to seek legal remedies. But the effects of recession encouraged construction employers to seek legislative restrictions on their unions’ increasingly desperate efforts to stem the loss of members and finances through labour clauses and contract compliance undertaken by sympathetic public authorities.

Lastly, the recent experience of construction industrial relations and legal policy in the two countries reveals how deregulation has contributed to the process of economic restructuring, specifically to

the reordering of industrial hierarchies and economic power in favour of large-scale capital. The different legal frameworks in Britain and the United States afforded similar opportunities to construction employers to shift the costs of competition and of increased uncertainty or variability of product demand down the chain of dependent specialist contractors and subcontractors and then onto their labour forces.