WILL A MORE INTERVENTIONIST NLRA REVIVE ORGANIZED LABOR?

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I. THE ISSUES: FLAWED ANALYSES AND POLICY RECOMMENDATIONS

Declines in union membership and in the percentage of the private-sector labor market organized by unions (density) have generated an outpouring of analyses and policy recommendations aimed at revitalizing private-sector unionism in the United States. The analyses err, however, in explaining the decline of private-sector unionism (membership and density) by blaming it on employer opposition. The resultant policy recommendations calling for a more interventionist National Labor Relations Act[1] (NLRA) in favor of organized labor, therefore, are misdirected.

A veritable cottage industry has arisen detailing the "iniquities" of employer opposition and its alleged responsibility for the decline of private-sector unionism.[2] This Article will offer an alternative analysis of why private-sector unionism has de-

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1. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1982)). Congress amended the Wagner Act in 1947. *See* Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1982)). The next major amendment to the NLRA occurred in 1959. *See* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)).

2. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises to Keep*]; Weiler, *Striking A New Balance in the American Workplace: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984); P. Weiler, The Representation Gap in the American Workplace (Aug. 1988) (unpublished manuscript) [hereinafter P. Weiler, Representation Gap]; R. Freeman, On the Divergence in Unionism Among Developed Countries (National Bureau of Economic Research Working Paper No. 2817, 1989) [hereinafter R. Freeman, Divergence]; Freeman, *Contraction and Expansion: The Divergence of Private and Public Sector Unionism in the United States*, 2 J. ECON. PERSP. 63 (1988); R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984); T. KOCHAN, H. KATZ, & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986); M. PIORE & C. SABEL, THE SECOND INDUSTRIAL DIVIDE (1984); Lipset, *North American Labor Movements: A Comparative Perspective*, in UNIONS IN TRANSITION 421 (1986); *see also Oversight Hearings on the Subject "Has Labor Law Failed?": Joint Hearings Before the Subcommittee on Labor Management Relations of the House Committee on Government Operations*, 98th Cong., 2d Sess., Part I (June 21, 25, & 26) & Part II (Oct. 3) (1984) [hereinafter *Oversight Hearings on the Subject "Has Labor Law Failed?"*].

clined and, consequently, why the proposed public policy remedies of the "employer-opposition school" are misdirected.

The main remedy prescribed by the employer-opposition school is, as its name might suggest, to curb employer practices that it believes defeat the "promises" of legal protection held out by the NLRA. The remedy focuses particularly on the protective regulation of the National Labor Relations Board's (NLRB) representation elections in previously unorganized employee units.[3] Paul Weiler and others[4] have argued that "instant elections," the principal policy recommendation for strengthening the NLRA, would go far to recoup organized labor's recent declines.[5]

In the broad context of regulation versus free markets, the NLRA was a regulatory response to what was believed to be a failure of the labor market. A half-century later, elements of that law are effectively being "repealed" by resurgent market forces (as is often the case with other government market interventions, such as the minimum wage law).[6] Based on an analysis of the decline of unionism, this Article will argue that *irrespective of amendments to the NLRA*, private-sector unionism will continue to erode. Because competition and structural changes in labor markets have such powerful effects and because these effects will be felt into the next century, there is no constitutional legislative remedy capable of reviving private-sector unionism. Its future is one of continued decline but not total disappearance.

Although the "employer-opposition school" has focused substantial attention on amending the NLRA, it has been strangely silent about the other federal policy governing private-sector labor relations in this country, the Railway Labor

3. *See* Weiler, *Promises to Keep*, *supra* note 2.

4. *See, e.g.*, *id.* at 1820-22.

5. Kochan, Katz & McKersie propose that managerial decisions to make new investments should become subject to mandatory bargaining, in other words, to introduce a form of co-determination, to get the unions' foot in the door of new plants. *See* T. KOCHAN, H. KATZ, & R. MCKERSIE, *supra* note 2. This proposal, euphemistically referred to as "strategic decisionmaking," is premised on the erroneous belief that such investments have been a major factor in the decline of unions. Not only is this proposal opposed by management, but unions in this country have historically avoided such a role.

6. Periodically, market forces (inflation) reduce real wages at any given level of nominal wages, and leads to calls to increase the minimum wage in order to restore its purchasing power. *See* Stigler, *The Economics of Minimum Wage Legislation*, 26 AM. ECON. REV. 3 (1946).

Act[7] (RLA). It seems that the school erroneously assumes that the RLA does not require their attention because it only covers a relatively small number of employees and because union penetration remains at peak levels. Because of price regulation, structural changes in labor and product markets, and public policies in labor relations (the kind that the "employer-opposition school" might well envy), railway transportation has experienced asymmetrical trends in union membership and union density. Although the industry has experienced devastating declines in employment and union membership since the end of World War II, it is currently second only to the United States Postal Service in density. The union's share of employment in the Postal Service is in the high ninety-percentile range; the figures for the railways are not far behind.[8] The implications of these data deserve consideration. They are instructive in analyzing what could lie ahead if the NLRA were to be amended to regulate the rest of the private-sector labor-management relations as comprehensively.

Employer opposition, though typically characterized as if it were some demonic force, is, of course, a dimension of competition.[9] The bottom line is that employers are simply players acting out market imperatives. The precise issue is the extent to which employer opposition is responsible for the loss of union members as distinguished from other competitive forces that thwart union organization efforts.

Public policy restricts employer opposition to the process of unionizing unorganized workers. For this reason and contrary to conventional views, the visible hand of employer opposition has had little impact either on the absolute decline in union membership or on the percentage of the labor market organized. Rather, the invisible hand of other market forces bears the major responsibility for the decline of unionism in the private sector.

7. Railway Labor Act, 45 U.S.C. §§ 151-188 (1982).

8. See L. TROY & N. SHEFLIN, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE, FINANCE, DIRECTORY 3-21, Table 3.93 (1985), and unpublished update.

9. Freeman describes managerial opposition as a "jihad for a union free environment," R. Freeman, Divergence, *supra* note 2, at 16, and as a declaration of war, *see id.* at 14.

One of these market forces is *employee* opposition to unionization,[10] and such opposition is generally ignored by the "employer-opposition school."[11] Those holding the "employer-opposition" view do not appear to regard employee opposition as a distinct, separate force affecting union organizing efforts; indeed, they do not acknowledge that it even exists. Employee opposition is apparently subsumed under the heading of employer opposition, perhaps on the assumption that workers who choose to oppose unionization would not do so if they were capable of exercising their own judgment. Nevertheless, employees, like employers, also act out economic imperatives. Employee opposition, this Article will argue, plays a far more important role in unions' inability to organize the nonunion workers than does the opposition of employers.

By the onset of the new century, as a result of continued structural change and competition, union penetration of the private-sector labor market should fall to approximately the levels prevailing at the beginning of the Twentieth Century, that is, about seven to eight percent. Put another way, if the trends in private-sector membership continue as they have since peaking in 1970, and, given the most recent employment projections to the year 2000,[12] private-sector union density can be expected to effectively slip back a century. At present, private-sector density has already tumbled to twelve percent, a level not seen since 1929.[13] Nevertheless, the private-sector union movement will not likely disappear. It could, instead, be consigned to what has been characterized as "ghetto unionism,"[14] or what Marxists might term the "dust-bin" of history.

10. The author's colleague, Neil Sheflin, first suggested this concept and phrase to the author.

11. *See, e.g.*, T. KOCHAN, H. KATZ, & R. MCKERSIE, *supra* note 2, at 79 ("The central argument of this chapter [chapter 3] is that the emergence of a large nonunion sector in the United States since 1960 was a function of a changing environment [competition], deep seated managerial values opposed to unions, and increased opportunities and incentives to avoid unions resulting from changing competitive and cost conditions.").

12. The employment projection is from the Bureau of Labor Statistics and is unpublished at this time.

13. Because they underestimated or largely ignored the impact of market forces other than employer opposition, Kochan, Katz, and McKersie forecast that private-sector unionization would be fifteen percent of the labor force by 1990. *See* T. KOCHAN, H. KATZ, & R. MCKERSIE, *supra* note 2, at 251. Within two years of the publication of their work, however, unionization had already fallen below the forecasted level. If current trends in membership continue, coupled with expected employment projections, the density rate in 1990 will be about one-half their predicted level.

14. *See* R. Freeman, Divergence, *supra* note 2.

Crucial evidence for this Article's analysis of the decline of American private-sector unionism is found in the existence of similar unionism decline across all advanced industrialized countries. Contrary to the divergence assumed by the "employer-opposition school,"[15] there is convergence among industrial nations in the decline of private-sector unionism.[16] Kerr, Dunlop, Harbison, and Myers had hypothesized that as industrialism spread, it would have a common impact on the growth of private-sector unionism.[17] A post-industrial extension of their analysis would anticipate symmetry in the decline of private-sector unionism, and this decline has happened. The causes of this decline—market forces inducing structural changes in the labor market—are common to all countries.

Additional corroboration for my analysis is found in another feature of unionism shared by all advanced industrialized countries: the growth and stability of union membership and density in the public sector. Kerr, Dunlop, Harbison, and Myers focused on the private sector, no doubt because the public sector was not yet as significant as it ultimately came to be, especially in this country. An extension of their analysis to the public sector implies that the expansion of public-sector unions across developed economies should be (and is) a common development.[18] Likewise, the explanation for the growth of public-sector unionism is also common to all countries: the *insulation* of public-sector labor markets from market forces, coupled with favorable public policy and structural changes in labor markets. Because of limited market pressures, public-sector unionism has flourished while private-sector unionism has languished. Indeed, the experience of the public-sector labor market demonstrates that while public policy can spur union growth, the essential requirement for its stability is the absence of competition.

Market conditions are not alone in setting the two sectors apart. Public policy has also distinguished between the two sectors of the labor market. Policies creating economic rights for public-sector workers in labor-management relations were al-

15. *See, e.g.*, R. Freeman, Divergence, *supra* note 2.

16. *See* J. Visser, European Trade Unions in Figures (1989); L. Troy & N. Sheflin, *supra* note 8, at 7-17.

17. C. Kerr, J. Dunlop, F. Harbison, & F. Myers, Industrialism and Industrial Man: The Problems Of Labor and Management in Economic Growth (1960).

18. *See* J. Visser, *supra* note 16.

ways independent from those addressed to the private sector. When the National Labor Relations Act was adopted in 1935,[19] government employees at all levels were exempted. Federal employees were excluded because many, including President Roosevelt, opposed giving government employees the right to organize and to strike. State and local employees were exempted because in that era few believed that these employees could constitutionally be brought under federal jurisdiction, a view that has now changed with the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[20]

A basic understanding of the relationships between the two sections of organized labor on the one hand, and the two labor markets on the other, exposes basic faults in the defective analyses of the decline of private-sector unionism and its attribution to employer opposition. Understanding the relationship of public- and private-sector labor markets and unionism will also explain why public policy changes favoring unions *can* make a difference to organized labor—but in the *public*, not the private, sector. Such an understanding will underscore how a revised public policy extending federal jurisdiction to public employment at all governmental levels—state and local as well as federal—could accelerate the transformation of unionism in this country from a predominantly private to a predominantly public-sector union movement.

A "nationalized" labor relations policy encouraging public-sector unionism would go far toward stimulating new union growth. As noted, *Garcia* makes possible the extension of congressional regulation of state and local government employees. It only awaits action by a willing Congress and President—a prospect, however, that is unlikely at this time. Even so, public-sector unionism, insulated from competition as it is, is steadily becoming a larger part of the union movement. In the absence of a "nationalized" public policy, it is the market, paradoxically, that is steadily altering the composition of unions: As market forces diminish the size of private-sector unions, public-sector unions, largely immune to market forces, are maintaining their ranks. Stability and slow growth may make public-sec-

19. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1982)).

20. 496 U.S. 528 (1985).

tor unions the dominant wing of organized labor by the next century.

The outcome of these changes are bound to make major differences to the private and public-sector economies, their employees, institutions, and the public at large. They will radically alter the character, philosophy, and policies of the union movement. In effect, the historically dominant axis of unions and companies in the private sector will give way to a new axis of industrial relations power: public management and public-sector unions. These changes will transform the functions and philosophies behind union activity.

Such shifts have already taken place abroad. Union movements in Canada, France, the Netherlands, and Britain[21] have already made the transition from a private to a publicly dominated union movement. What unions do in these environments, and the effects of their actions on the markets, will be instructive for countries such as the United States that lag in the evolution from private- to public-sector dominance. The United States lags because private-sector employment and output account for significantly greater amounts of the total economic output than in other advanced capitalist nations and because public policy fostering unionism in the public sector remains divided among the three levels of government.

Particular attention should be paid to Canadian unionism, both private and public, because that country has been repeatedly cited by the "employer-opposition school" as conclusive evidence for its analysis, and as the exemplar of what public policy should be in the United States.[22] Their reasoning has been that the Canadian and Western European countries' labor markets have undergone the same structural changes as the United States, but in contrast to the United States, the union movements in these other countries have prospered. Because proponents of this view reject the conclusion that structural change in labor markets is the cause of union decline, they reason that employer opposition must be responsible for this phenomenon. An alternative explanation, offered by this Article,

21. *See* Visser, *Trade Unionism in Western Europe: Present Situation and Prospects*, in TRADE UNIONS IN INDUSTRIALIZED MARKET ECONOMIES: PRESENT SITUATION AND PROSPECTS (1988) (special issue of LABOUR & SOCIETY), *reprinted in* J. VISSER, *supra* note 16; J. VISSER, *supra* note 16; Letter from N. Millward, U.K. Department of Employment, to L. Troy (Sept. 15, 1989) (on file at *Harvard Journal of Law & Public Policy*).

22. *See, e.g.*, Weiler, *Promises to Keep*, *supra* note 2, at 1816-19.

will show that statistical evidence contradicts the claim that all advanced industrial nations have "essentially"[23] the same labor market structure. Differences between the United States and all other countries in the *composition* of their labor markets as well as in the *timing* of their labor market changes explain why the United States is a leader in the decline of private-sector unionism. The downward trend of private unionism in the United States, however, is hardly unique among advanced industrial countries.

II. Testing Employer Opposition

This Article will evaluate the employer-opposition school's explanation of the decline of unionism by examining four aspects of union decline: (1) the "membership deficit" of the 1970-1989 period; (2) employee opposition; (3) the experience of Canada; and (4) trends in unionism in Western Europe.

A. *The "Membership Deficit"*

A prerequisite to examining the "membership deficit" is to clarify the term. Private-sector unions' "membership deficit" is simply the loss of members from their all-time peak to current levels. For purposes of assessing the effect of "employer opposition," the author shall estimate the extent to which employer opposition can account for the deficit.

Since the Supreme Court upheld the constitutionality of the NLRA in April 1937,[24] employers have been forbidden from reducing union membership by ejecting unions as the bargaining agents of their employees. Prior to the Act, in the 1920s for example, employers rolled back many of the gains unions had won during World War I and in the immediate post-war era that preceded the severe cyclical downturn of 1921-1922. In doing so, employers were reacting in opposition to the significant union gains of this era made under the auspices of government policies, particularly in the areas of coal mining and railway transportation. The decline of the 1920s should be distinguished from the present day, however, because market forces other than employer opposition are currently responsible for the losses of union membership.

23. This is the word typically used by members of the employer-opposition school. *See, e.g.*, R. Freeman, Divergence, *supra* note 2.

24. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Under contemporary public policy, employer opposition to unions must be limited to opposing the organization of previously nonunion workers. Thus, the argument of the employer-opposition school must be understood to mean that employer opposition has prevented the replacement through new organization of membership eroded by other market forces. This understanding of the meaning of employer opposition leaves the school of that name with the problem of explaining why unions were so successful in organizing the unorganized during the 1930s and 1940s, during the fiercest employer opposition of the century, and why they have been so singularly unsuccessful in recent years. Indeed, a whole new federation, the Congress of Industrial Organizations (CIO), was formed in those times of intense opposition. Moreover, the manufacturing industry, historically impervious to unionization, became extensively organized at that time. Obviously, something new and extraordinary has happened since those early developments. What has occurred, essentially, is a change in the environment. Among the new elements are radical changes in the nature of work and the appearance of *employee* opposition to unionization, a concept ignored by the "employer-opposition school."

Employer activities aimed at preventing the unionization of employees are circumscribed by legal requirements imposed by the NLRA and enforced by the NLRB and the courts. A considerable literature has arisen contending that employers circumvent these rules,[25] and while much of this literature is debatable on its own terms,[26] the "membership deficit" and other data will show conclusively that employer opposition is "essentially" irrelevant as a factor in the decline of American private-sector unionism.

Although employers cannot directly strip unions of their bargaining status, they can challenge a union's majority status. To do so, however, an employer must demonstrate a good faith doubt as to the union's majority status. Elections resulting from such a challenge are few in number and affect small numbers of employees.[27] Alternatively, although employers cannot act directly to decertify a union, *employees can*. They have done

25. *See* sources cited *supra* note 2.

26. *See* E. Miller, Paul Weiler's Funny Figures, Remarks at the American Bar Association Annual Meeting (Aug. 9, 1988).

27. *See* NLRB ANN. REP. Table 14, D (1970 through 1985).

so at an increasing rate, as the NLRB's statistics on decertifications indicate. Although the numbers of employees and elections are small, their rising number demonstrates a trend toward employee opposition to unions and a preference for individual representation amongst organized workers.

Since the Taft-Hartley Act amended the NLRA in 1947,[28] employees represented by unions have been able to petition to decertify their bargaining representative, a right unavailable to them under the original Act. Indeed, under the original Wagner Act, once employees chose a bargaining agent, they were for all practical purposes prevented from returning to individual representation. The chances of such occurring were extremely remote; if the bargaining rights of an incumbent union were challenged by one or more other unions, and a majority of the votes cast were for "no union," only then could employees reject organized representation. Whether any such *de facto* decertifications ever occurred under the Wagner Act is apparently unknown.

Under the original Wagner Act, employers could not file a petition for decertification, and any overt moves to eject a union would constitute an unfair labor practice. Since the Taft-Hartley Act amended the original NLRA, however, employers have been able to replace workers during an economic dispute. In some instances, these disputes have culminated in employee-filed decertification petitions as allowed under the Taft-Hartley Act.[29] This complicated process of decertification cannot be described as a quantitatively major path contributing to the loss of union membership. From 1970 (when private-sector union membership peaked) to 1988, the total number of employees eligible to vote in elections in which unions were ousted was 351,000.[30] In addition to strike replacements and decertifications, unions lose membership from natural attrition—for example, when plants close—and the unions always must be organizing new employees to avoid decreases in the number of members.

As noted above, private-sector unions' "membership deficit"

28. *See* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1982)).

29. *See* 29 U.S.C. § 159(c) (1982). For the Supreme Court's initial affirmance of permanent replacements, see National Labor Relations Bd. v. MacKaay Radio & Telegraph Co., 304 U.S. 333 (1938).

30. *See* NLRB ANN. REP. Table 14, D (1970 through 1985).

is the difference between their all-time peak and the current membership. For purposes of assessing the effect of "employer opposition" on this deficit, the author shall estimate the extent to which that opposition accounts for the deficit. Currently, the deficit is 6.5 million members, the difference between their all-time peak in 1970 of 16,978,000 members and their 1989 level of 10,520,000 members.[31]

The "employer opposition" school, of course, attributes most of this deficit to employers' ability to defeat unions in NLRB representation elections. But is this so? If we calculate the number of all employees eligible to vote in elections that unions *lost* in previously unorganized units from 1970 to 1988, the total is 4.4 million. The relevant question is, what proportion of all these nonunion workers would have become union members were it not for employer opposition?

One approximation is suggested by the Getman, Goldberg, and Herman study of thirty-one "hotly contested campaigns" in 1972 and 1973. Their finding—virtually zero impact. In Professor Weiler's words, they "concluded that even the most egregious of employer tactics had no discernible impact on the results on the NLRB representation elections."[32] Getman, Goldberg, and Herman found that the outcomes were predictable from the pre-campaign attitudes of the voters in twenty-nine of the thirty-one elections studied. Subsequently, as Professor Weiler reported, Williams Dickens challenged these findings. Using "the Getman study's background information about plant settings and employer attitudes to run computer simulations of each of the thirty-one elections," Dickens concluded "that unions would have won forty-six to forty-seven percent of the elections if the employer had campaigned entirely cleanly" instead of the twenty-four percent they actually won."[33] Dickens also estimated probable union wins of fifty-three to seventy-five percent (a rather wide range) if there were no employer campaigns, and he estimated wins of three to ten percent if employers relied entirely on the illegal practices identified in the Getman sample.[34] The author of this Article

31. *See* L. TROY & N. SHEFLIN, *supra* note 8, at A-1, 2 (private-sector membership for 1970); Bureau of Labor Statistics, Press Release, United States Dept. of Labor: 90-59 (Feb. 7, 1990) [hereinafter BLS Press Release] (private-sector membership for 1989).

32. Weiler, *Promises to Keep*, *supra* note 2, at 1782.

33. *Id.* at 1785-86.

34. *See id.* at 1786.

declines to rely on both of these latter alternatives because they are unrealistic: Employers have a legal right to campaign against unionization using legal tactics. Even during the years of the best union showings, unions seldom came close to the seventy-five percent win rate; nor did unions ever lose ninety to ninety-seven percent of elections in the history of the NLRA. It is also worth remembering that during the Carter presidency, presumably a period when the Board was in hands of members more favorable to organized labor, unions were declining in membership and had already begun to lose a majority of NLRB elections.

In the Getman study, unions won one-forth of the elections, so the marginal difference between Dickens' simulation of a "clean employer" campaign and what actually transpired was twenty-two percent. In other words, in the simulation, the union win rate would increase from twenty-four percent to forty-six percent. Because the purpose of the Getman study was to examine the impact of employer campaigns against unions, the elections examined could not be representative of the general population, but were actually a biased sample. In fact, in 1972 and 1973, the period of the Getman study, unions won 55.6% and 52.8%, respectively, of elections in previously unorganized units. Between 1970 and 1988, unions won on average more than one-half (50.4%) of elections in previously unorganized units, double the original rate from elections considered in Getman's study and more than the Dickens estimate.

How much of an impact does all this have on the "employer opposition" school's contention that employers are principally responsible for private-sector union decline in this country? As we shall see, very little. To assess that impact, the author shall use the Dickens estimate of the additional union victories in elections unions might have won in the Getman study under the Weiler and Dickens condition that the employer campaign be "clean." Let us assume that the margin is characteristic of all NLRB elections, *even though Dickens's simulated results were produced from data drawn from "hotly contested elections,"* that is, elections in which employer opposition was out of the ordinary. To say the least, that is a generous assumption because it is questionable that a small, selective sample of thirty-one elections should apply to the more than 57,000 elections which unions lost between 1970 and 1988.

Despite the caveats, let us apply Dickens's incremental figure of twenty-two percent to employees eligible to vote in elections which unions *lost* from 1970 to 1988. The purpose of the procedure is to translate elections into potential union members that unions might have won under the Weiler and Dickens concept of "clean" employer practices in an election campaign. In the period from 1970 to 1988 there were 4,422,828 employees *eligible to vote in elections that unions lost.*[35] Thus, the Weiler and Dickens clean campaign model would imply that fewer than one million more of those employees eligible to become union members (973,022) would have found themselves represented by unions. This constitutes about fifteen percent of the membership deficit of 6.3 million (1970 to 1988). Thus, granting the "employer opposition school" the level playing field they claim does not exist, the quantitative effect of employer opposition to organizing the unorganized is at most fractional.

Since the Taft-Hartley amendments of 1947, employer participation in representation elections has been legal, provided the company's communications to its employees are devoid of threats or promises of reward.[36] Despite this fact, the term "employer opposition" has taken on a pejorative meaning implying that *all* employer opposition is illegal. In no small part, this accomplishment can be attributed to its frequent use as a "catchword" to describe any hypothesized evils committed by employers towards unions. Significantly, Paul Weiler has stated that "[m]ost employers still do fight within the legal rules of the contest" and that "our national labor law still states that employees can have union representation and collective bargaining if they want it . . . [b]ut they must *really* want the benefits of that institution . . . ."[37]

B. Employee Opposition

Although the author does not know how Professor Weiler knows that "most employers still do fight within the legal rules of the contest," that conclusion is certainly consistent with my contention that the basic reason unorganized workers reject collective bargaining is their opposition to collective representation, "employee opposition." Nevertheless, by adding that

35. *See* NLRB ANN. REP. Table 13, B (1970 through 1988).
36. *See* 29 U.S.C. § 158(c) (1982).
37. P. Weiler, Representation Gap, *supra* note 2, at 7 (emphasis in the original).

employees must *really* want collective bargaining, Weiler adds yet another dimension to the "employer opposition" school's misdirected analysis, namely, the general "chilling effect" of employers' known opposition to unionization. Is there evidence that this "chilling effect" is a significant factor? The evidence is to the contrary.

Several surveys of the unorganized workers' rejection of unionism illuminate this issue. One of the latest surveys is that of the *Washington Post*. The survey was conducted in September 1986 and published one year later. It reported that seventy-five percent of nonunion workers would reject union representation in a secret ballot election (exactly the type conducted by the NLRB).[38] Probably the most significant of these surveys is the Lou Harris Associates' survey among private-sector employees, conducted in November 1984. It was conducted for the AFL-CIO in connection with the Federation's self-study for the purpose of obtaining analyses and recommendations for overcoming its deteriorating position with private-sector employees. The Harris report provided extensive detail describing the decline as well as reasons for its occurrence. Sixty-five percent of the nonunion workers polled said that they would not vote for a union in a secret ballot election.[39] A similar survey of private-sector wage and salaried workers conducted by the Institute for Social Research of the University of Michigan in 1977 found that sixty-seven percent of the nonunion workers polled would not vote for a union in a secret ballot election.[40]

The employer opposition school surely cannot claim these survey results are tainted by the chilling effect of employer opposition. For one thing, the pollsters never mention in their queries of unorganized workers that their preferences can be registered in secret government (NLRB) elections. One example of the question pollsters ask of the unorganized worker is: "If an election were held tomorrow to decide whether your workplace should be unionized or not, do you think you would definitely vote for a union, probably vote for a union, probably vote against a union, or definitely vote against a union."[41] Because the NLRB conducts all of its elections by secret ballot,

38. *See* Wash. Post, Sept. 13, 1987, at H1, col. 1.

39. *See* Louis Harris and Associates, Inc., A Study on the Outlook for Trade Union Organizing 63 (Nov. 1984) [hereinafter Harris Survey].

40. *See* J.L. MEDOFF, THE PUBLIC'S IMAGE OF LABOR AND LABOR'S RESPONSE (1984).

41. Harris Survey, *supra* note 39, at 63.

this prompts the question of why none of the pollsters communicated this information to their interviewees. The failure of the surveys to mention NLRB elections and their secrecy in ascertaining nonunion workers' decisions could be interpreted by the workers polled to mean that such elections were only hypothetical. An unintended effect, perhaps, is that the absence of any reference to the NLRB by private pollsters casts even more cold water on any possible claims by the employer-opposition school of the chilling effect on the unorganized workers. Even more telling are the reasons unorganized workers have given for rejecting collective bargaining, among which fear of the employer ranks near the bottom.[42]

The Harris and Michigan surveys also provided detailed demographic breakdowns. Of significance in both surveys was the discovery that nonunion workers' rejection of unions cut across all regions of the United States, both sexes, and all age groups. Additionally, the Michigan survey reported nonunion workers' preferences in all the major industry groups. It reported that even among blue collar employees in manufacturing (fifty-four percent) and construction (seventy-six percent), nonunion workers said they would not vote for a union (or employee association) in their workplace. This finding is particularly interesting because these two industries combined form the industrial heartland of private-sector unionism.

Occupational breakdowns in the Harris survey complement the industrial findings of the Michigan survey. By occupation, skilled workers, the backbone of the old American Federation of Labor (AFL), matched the average rejection rate (sixty-five percent) of nonunion workers, and a majority of unskilled workers (fifty-three percent) also said no to unions. Traditionally, many of these unskilled workers constituted the backbone of the old CIO.

In the Harris poll, the only groups in which a majority declared themselves in favor of union representation were service workers, blacks, and Hispanics, groups that probably overlap. This finding was consistent with that of the Michigan survey, in which sixty-nine percent of nonwhite workers said that they would vote for union representation. Between the Michigan (1977) and the Harris (1984) surveys, however, support for un-

42. *See* Harris Survey, *supra* note 39, at 65.

ions did ebb substantially even among minorities. Harris reported that fifty-four percent of blacks and fifty-one percent of Hispanics would vote in favor of a union, in contrast to the previous average of sixty-nine percent for both groups. Harris also found that the percentage of rejection of unions from income classes $15,001 and higher rose, climbing from sixty-seven percent to eighty-two percent. The only income group to express majority support for unions (fifty-seven percent) were those whose annual income was $15,000 or lower.

While a majority of the groups from which unions have historically drawn their strength have turned away from unions, the growth occupations most identified with the "information age," or post-industrial labor market are also rejecting union representation by decisive proportions. Paradoxically, the demand for union representation comes only from those groups from which the union movement has historically drawn little membership or for whom unions have traditionally expended little effort to organize. In contemporary parlance, there is an historical disconnect between union organization and those workers who show the most interest in union representation. Meanwhile, there is little demand for union representation among the professional, technical, and clerical occupations that will dominate the work force in the future. Harris reported that these groups rejected unions by higher than average percentages (between sixty-two percent and seventy-nine percent). Part-time workers, a growing factor in the labor market, rejected union representation at a rate below average (fifty-four percent), but full time workers raised the overall average to sixty-five percent.

Henry Farber combined the Harris and Michigan surveys with two other longitudinal studies and concluded that virtually "all of the decline [in the demand for union representation among nonunion workers] can be accounted for by the increase in the nonunion workers' (job) satisfaction and decrease in perceptions of union instrumentality."[43] Moreover, his findings were consistent with those above that the increasing demand for individual representation cuts across virtually the entire labor market.

Analysts of the "employer-opposition school" have managed

43. H. FARBER, TRENDS IN WORKER DEMAND FOR UNION REPRESENTATION 9 (National Bureau of Economic Research Working Paper No. 2857, Feb. 1989).

to perceive a silver lining in these surveys.[44] They were encouraged by the gap between the percentage of nonunion workers who said they would vote for union representation (33%) and the percentage of private-sector workers who were actually in unions (22%) in 1977. Even though only a minority of all workers wanted union representation, the percentage of those who did greatly exceeded the actual levels of density in the private sector. The analysts thought that the finding might indicate that the potential existed to increase union membership by two to two-and-one-half fold. Union organizers, however, confront a different world, the real one, rather than that of academic speculation. Although the NLRB requires only a thirty percent showing of interest by workers to invoke the election procedure, union organizers rarely petition for an election with such a small showing. Thus, to treat the gap between potential and actual density as real is chimerical.

The survey findings that nonunion workers prefer individual representation raise the question of why employer opposition is so ineffective in NLRB elections. Over the period 1970-1988, unions won 50.4% of all elections in previously unorganized units at the same time that survey results showed a rising trend favoring individual representation. The answer for the discrepancy lies in part in the unions' selection of elections that they are most likely to win. This indicates that a showing of interest in an NLRB representation election must go considerably beyond the thirty-percent minimum requirement. Another reason, I submit, is that the effectiveness of employer opposition is over-rated.

Over the period 1970-1988, nonunion workers did vote for individual representation in a pattern consistent with the Harris and Michigan indicators. The average percentage of *votes* by nonunion workers in previously unorganized units for individual representation over these years was 64.9%. The close proximity of this percentage to the survey findings reinforces the conclusion that *employee* opposition is, quantitatively, a more significant factor in the decline of private-sector unionism than *employer* opposition.

Why then are nonunion workers rejecting union representation and in such large numbers? The Harris survey considered

44. *See, e.g.*, Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV. 23 (Apr. 1979).

this question in considerable detail.[45] Of the twenty reasons given by nonunion workers, fear of the employer or fear that the company would go out of business and the worker would lose his job if the establishment became unionized ranked as the least significant. In addition, almost two-thirds of the sixty-five percent of nonunion workers who would vote against union representation said that they did not expect their employer to retaliate if a group within the company attempted to form a union. The *Washington Post* survey similarly reported that sixty-two percent of nonunion workers indicated that they did not believe that they would be fired if their employer knew they supported forming a union.[46]

The two primary reasons given by nonunion workers for rejecting unions were that they did not need unions or that unions did not make sense for their jobs. The Harris survey found that nonunion workers were more satisfied than union workers in their jobs with respect to such important aspects as job and employment security, recognition of work performance, and participation in decisions that would affect their jobs.[47] It is useful to distinguish between job and employment security: Job security refers to protection against arbitrary discharge; employment security refers to protection against lay off. The Harris poll does not distinguish between the two, but the nonunion workers surveyed were likely responding as much to the latter as to the former connotation of the term "job security."

Because of the nonunion workers' attitudes revealed in its survey, Harris reported to the AFL-CIO that for the nonunion worker, "[s]imply put, the union route is an irrelevant way to solve their work problems." The report went on to comment that "[t]hese results could be viewed as devastating for the prospects of organizing unorganized workers in the United States. To be considered irrelevant is the crowning insult for an honorable institution that has written many proud and significant chapters in American history and in industrial progress."[48] Despite the fact that the Harris organization began its report to the AFL-CIO with comments concerning the anti-union attitudes of employers, it did not propose any legislative efforts to

45. *See* Harris Survey, *supra* note 39, at 65.
46. *See* Washington Post, *supra* note 38.
47. *See* Harris Survey, *supra* note 39, at 65.
48. *Id.* at 29-30.

revitalize the union movement based on its findings. Rather, it put faith in the expectation that in an open society and free economy such as ours, all types of employees would desire some form of representation to resolve work related problems. It was a faith wholly contradicted by its own empirical findings.

C. The Canadian Experience

The third test of the validity of the "employer-opposition school's" argument involves a comparison of the Canadian and American experiences. Paul Weiler has asked, "In attempting to diagnose and prescribe a cure for the ailments of the American regime, to what extent can we draw on the Canadian experience?"[49] In answering his own question, he wrote:

> Lessons from Canada are far more likely to be instructive than are studies of procedures used [in other countries] . . . . Not only do Canada and the United States share essentially a single geographic and economic environment, but they also have a remarkably similar industrial relations system. . . . [The] same "international" trade unions that operate in the United States also negotiate with Canadian employers—many of whom are subsidiaries of American firms—to reach collective bargaining agreements.[50]

Thus, he proposed three tests for use in the comparison of the Canadian and the United States experiences. First, are the results of the two "certification systems" strikingly different? Second, are the same international unions faring differently in each country? And third, do the two countries really share essentially the same economic environment? The analysis of this Article indicates that the correct answer to all three of these questions is no.

1. *Results of the Two Certification Systems*

Professor Weiler and others have pointed to divergences between overall density rates (private and public combined) in the United States and Canada as evidence of the strikingly different results of the two countries' "certification systems."[51] Overall density in Canada began to move above that of the United States about 1955 after remaining below the American

49. Weiler, *Promises to Keep*, *supra* note 2, at 1819.
50. *Id.*
51. *See id.*

figure for twenty years. The gap between the two countries has steadily widened through 1980, the last year on which Professor Weiler apparently had data. Much of the surge in Canadian density, he acknowledged, came from the growth of public-sector unionism. Because public-sector unionism also grew in the United States from the 1960s through 1980, however, he concluded that the growth of Canadian public-sector unionism "cannot explain the divergent trends in overall density in the two countries."[52] In other words, Professor Weiler attributed the divergence of overall density between the two countries to the continued rise of private-sector unionism in Canada and its corresponding decline in the United States.

Data that the author has presented elsewhere[53] contradict Professor Weiler's conclusions on two counts. First, public-sector unionism in Canada represents a significantly larger share of total union membership than it does in the United States. Its continual growth *is*, therefore, responsible for the divergence in overall trends in density. Second, contrary to Professor Weiler's conclusion, and that of a host of other academics tilling the field,[54] *private-sector union membership and density in Canada have both declined between 1975 and 1985*. Thus, the Canadian "certification model" has not yielded different, but rather the same results as that of the American. The Canadian model, too, has fallen victim to the same "ailments as the American regime," namely, structural change and competition.

These findings have important public policy consequences. The Canadian model, a model subject to far more regulation than the American, has succumbed to the same erosion in unionism, and for the same market reasons. The timing and the extent of that erosion have lagged the United States mainly because of structural differences between the two labor markets, including Canada's delay in switching from a goods to a service-dominated labor market (the post-industrial market), especially measured by private services, and Canada's relatively larger public-sector (goods and services) labor market. In addition, Canadian trade practices and the country's more regulated "certification system" have contributed to the lag and to

52. *Id.* at 1818 n.171.

53. *See* Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?*, 11 J. LAB. RES. 111 (1990).

54. *See generally* sources cited *supra* note 2.

the slope of the decline of its private-sector membership and density. Nevertheless, despite the protective wall surrounding the Canadian industrial relations system, its private sector is steadily succumbing to the impact of market forces. In the 1990s, when the free trade agreement between Canada and the United States becomes fully operational, this decline will accelerate. The current decline of Canadian private-sector unionism will prove to be the forerunner of greater losses in the future.

Consequently, on purely analytical grounds, to demand that the Canadian certification model be applied to cure the ailments of the American system of industrial relations is a misdiagnosis of causes and mis-application of remedies. Before getting to the details of the underlying facts on Canadian union membership and density, it should first be explained why Professor Weiler and others have gone awry. There are no official or privately developed statistics on the breakdown between public and private-sector unionism in Canada.[55] My data for 1975 through 1985 is the first of its kind; I engaged in the enterprise of data development to test the claims that the United States is unique in the decline of private-sector unionism. Based on my findings, I have concluded that it is not. The only country for which there does exist a continuous series of data on public and private-sector unionism is the United States. My colleague Neil Sheflin and I have developed data for the United States covering the period from 1897 to 1983,[56] and we are now completing an update to 1989.

Because of the absence of such data for Canada, Professor Weiler and others have inappropriately used the *average* density of public and private-sector unions to erroneously infer that private-sector unionism flourished in Canada but declined in the United States. Richard Freeman made the same faulty inference when comparing the United States with Western European countries and Canada. He declared that these "crude indicators [average densities] . . . clearly contradict the notion that the decline in union density in the United States is part of a

55. Official Canadian membership statistics are a variable yardstick of trade union developments in that country. They are obtained from self-reports of unions and are not subject to any verification. Space does not afford me the opportunity here to examine this issue in detail. Readers are invited to communicate with me for details.

56. *See* L. TROY & N. SHEFLIN, *supra* note 8.

general collapse of unions in the developed world . . . ."[57] The problem with Professor Freeman's analysis is less that "crude indicators" can "clearly contradict," than the fact that he demands drastic policy changes in American labor law based on a conclusion drawn from such flawed data. For anyone to overturn his "findings," he wrote, "a persuasive explanation of the decline in union density in the United States should also explain why density did not decline in Canada in the same period [1970 to 1985]."[58] As already indicated, Canadian density did decline.

Professors Weiler and Freeman have not been alone in this incorrect assessment of the divergence of private-sector unionism between the United States on the one hand and Canada and Western Europe on the other. The same view has echoed throughout academia. Professors Chaisson and Rose have declared that the American and Canadian union movements "are moving in opposite directions," with American unions experiencing "stagnation and decline," while Canadian unions are enjoying "robust membership growth."[59] Professor Kumar wrote, "[i]n sharp contrast to the United States, the Canadian labor movement has been vibrant, showing remarkable resiliency in the face of a vastly altered economic and labor market environment of the 1980s."[60] Professors Huxley, Kettler, and Struthers reproduced Professor Weiler's chart that purported to demonstrate the divergence between the fortunes of private-sector organized labor in the United States and Canada[61] in their essay, "Is Canada's Experience 'Especially Instructive'?"[62] Predictably, these authors arrived at the same conclusions as those reached by Professor Weiler. Clearly, the myth that private-sector unionism prospered in Canada while it floundered in the United States has triumphed over reality.

57. Freeman, *Contraction and Expansion: The Divergence of Private and Public Sector Unionism in the United States*, 2 J. ECON. PERSP. 63, 68-69 (1988).

58. *Id.* at 69.

59. G. CHAISSON & J. ROSE, CONTINENTAL DIVIDE: THE DIRECTION AND FATE OF NORTH AMERICAN UNIONS 3 (McMaster University, Faculty of Business, Working Paper, No. 309, 1988); *see also* W. DICKENS & J. LEONARD, STRUCTURAL CHANGES IN UNIONIZATION, 1973-1981 (National Bureau of Economic Research, Working Paper No. 1882, 1986).

60. P. KUMAR, ORGANIZED LABOR IN CANADA AND THE UNITED STATES: SIMILARITIES AND DIFFERENCES 1 (Queen's Papers in Industrial Relations, 1987-11).

61. *See* Weiler, *Promises to Keep*, *supra* note 2, at 1818.

62. Huxley, Kettler, & Struthers, *Is Canada's Experience 'Especially Instructive'?*, in UNIONS IN TRANSITION 113, 113-120 (S.M. Lipset ed. 1988).

This myth apparently had a more decisive influence on the AFL-CIO's analysis of its declining strength than did the data produced by the Harris report. It provided the Federation the opportunity to use employer opposition as a substitute explanation of the union's central problem and offered revision of public policy as the cure. The Federation found

> the Canadian experience . . . instructive [because] Canada has roughly the same type of economy, many similar employers, and has undergone the same changes [as] the United States. But in Canada . . . the percentage of the civilian labor force that is organized increased . . . at the same time that the percentage of organized workers declined in the United States . . . .[63]

Underlying the employer-opposition school's error on the cause of the decline of private-sector unionism was the erroneous assumption that all advanced industrial nations had developed essentially the same labor market. On the strength of that assumption, the school's adherents concluded that the unions' decline was not only unique to the United States, but also uniquely the result of another factor—employer opposition.[64] Professor Lipset asserted that because "comparable shifts [in structure] have been occurring in the rest of the developed world, the consequences for unions [everywhere] should be similar."[65] He concluded that the consequences were not similar, and that only the United States had experienced a decline of its private-sector union movement.

Thus, there are two factual issues that require clarification to demonstrate that the employer-opposition school was wrong in its analysis and in its suggested remedy of augmenting the regulatory power of the NLRA. First, has private-sector unionism declined in Canada (and Western Europe) as well as in the United States? Second, have Canada (and Western Europe) experienced essentially the same structural change in labor markets as the United States? The answer is "yes" to the first, and "no" to the second question. The decline of private-sector unionism (membership and density) has befallen all developed countries for market reasons common to all, but the structure of the various markets (especially the relative size of the public

63. AFL-CIO, THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS 15 (1985).
64. *See generally* sources cited *supra* note 2.
65. Lipset, *supra* note 2, at 422.

and private-sectors) has caused the decline to occur at different rates among the countries. Increased regulation of industrial relations, therefore, will be insufficient to contain the market forces that are eroding private-sector unionism in this country and elsewhere.

Contrary to the common preconception, from 1975 to 1985, private-sector density in Canada shrunk by nearly one-fifth from 25.7% to 20.7%.[66] This decline occurred both in the areas of private goods and private services. In goods, the decline was fairly sharp, from 44% to 38%; in private services it was more modest, decreasing from 6.5% to 6.3%.[67] Thus, the decline of private-sector density encompassed the whole of the private-sector labor market, albeit at different rates.

Although density fell sharply in the private labor market, the decline in membership between 1975 and 1985 was less pronounced. Over the decade, it shrunk only 3.5%, from 1,550,000 in 1975 to 1,496,000 in 1985. The modest decline was the result of offsetting membership changes in goods and services as well as the impact of my methodology. Membership fell by 116,000 in goods and rose 62,000 in services. My methods probably underestimated the decline because key unions in or mostly in the private sector show sharper declines in that area than the industrial aggregates used.[68]

Even though the decline of private-sector membership and density may be underestimated, the difference in the rates of decline between membership and density in Canadian labor organization highlights another parallel to the United States experience. The more rapid decline of private-sector density as

66. Troy, *supra* note 53, at 126.

67. Meltz reported a decline in private services density, from 1968 to 1986, from 8.8% to 7.9%. These were unadjusted for the public component of private services in Trade and FIRE (finance, insurance, and real estate sectors), however, and this would have reduced the levels and probably sharpened the decline. He also reported statistics from Canada's Labor Market Activity Surveys (LMAS) for 1984 and 1986, showing a gain in private services from 10.6% to 10.7%. In addition to the absence of any adjustments for Trade and FIRE, the LMAS's survey in 1984 was for a single month while that for 1986 was an annual average. If Meltz's special tabulations compared the comparable months, the result is, again, just a single month's figure. Moreover, Meltz does not report the comparability of the sampling errors, 1984 and 1986. *See* N. Meltz, Unionism In The Private Service Sector: A Canada-U.S. Comparison (1989) (unpublished manuscript).

68. Readers are invited to contact me for my sources and methods. Briefly, my sources were the union membership figures by unions under the Canadian Corporation and Labour Returns Act, identified by industry. I adjusted these between public and private sectors using data from ECONOMIC COUNCIL OF CANADA, MINDING THE PUBLIC'S BUSINESS (1986).

compared to membership demonstrates that nonunion employment grew so rapidly in Canada that it drove density down by nearly one-fifth. In other words, union density fell in Canada's private sector more because of the growth in nonunion employment than because of the decline in membership. Parallel trends affecting private density took place in the United States, albeit sooner and on a larger scale because of the more rapid growth of nonunion employment and an earlier and greater decline in union membership.

It is evident that the "certification model" in the United States and that employed in Canada do not differ in results. On the contrary, they have experienced parallel results. The Canadian experience, therefore, cannot and should not serve as the basis for reforming American labor law to revive the faltering American private-sector union movement.

2. The International Unions

Parallel results also emerge when the records of international unions operating in both Canada and the United States are compared. During the 1980s, when private-sector unions experienced one of their most severe drops in membership in United States history, the membership of international unions fell sharply in both countries. Between 1980 and 1985, the membership of these unions fell by eighteen percent in the United States, while in Canada the same unions lost twelve percent of their membership.[69] The sharper decline in the United States was predictable, of course, because of the American labor market's lead in structural change and its greater susceptibility to international competition.

Another measure of the severity of private-sector membership loss in Canada is the international unions' share of total membership. In 1980, these internationals accounted for 1,313,000 members (forty-three percent of total Canadian membership), but by 1985 their membership had declined to 1,158,000 members (thirty-four percent of total Canadian membership). One reason for the drop in the internationals' relative share of total Canadian membership was the continuing expansion of public-sector membership, a membership that

69. *See* Troy, *supra* note 53, at 130, Table 6.

is overwhelmingly national.[70] In contrast, most international union members are from the private sector.

As in the United States, the losses of Canadian private-sector union membership and density have led to the disappearance of a large number of local unions. In fact, the number of local unions that disappeared in Canada is similar to the American experience during the 1980s. While 17.6% of the local unions affiliated with these internationals vanished in the United States, 13.7% of the locals affiliated with the same unions disappeared in Canada.[71] This index of union penetration is telling evidence that the erosion of private-sector unionism in Canada is as deep-seated and pervasive as in the United States. Thus, contrary to the divergence theory, the international unions are not faring differently in the two countries. Here too there is convergence, not divergence, of the transnational experience.

Not surprisingly, therefore, Canada and the United States are also alike in the decline of the industrial centers of unionism: manufacturing and construction. Between 1975 and 1985, union membership in Canadian manufacturing, almost all of which is private-sector, plunged nearly 20%, while employment fell only 4.3%. This drop implies the same thing as in the United States: Nonunion manufacturing employment has risen. It also implies at least a nascent if not well established degree of employer opposition to unions in the private sector in Canada. As companies open new installations, particularly in the high-tech industries, they are doing so in a nonunion environment. A similar pattern emerges in Canadian construction. Over the same decade, membership in the construction industry declined twenty-two percent while employment declined by less than eight percent. As with the manufacturing data, this statistic demonstrates that nonunion employment has increased.

Shortly after completing these analyses, the author of this Article obtained membership and employment data for Canadian manufacturing and construction in 1986. Although they showed gains in membership and losses in employment in manufacturing, thereby raising density, the figure of 37.8% still falls well below the 1975 density of 45.4%. In construction,

70. *See id.* at 132.
71. *See id.*

both membership and employment increased above 1985 levels, but again the density fell below the 1975 figure.[72] It is also important to note that the 1986 data reflect data self-reported by the unions that are not subject to independent verification. Thus the reliability may be suspect. In the United States, in contrast, such data are derived from financial reports of unions[73] or from census surveys published by the Bureau of Labor Statistics.

3. *The Economic Environment of the Labor Market: The Public Sector*

Professor Weiler, along with others, has contended that the economic environment, notably the labor markets, of the United States and Canada are the same.[74] But, they are not. Canada's labor markets differ from those in the United States primarily in the size of the public sector. A problem in recognizing this confronts the researcher because Canadian data do not distinguish public- from private-sector employment. In Canada, the data combines public with private employment in many industries. Output, not ownership, organizes Canadian industrial classifications.[75]

Using available Canadian data on the extent of employment in government-owned enterprises across industries in Canada, the author recast Canadian employment in goods and services to approximate the public-private breakdown in the United States.[76] By way of illustration, education and health and welfare services, two industries funded primarily out of public monies, were reclassified by moving them from the general category "services" as officially published in Canada, to "public services." Both industries were among the fastest growing in employment and union membership. While total employment nearly doubled between 1975 and 1985, employment in education and health and welfare nearly tripled. The author made similar adjustments in the goods sector of the labor market, in which government enterprises were reclassified according to

72. *See id.*

73. *See* L. TROY & N. SHEFLIN, *supra* note 8, at 4-1.

74. *See supra* text accompanying notes 49-50.

75. *See* R. ROSE, PUBLIC EMPLOYMENT IN WESTERN NATIONS 2 (1985).

76. *See* Troy, *supra* note 53, at 126-31.

their mode of ownership; that is, they were transferred from the private to the public sector.

By combining the results of the public goods and public services sectors, one discovers that Canada, instead of having a labor market similar to the American one, has developed a *different* labor market, one in which the proportion of the public sector is far greater than in the American market. In 1985, Canada's public-sector labor market was nearly twice as large as the United States, with the public sector accounting for thirty percent of total employment in Canada, compared with about sixteen percent in the United States.[77] Conversely, the private sector is far larger in the United States. Private services have grown much more rapidly in the United States since the emergence of the service or post-industrial labor market, and private services, therefore, are much larger in the United States than in Canada. In 1985, private-sector services in the United States accounted for seventy-six percent of total services, compared with sixty-two percent of total services in Canada. (Government services account for the balance in each country.)

The view that the labor market and the economic environment are essentially the same in Canada and the United States is wrong. This error is not only the result of differences in the composition of employment, but also because of differences in the timing of the move to services, including public services. Because of the greater importance of the public-sector labor market—coupled with far more favorable government policies toward the public-sector labor organization than in the United States—public-sector union membership grew faster and comprises a far larger proportion of total membership in Canada. While private-sector membership and density fell in Canada over the decade 1975-1985, public-sector membership rocketed upward. Density jumped from 48% to 66%, and membership jumped from 1.1 million to nearly 2 million.[78] Moreover, if I did indeed underestimate the decline of private-sector unionism, I necessarily must have underestimated the growth of public-sector unionism in Canada.

Because the trends in public and private-sector membership in Canada diverged, the composition of Canadian membership changed radically. In fact, the two sectors reversed relative po-

77. *See id.*
78. *See id.*

sitions during the decade. In 1975, private-sector membership dominated the Canadian union movement with fifty-eight percent of total membership; by 1985, public-sector membership became dominant, accounting for fifty-six percent of total membership.[79] As a result, the Canadian union movement is now primarily a public-sector union movement. In contrast, the union movement in the United States remains primarily a private-sector union movement. In 1985, the Canadian proportion of public-sector membership was nearly twice the proportion in the United States, fifty-six percent compared to twenty-nine percent. When analysts compared the *average* densities of the United States with Canada (and other countries), therefore, they were comparing apples with oranges. Can the "employer-opposition school" use such findings to justify a call for a more interventionist NLRA?

D. *The Western European Experience*

The "employer-opposition school" also cites Western Europe as evidence that the United States is unique in the decline of private-sector unionism. As with Canada, however, their evidence fails the test. Private-sector unionism has fallen everywhere—albeit slightly, it seems, in highly unionized Sweden.

There is no comprehensive series of data on union membership classified as to the private-sector and public-sector enrollment for European countries comparable to that of the United States. Figures on "market" union membership and density are available, however, and serve as a proxy.[80] Professor Visser, the source of this data, uses the term "market" to include state-owned enterprises and state-furnished services and, therefore, includes substantial numbers of union members and workers properly belonging in the public sector. Hence, the figures overstate the size and density of private-sector unionism and understate public-sector unionism. Nevertheless, for eight European countries, large and small, union density in the "market" sector fell over the last two decades. In Sweden it remained unchanged, suggesting that if the figures were solely private-sector, most likely there would have been a decline, however small.[81]

79. *See id.*
80. *See* Visser, *supra* note 21, at 5; J. VISSER, *supra* note 16.
81. *See* Troy, *supra* note 53, at 135, Table 9.

A brief survey of developments among these countries demonstrates that the decline in their private-sector unionism also undermines demands for public policy changes in the United States. Significantly, in the Netherlands the decline in union density *preceded* the decline in the United States. "Market" unionism peaked in the Netherlands in 1947, six years before the American private-sector peak (1953),[82] and through 1985 its decline in density was even larger than in this country.[83] The Netherlands' historically greater exposure to international competition most likely explains the earlier Dutch decline.

In the United Kingdom between 1979 and 1986, total membership actually declined more than in the United States. It fell by more than one-fifth in the United Kingdom; in the United States it declined by eighteen percent.[84] As in the United States, the decline in the United Kingdom took place in the private, not the public sector. Paradoxically, the share of private-sector membership rose between 1984 and 1987 because of the privatization programs of the Thatcher government.[85] When the enterprises were privatized, the prevailing system of labor relations accompanied the transfers, including the high degree of unionization of the employees. It will be interesting to observe whether the high density rates in these newly-privatized British enterprises will persist. It is likely that they will begin to decline because of structural changes in their work forces. Technological changes and competition will require companies to rely more on professional and technical workers who are likely to be nonunion personnel.

In the Federal Republic of Germany, density slid very slowly in the "market" sector during the 1980s, but it did decline.[86] Two important factors have influenced the slow decline of the private sector in West Germany. First, its export driven economy has bolstered unionism in manufacturing. Second, "guest" workers have affected union membership and employment. As unemployment grew in the 1980s, foreign workers were displaced both as employees and, presumably, as union members. The one year for which the author has data suggests

82. *See* L. TROY & N. SHEFLIN, *supra* note 8, at A-1, Table A.
83. *See* J. VISSER, *supra* note 16, at 60, Table 4.
84. *See* U.K. Department of Employment, *Membership of Trade Unions in 1986*, EMPLOYMENT GAZETTE 276, Table 1 (May 1988).
85. *See* Letter from N. Millward, *supra* note 21.
86. *See* J. VISSER, *supra* note 16, at 60, Table 4.

how extensive this phenomenon might have been. In 1978, foreign workers comprised ten percent of total employment, but their dismissal rate was 144 per 1,000 workers, more than double the rate of 66 per 1,000 for German nationals.[87] Although it is unclear how "guest" workers are counted on unemployment and union rolls,[88] total (private and public) active union membership in the Federal Republic hit a high of 8.5 million in 1981, only six years after total private and public membership peaked in the United States. From 1979 to 1985, total membership in West Germany fell three percent, and "market" density declined from thirty percent to twenty-eight percent.[89]

The decline of private-sector union membership in Western Europe, coupled with the stability of public-sector membership, realigned the relative positions of the public and private-sector union movements, just as in the United States and Canada. Public-sector membership rose and private-sector membership declined in importance. The United Kingdom stands as the only exception, where, because of privatization, private-sector membership's share of the total has apparently risen. In summary, the "employer-opposition school" can find no evidence in the behavior of unionism in Western Europe or Canada to support its recommendations for public policy changes in the United States to revitalize the American union movement.

III. An Alternative Explanation: Competition and Structural Change

If the advanced industrial nations exhibit a common decline in private-sector unionism, then there is almost certainly a common explanation. Market forces—intensified global competition and structural changes—are the common factors.

Structural shift, spurred by competitive forces, affects employment and unions in two ways, and both are substitution effects. First, it changes the occupational mix of an enterprise and an industry by shifting employment from production to

87. *See* Bosch, *West Germany*, in Managing Workforce Reduction 173 (M. Cross ed. 1985).

88. Despite calls to the labor attache of the Federal Republic, the author has been unable to determine how "guest" workers are counted either in the employment or union rolls, but clearly they must be a factor affecting the trends in each.

89. *See* J. Visser, *supra* note 16, at 60, Table 4.

non-production employment, to white collar and predominantly nonunion occupations. Second, structural change has expanded employment in establishments and industries relying particularly on predominantly nonunion white-collar occupations. For unions, both aspects of structural change have spelled decline. Each aspect of structural change, however, affects unions differently. The first reduces membership and density; the second, essentially a straightforward expansion of nonproduction employment, reduces density, not membership. The first type of structural change is a "within-industry" effect, and this, as indicated, reduces the number of union members as well as density; the second, the "across-industry" effect, reduces union density across industries and throughout the entire private sector.

The effects of structural change will first be analyzed through a review of how competition and structural changes reduced membership and density (the "within-industry" effect) among the unionized industries of manufacturing, transportation, communications, construction, mining, and railway transportation.

A. *Structural Changes Within Manufacturing*

During the 1980s, the appreciation of the dollar probably reduced union membership in this country more than any other single factor. Between 1979 and 1985, the dollar gained more than fifty percent in value. This rise created far-reaching consequences for the structure of employment within manufacturing industries: "From 1979 to 1985, as the dollar appreciated and structural change accelerated, United States labor resources shifted out of the mature industries and production jobs most susceptible to import competition and toward the service-oriented manufacturing and jobs in which the United States has a comparative advantage . . . ."[90] Not only did the latter industries weather the financial storm, but they were also able to increase employment. These export-oriented industries enjoyed a comparative occupational advantage because of their "heavy emphasis on managerial, technical and sales service." Industrially, these were "the largely high-tech, service-oriented indus-

90. Little, *Exchange Rates and Structural Change in U.S. Manufacturing Employment*, NEW ENG. ECON. REV. 62, 68 (Mar.-Apr. 1989).

tries that were most internationally competitive."[91] They were also predominantly nonunion.

On the other hand, the "mature industries" penalized by the appreciation of the dollar were the unionized industries. Examples include primary metals, apparel, lumber, paper, and leather manufacturing—all industries with a substantial degree of union presence. Perversely, after the dollar turned down, the unionized industries did not recover either their former levels or mix of employment. While the process of appreciation and depreciation of the dollar had asymmetrical effects on the structure of manufacturing employment, it had symmetrical effects on unionism: It reduced the number of union members. The appreciated dollar especially devastated union membership in manufacturing. Between 1980 and 1989, total private-sector membership fell about 4.7 million. Of that number, one-half was accounted for by membership in manufacturing industries. In only nine years, manufacturing union density dropped from thirty-two percent to twenty-two percent.[92]

Other important short-run factors that diminished unionism in manufacturing industries during the 1980s were the cyclical downturns of 1979-1980 and 1981-1982, and dis-inflation. Unlike other cyclical episodes, the cyclical upturns of this period did not permit union membership to recover. Exchange rate pressures, accompanied by structural adjustments necessary to accommodate employment requirements, explain why the unions failed to recover. Dis-inflation and competition spawned the 1980s' "give-back" phenomenon in collective bargaining, which further weakened the private-sector union movement.

In addition to short-run structural changes within manufacturing, unions have also lost membership and labor market penetration because of long-run changes in production and employment. Manufacturing has changed over the past several decades, principally because firms have increasingly substituted "high tech" for traditional manufacturing. The mix of employment has also changed extensively, with managerial, professional, and technical occupations growing at the relative expense of production worker occupations. Furthermore, as the surveys of employee attitudes on joining unions have

91. *Id.* at 62.

92. *See* Adams, *Changing Employment Patterns of Organized Workers*, MONTHLY LAB. REV. 25 (Feb. 1985); BLS Press Release, *supra* note 31.

demonstrated, white collar groups have an overwhelming preference for individual representation.

As for the future, employment projections into the next century indicate that these structural changes within manufacturing will continue unabated. The consequences for unions will be a continuation of the slide in both membership and density. For example, between 1988 and 2000 employment in primary metals manufacturing, a center of union power since the rise of the CIO, will shrink about ten percent, and with it will come an accompanying decline in union membership. Meanwhile, employment in high-tech instruments and related manufacturing products, industries that are predominantly nonunion, will grow by about the same rate and number of employees.[93] Thus, the example illustrates the continuing erosion of union ranks and substitution of nonunion for union employment.

Long run changes in manufacturing, as in other industries, are the result of economic life cycles. Industries must either grow or decline, and over time the life histories of industries tend to become shorter.[94] Unions associated with such industrial life cycles share the fate of the industries affected, as illustrated by this abbreviated list of defunct labor organizations: Elastic Goring Workers, Carriage Workers, Sheep Shearers, Broom and Whisk Makers, Tack Makers, Sawsmiths, and so forth.

B. *Structural Changes in Non-manufacturing*

Deregulation accelerated the decline of union membership and density in transportation and communications. Together with public utilities, membership in this sector shrank by over 625,000 from 1980 to 1989, while density plummeted from forty-eight percent to thirty-two percent.[95] This decline was mostly the result of changes in occupational shifts and, except for railways, the growth of nonunion operations associated with these industries.

Similarly, competition within the construction industries reduced construction membership by 226,000 and density from

93. *See* Bureau of Labor Statistics, Press Release 89-485 (Oct. 12, 1989).

94. *See* A. BURNS, PRODUCTION TRENDS IN THE U.S. SINCE 1870, at xvii-xviii (1934); S. FABRICANT, EMPLOYMENT IN MANUFACTURING, 1899-1939, at 146 (1942).

95. *See* Adams, *supra* note 92, at 26; BLS Press Release, *supra* note 31.

32% to 21.5% during the same period.[96] A similar analysis and chronology can be laid out for the mining industries, but it will suffice to note that the United Mine Workers (UMW) in 1989 has but one-tenth of its peak membership of nearly 600,000 in 1942.[97]

As already pointed out, employer opposition that resulted in ousting unions from established relationships could not be responsible for these enormous losses in union membership in and out of manufacturing. The scale of the losses in the affected industries involve most of the union movement's largest, richest, and most powerful organizations: the Steelworkers, the Auto Workers, the Teamsters, the Machinists, the Ladies Garment Workers, the Clothing Workers, and the UMW. Losses of the magnitudes suffered by these unions did not come from employers ousting them and would never have met with their meek acquiescence or the tolerance of the law. In the case of the UMW, for example, employers have ousted no Mineworkers members as in the 1920s.[98] In addition, as employers opened new, mostly nonunion, mining operations, the UMW never regained its domination of the industry, thus underlining the impact of structural change within the industry.

C. *Railways—A Special Case*

Railway transportation also illustrates how structural changes have affected employment and unionism—but with a twist. Because of public policy, union density has remained stable while employment and membership in unions dwindled. Unpublished figures prepared at the National Bureau of Economic Research many years ago showed railway membership at 1,418,000 and density at 76% in 1947. Currently, the author estimates union membership at about 225,000 and density at more than 90%.[99] While density rose, employment fell some 850,000 over the past 40 years. At the same time a large number of railway unions have passed into oblivion.[100] In contrast to the many labor organizations on the highways, few labor organizations at present are traveling the rails.

96. *See* Adams, *supra* note 92, at 26; BLS Press Release, *supra* note 31.

97. *See* L. TROY & N. SHEFLIN, *supra* note 8, at 3-1.

98. *See* J. RAYBECK, A HISTORY OF AMERICAN LABOR (1966).

99. L. Troy, unpublished tables prepared at the National Bureau of Economic Research (on file at HARV. J.L. & PUB. POL'Y).

100. L. TROY & N. SHEFLIN, *supra* note 8, at Appendix C5-C9.

How did the Railway Labor Act[101] (RLA) contribute to this unique situation? Is the RLA a possible model for revising the NLRA? To respond to these questions, a brief sketch of public policy toward railway labor relations is needed. Except for the union shop, the United States has resurrected the public policy prevailing during the years it ran the railroads, from April 1917 to March 1920.[102] In particular during World War I, the United States Railroad Administration installed a grievance procedure that assigned only union employees as representatives to the grievance adjustment boards, even though the boards also adjudicated grievances for nonunion employees. Naturally, this policy put a premium on union membership. Union membership soared during this period of government administration. When the railroads were returned to private management in March 1920 under the Transportation Act of 1920,[103] the grievance arrangements were abandoned. Moreover, employers ejected unions on many systems following the shopmen's strike of 1922, frequently establishing company unions in their place. The density rate on the railways declined.[104]

When the Railway Labor Act was adopted in 1926,[105] it did not restore the grievance adjustment boards, but they were subsequently restored in the 1934 amendments to the Act. Since 1934, section 153 of the Railway Labor Act has provided for a National Railroad Adjustment Board with thirty-four members, seventeen of whom "shall be selected by such labor organizations of the employees [that are] national in scope . . . ."[106] These are subdivided into four divisions to deal with different categories of railway employees.

At that time (1934), the national railway unions, often referred to as the "standard" unions (in contrast to the company and later small independent unions), declined the opportunity to sanction union shops and the check-off. They wanted first to squeeze out all or most of the non-standard unions. Once they did so, they requested and received congressional sanction in

101. 45 U.S.C. §§ 151-188 (1982).

102. *See* W. HINES, WAR HISTORY OF AMERICAN RAILROADS, ch. XIV (1928).

103. Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920).

104. *See* L. WOLMAN, EBB AND FLOW IN TRADE UNIONISM 219, Table V (1936).

105. Railway Labor Act, 44 Stat. 577 (Part II 1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982)).

106. 45 U.S.C. § 153 (1982).

1951 to negotiate union shops and the check-off.[107]

Unlike the union shop contract provisions negotiated under the NLRA, those under the RLA are not subject to state right-to-work laws. In 1956, the Supreme Court ruled in *Railway Employees Department v. Hanson*[108] that union shop provisions in railway agreements were not subject to state laws banning the union shop. As a result, employment is virtually wholly unionized on the railways. Thus, union membership in railways declined during the period of the most "supportive labor legislation" (to use the academic euphemism for pro-union law) in private-sector labor relations. Membership fell drastically because of structural changes in the labor market—shifts to other forms of transportation and technological change. On the other hand, public policy raised union density. The union shop, the check-off, and the grievance procedure have virtually shut out nonunion employment on the railways.

Not only has the "employer-opposition school" not mentioned that structural change has contributed to this debacle, but Richard Freeman unaccountably wrote that "in the [United States,] private-sector union membership, collective bargaining representation and the right to strike are coterminous under the same legal code."[109] The legal code to which he referred was the National Labor Relations Act.

In any event, one must ask whether the Railway Labor Act, adopted nine years before the NLRA, can be the model for revising the NLRA? The answer, clearly, is "no."[110] To duplicate its keystone, the grievance adjustment board, public policy would have to mandate a form of work's council in all establishments, with the employees' representatives chosen only from union members. Neither the structure nor the procedure for staffing them is feasible.

D. *From Goods to Services: The Post-Industrial Labor Market*

The broadest structural change enveloping the labor market was the transition from a labor market dominated by employment in goods industries to one dominated by services. In the

107. *See* G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 672 (7th ed. 1973).

108. 351 U.S. 225 (1956).

109. Freeman, *supra* note 57, at 67.

110. *See generally* Northrup, *The Railway Labor Act—Time for Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441 (1990) (this issue).

United States, this shift took place in the mid-1950s.[111] It changed union densities across as well as within industries, as described above. For the private economy as a whole, the post-industrial shift has steadily eroded the private-sector peak density from thirty-six percent in 1953 to a current level under thirteen percent. In fact, the current density rate in the private sector is about equal to the 1929 density rate.[112] In effect, union density in the private sector has slipped backward sixty years. As indicated above, by the year 2000 it is likely to have fallen back to levels prevailing at the beginning of this century.

The post-industrial shift changed the environment that governs union growth as much as did the NLRA. An econometric analysis of the Ashenfelter-Pencavel model of union growth in the United States found a structural break in the model in 1955 and confirmed an earlier break about 1937.[113] The break in 1955 coincided with the transition of the United States labor market from goods to services,[114] and the 1937 break with the Supreme Court's decision upholding the constitutionality of the NLRA.[115]

The United States labor market was the first to make the switch from goods to services. As already noted, it took place in the mid-1950s. Canada lagged the United States in the transition by more than a decade.[116] Likewise, all European countries, except the Netherlands, lagged behind the United States by even longer periods. The Netherlands made the transition to a service-dominated labor market between 1965 and 1969,[117] corresponding approximately to the Canadian transition. As of 1985, Italy, Switzerland, and the Federal Republic of Germany had not yet made the transition.[118] Manufacturing's

111. *See* V. FUCHS, THE SERVICE ECONOMY 19 (1968).

112. *See* L. TROY & N. SHEFLIN, *supra* note 8, at A-1; BLS Press Release, *supra* note 31.

113. *See* Sheflin, Koeller, & Troy, *Structural Stability in Models of Trade Union Growth*, 96 Q. J. ECON. 77 (1981); J. Keddy, Econometric Analyses of American Trade Union Growth: New Evidence (submitted to Professor Neil Sheflin in partial fulfillment of the Rutgers University Economics Honors Program (Apr. 7, 1988)).

114. *See* V. FUCHS, *supra* note 111, at 19.

115. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

116. *See* Worton, *The Service Industries in Canada, 1946-66*, in PRODUCTION AND PRODUCTIVITY IN THE SERVICE ECONOMY 238, 246 Table 3 (V. Fuchs ed. 1969).

117. *See* Sorrentino, *Comparing Employment Shifts in Ten Industrialized Countries*, 94 MONTHLY LAB. REV. 3, 6 (Oct. 1971).

118. This conclusion is based upon employment data from the Organization for Economic Co-operation and Development made available to the author by the Bureau of Labor Statistics from its employment data bank.

importance to the export-oriented economies of the latter two probably accounts for their lag. The United Kingdom made the transition in 1974, nearly two decades after the United States, and the French labor market made the transition into the post-industrial era in 1981.[119]

If the lags in conversion to service economies had been measured solely by private-sector employment, the lead of the United States would have been even greater. Because of extensive public ownership of industry and the earlier introduction of a more extensive welfare state in Canada and Western Europe, public employment grew sooner and to a greater degree abroad than in the United States in the post-World War II era. Thus an Organisation for Economic Co-operation and Development study of the period 1960-1978 found "some tendency for the public sector to grow faster than private services . . . [except in] the United States . . . where private services generally expanded employment faster than the public sector."[120] Put another way, public policy spurred the general transition of Canadian and European labor markets from goods to services, and from the industrial to the post-industrial labor market, while market forces were more important to the American transition.

Not only has the growth of private-sector services in the United States outdistanced that of Canada and Europe, its composition has been much more high-tech as well. In other words, the United States also leads Canada and Western European countries in structural changes *within* the private service industries. Of particular significance is the growth of producer service industries such as advertising, computer software, data processing, temporary personnel, management, business consulting, legal, accounting, engineering, and architectural services. In 1986, producer services employed about 6.8 million workers, nearly 7% of total non-farm employment in the United States.[121] The gains in producer services are classified separately from the same or similar services performed "in-house" by manufacturing companies. As will be recalled, these "in-house" services played a significant role in the successful

119. *See* Letter from N. Millward, *supra* note 21.

120. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EMPLOYMENT IN THE PUBLIC SECTOR 15 (1982).

121. *See* Tschetter, *Producer Services: Why Are They Growing So Fast?*, 110 MONTHLY LAB. REV. 31 (Dec. 1987).

performance of export-oriented, high-tech manufacturing during the period of rapid dollar appreciation, and they contributed to these industries' comparative advantages in international trade. Producer services within manufacturing continue to grow, and this growth helps to explain why the share of production-worker employment and, therefore, unionism, continues to decline within manufacturing. Meanwhile, the growth of producer services outside manufacturing has increased the ratio of white-collar employment to other occupational groups within the service sector. This development parallels the substitution of white-collar for blue-collar jobs in manufacturing and, like that substitution, enhances the sector's resistance to cyclical downturns and to unionism.

Because of the United States's lead in the switch to services, especially in the private sector, it is not surprising that the Canadian and European private-sector union movements should lag behind the American experience in the decline of private-sector density and membership. What is surprising, however, is that in the case of Canada, the lag in membership took so much less time. Private-sector membership in the United States peaked in 1970, although in Canada the peak apparently dates from 1975. In contrast, Canada lagged the United States in the switch from goods to services (including government employment) by more than a decade.

E. *Geography and Structural Shift*

Geography is another structural factor affecting the comparability of labor markets, union membership, and density. The availability of a predominantly nonunion South has often enabled companies in this country to set up nonunion operations in that region of the country. After 1992, European businesses will have a similar opportunity in Spain, Portugal, southern Italy, and Greece. Unless prevented by regulations of the European Community, they may well do so. Even within the limited confines of Britain, there has already been a move from the more organized north to the less organized south.[122] Now that the Canadians have approved the free trade agreement with the United States, it will be interesting to see how many companies

122. *See* P. BEAUMONT, THE DECLINE OF TRADE UNION ORGANIZATION 8-9 (1987).

in Canada decide to migrate to the American South and Southwest.

F. *Scale Effects and Structural Change*

Structural changes in the labor market are typically associated with changes in market composition, but there is also a scale effect. This scale effect applies to the number of business enterprises as well as to the number of people employed. The magnitude of employment growth has contributed to the decline of union density and of the unions' ability to replace losses because it has simply overwhelmed union organizing efforts. The number of NLRB elections in previously unorganized units relative to total, private, non-farm employment, dropped more than seventy-five percent between 1970 and 1988 (from thirteen-per-one-thousand employees to four-per-one-thousand employees).[123]

In the meantime, the number of companies outside of agriculture that filed corporate tax returns with the Internal Revenue Service more than doubled between 1970 and 1986.[124] At the same time, the publicly held corporation has undergone rapid change, making corporate behavior and structure more responsive to increased competition.[125] By contrast, many private-sector unions are adapting to the new environment—if adaptation is the correct way of describing it—by turning away from the private to the public-sector labor market to gain new members.

G. *Structural Change and the Employer-Opposition School*

In *What Do Unions Do?*, Freeman and Medoff tested the effect of structural change on unionism in the United States between 1954 and 1979, and found that it could explain seventy-two percent of the decline in density; they then rejected their finding, primarily because "[i]f structural changes were the chief factor behind the decline of unionism, the proportion organized would fall everywhere. . . . Perhaps most telling is the fact that the country most like the U.S., Canada, where many of the same unions and firms operate, the percentage organized went

123. *See* NLRB ANN. REP. Table 13, B (1970, 1988) (data reported annually).

124. The number of corporate returns is from data supplied to the author by the Statistics Division of the Internal Revenue Service (Aug. 31, 1989).

125. *See* Jensen, *Eclipse of the Public Corporation*, HARV. BUS. REV. 61 (Sept.-Oct. 1989).

from below the U.S. average to above it."[126] Subsequently, Freeman reiterated this conclusion and expanded it to include Europe as well as Canada: "If 'post-industrial' or structural changes inexorably reduce unionization, density would have fallen in Canada and other developed countries, all of which experienced essentially the same structural changes as the United States, as well as in the United States."[127] Having concluded that structural change could not account for union decline, Freeman and Medoff, along with Weiler and others, substituted employer opposition as the responsible factor.

After examining the data on unionism and employment, the evidence presented here shows that private-sector unionism (membership and density) have declined in all other advanced industrial countries as well and that labor markets, instead of being essentially the same across countries, were (and remain) essentially dissimilar. They were (and are) essentially dissimilar in the timing of their transition to post-industrial labor markets and the composition of those labor markets. Freeman and Medoff should have stood by their original findings!

Canada and Western Europe lag the United States in structural changes in manufacturing and in private services. Occupationally, American manufacturing relies more on professional, technical, managerial, and administrative personnel and on fewer production workers. Industrially, high tech manufacturing is more important in the United States. As a result, market forces are steadily dividing manufacturing in the United States between a cyclically resistant nonunion component and a cyclically sensitive union component. Similarly, in private services, market forces are strengthening a cyclically resistant nonunion work force.[128] Manufacturing has also been divided on the basis of relative vulnerability to the rapid appreciation of the dollar during this decade. The union sector has tended to suffer greatly from the high cost of American products abroad, while the nonunion sector has proved better capable of making the necessary adjustments.

The American and foreign labor movements, like their labor markets, also differ in membership composition and timing. In

126. R. FREEMAN & J. MEDOFF, *supra* note 2, at 227.

127. Freeman, *supra* note 2, at 70.

128. *See* Burgan, *Cyclical Behavior of High Tech Industries*, 108 MONTHLY LAB. REV. 9 (May 1985).

general, public-sector membership, as a proportion of total membership and as a percentage of employment, is greater in Canada and Western Europe (except for Switzerland) than in the United States.[129] In America, the labor movement continues to be primarily a private-sector movement. Thus, lags in labor market developments abroad translated into lags in the decline of foreign private-sector unionism, just as the structuralists would predict.

IV. Public Policy and Public-Sector Unionism

In contrast to the private sector, more interventionist public policy in the public sector will stimulate and increase both membership and density. Given the limited competitive pressures in the public sector, if the NLRA or an equivalent statute extends federal jurisdiction over federal, state, and local employees, that extension will further insulate the public-sector labor market from competition, stimulate membership, and enhance the power of public-sector unions. In the public-sector labor market, revised public policy *would* mark a turning point for organized labor. As already indicated, such a public policy model is now constitutionally possible in the wake of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[130] as the Court established the precedent for federal regulation of employee relations at the state and local level.

In the absence of help from "nationalized" public policy, the size of the public-sector union movement will probably remain stable. A continuation of its growth comparable to the 1962-1977 period, is most unlikely.[131] Indeed, if trends in public-sector membership continue on the path of stability that has been underway since its peak in 1975, given the expected (albeit slow) growth in public-sector employment, by the year 2000 density could fall from its current level of about thirty-seven percent to thirty-one percent.

There are several reasons that public-sector membership can be expected to remain stable: slow growth in the size of the

129. *See* Troy, *supra* note 53, at 139, Table 9.

130. 496 U.S. 528 (1985).

131. *See* L. Edwards, The Future of Public Sector Unions: Stagnation or Growth?" (Oct. 1988) (paper prepared for the Allied Social Science Associations meetings, Dec. 28-30, 1988). Much of the analysis that follows is drawn from Linda Edwards's paper.

public labor market; a public policy that is divided by the federal system; and a new organizing environment unlike that of the halcyon days of public-sector growth in the 1960s and 1970s. Privatization will do little to reduce the size of the public sector in this country, and the public-sector unions in the United States, unlike their counterparts in Great Britain, have little to fear from this development. There is also less potential for substituting capital for labor in the public sector. Moreover, some functions are not easily transferred from the public to the private sector and those that could be transferred would have only a limited effect on unionism. Privatizing the postal services, while potentially significant, hardly seems likely.

Although public-sector unions have little to fear from privatization, other developments influencing growth are not promising. The share of public-sector employment to total employment has stabilized, and total government spending (federal, state, and local) as a percentage of gross national product, was about the same in 1988 as in 1975.[132] The composition of government expenditures also influences the demand for employees, and that composition, together with the slower growth of expenditures in the 1980s, has slowed the growth of public employment. Interest and transfer payments, which have grown substantially in recent years, do not require as much labor as other types of government expenditures. Hence, overall gains in public employment that translate into more union members will be limited.

Expected changes in the structure of public-sector employment also will have a negative impact on the growth of public-sector unions. Women and part-time employees are becoming more important in the public sector, and neither group has shown a significant demand for union representation, at least in the private sector. On the other hand, the aging of the population will likely lead to some growth in demand for public services, and thereby generate the potential for increased unionism. Likewise, at the other end of the age profile, family formation by the post-war baby boomers could lead to increased demand for educational personnel, a highly organized group for which new entrants will likely result in increased union membership.

132. *See* PRESIDENT & COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT AND REPORT OF THE COUNCIL OF ECONOMIC ADVISERS (1989).

Clearly, the future growth of public-sector unions will depend more upon new legislation favorable to their expansion than on demographic influences that lead to increased employment and membership. During the past decade and a half, however, there were fewer changes in public policy than in the period of public-sector union expansion from 1962 to 1976. Nevertheless, there is still the possibility for new public policy favorable to union organization. As of 1987, ten states are still without legislation or executive orders that encouraged unionization: Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Utah, Virginia, and West Virginia.[133] In addition, existing laws encouraging unionization can be amended and thus increase union membership and penetration. Most helpful to public-sector unions would be the "nationalization" of public employment law. The prospects of this are extremely slight, but the prospects of amending existing state laws to encourage unionism are more favorable.

Yet another reason that public-sector unions cannot be expected to grow significantly in the future, absent radical changes in public policy, is the drying up of the major wellspring of past successes—employee associations. Considerable attention has been given to the growth of public-sector unionism, but the role of the employee association as the engine of that growth is either submerged or missing in these accounts. Although precise data are unavailable, a fair estimate is that well over half of the present 6.4 million public-sector union members were originally organized in employee associations.[134] Paradoxically, it was the competition for representation that produced their transformation to unions. Threatened with takeovers and displacement by established unions, many associations made the transition from non-bargaining associations to unions by becoming *de facto* unions or by merging with established unions.

To a very great extent, the contemporary public-sector union movement in the United States is the product of the transformation of professional and public-employee associations into *de facto* unions. Thus the movement is less one of new organizations than of pre-existing organizations, and unions that ac-

133. *See* L. Edwards, *supra* note 131, at 8.

134. *See* L. Troy & N. Sheflin, *supra* note 8; Levitan & Gallo, *Can Employee Associations Negotiate New Growth?*, 112 Monthly Lab. Rev. 5, 5-6 (July 1989).

quired formerly independent public-employee associations can be said to have "organized the organized." This process separates them historically from the organizing experience of private-sector unions. Because of the process of transformation from associationism to unionism, the public-sector union movement, which was born in the 1960s, did not have to shed the "blood, sweat, and tears" of the private unions—especially those that created the CIO in the 1930s and 1940s.

The principal examples of self-conversion from association to union are the National Education Association, the American Association of University Professors, and the Fraternal Order of Police. An unknown number of public-employee associations have affiliated with, or fully merged into, existing public-employee unions and private-sector unions. The public-sector union that has absorbed the most public-employee associations is the American Federation of State, County and Municipal Employees of the AFL-CIO. The principal private-sector union to acquire these associations is the Service Employees International Union (SEIU) of the AFL-CIO. In fact, the SEIU has been so successful that what was once a totally private-sector union has now become a predominantly public-sector union.[135] Given that there are philosophical and policy differences between the public and private-sector unions in general, problems may very well beset a union like the SEIU, especially at the policy level. This is unlikely to lead to union instability, but it will lead (if it has not already) to stresses between the public and private-sector groups. It is reasonable to expect that the leadership of the SEIU will pass to individuals from the public sector.

Other private-sector unions that have joined in the acquisition of public-sector members are the Teamsters, the Communication Workers of America, the Autoworkers and the Steelworkers.[136] Private-sector unions have jumped into the public-sector field because membership in their traditional jurisdictions has declined drastically, and acquiring public-employee associations is a relatively easy and low cost way to recoup those losses. Nevertheless, unlike the SEIU, none of

135. *See* L. TROY & N. SHEFLIN, *supra* note 8.

136. *See* AFL-CIO PUBLIC EMPLOYEE DEPARTMENT, AMERICA NOT FOR SALE, at back cover (1989) (booklet).

these private-sector unions accounts for a sizeable membership from the public sector.

The acquisition of public-employee unions has converted private-sector unions into a new type of labor organization, the "joint union." The joint union is one that enrolls both public and private-sector members. Even though this step adds dues-paying members to the rolls of formerly private-sector-only unions, "organizing the organized" in the public sector is but a surrogate for organizing the unorganized in the private sector. It avoids confronting the problems private-sector unions face and represents an admission of private-sector unions' inability to organize.

Certainly, joint unions will inevitably develop stresses because of the divergent interests of private and public members. They may only become acute when an organization, such as the SEIU, tips the balance of membership to the public sector. Moreover, the internal stresses of an individual union reflect in microcosm the stresses between the public and private-sector movements generally. As indicated elsewhere, the two wings of the union movement do not share common philosophies and policies, despite nominal fraternalism.[137] The advantage for independent associations in joining a national or international union, particularly one affiliated with the AFL-CIO, is that it reduces their vulnerability to raids. Affiliation is a way of warding off unfriendly takeovers.

Now that there are so few independent associations left to tap, what will the public-sector unions do to recruit members? The answer is that "[w]ith the association well running dry, future [g]overnment unionization is now much more dependent upon the old-fashioned campaign of organizing the unorganized."[138] Fortunately for public-sector unions, this campaign will require neither the blood, sweat, nor tears associated with organizing private-sector unions because public employers in general offer little resistance. After all, public employers are running a business that does not have to meet the rigors of market competition, a competition that has become more intensified than ever before. Indeed, going union could well

137. *See* Troy, *The Impact of Public Employee Unionism on the Philosophy of Organized Labor*, 3 GOV'T UNION REV. 3 (Spring 1982); Troy, *The Agenda of Public Sector Unions and Associations*, 4 GOV'T UNION REV. 15 (Spring 1983).

138. Levitan & Gallo, *supra* note 134, at 7.

serve the bureaucratic interest of larger staffs and budgets. Nevertheless, the task will not be easy, and even less so for the reason given by Sar A. Levitan and Frank Gallo: the absence of public-sector bargaining laws in southern and mountain states.[139] On balance, the factors that have been crucial to the past expansion of public-sector unionism in the United States are unlikely to rekindle their growth in the future. Levitan and Gallo opine that "there is even a possibility that public-sector unionization may be beginning a decline similar to what has been happening in the private sector for over three decades."[140] As indicated above, such indeed will be the case insofar as the percentage organized is concerned if trends since 1975 continue.

Nevertheless, even in the absence of growth, public-sector unionism is likely to become the dominant wing of the union movement. Not only is current public-sector union density more than three times as great as in the private sector (thirty-seven percent as compared with twelve percent), but public-sector membership currently approaches forty percent of total membership, a record high.[141] Like the convergence of private-sector unionism's decline internationally, public-sector unionism is gaining ascendancy internationally. As previously noted, Canada's union movement is already predominantly public in character, and the same is true in several other countries.

In the United States, it is likely that public-sector unions will displace private-sector unions as the primary center of labor organization, perhaps by early in the next century. This shift will happen sooner if public policy fostering its growth is adopted. Nevertheless, market forces may bring this about even in the absence of more intrusive public policy as these forces further diminish the size of the private-sector unions and as the public-sector union membership remains stable. As the process of transformation unfolds, it will change the character, philosophy, and policies of the union movement. This Article only identifies the new direction, but future study may reveal the specific nature and extent of the shift.

In brief, the basic goal of public-sector union organizations is to redistribute more of the national income from the private to

139. *See id.* at 13.
140. *Id.*
141. *See* BLS Press Release, *supra* note 31.

the public economy and from private to public-sector employees. Their goal is to increase the "socialization" of income as well as to change the distribution of personal income. By contrast, private-sector unions' goals embrace a redistribution of income from owners to workers and Keynesian-type economic intervention to maintain high levels of employment. The two wings are thus philosophically at odds. An indication of this is the greater degree of private-sector union member support for Ronald Reagan versus the greater degree of public-sector union support for Walter Mondale in the 1984 presidential election, in which higher taxes were a major a issue. Professor Freeman has also noted the change in the character of the union movement that has been induced by the rising trend of public-sector unions internationally. He agrees that there is a split in the philosophies and agendas of public and private-sector unions:

> The shift to white collar and public sector membership has begun to change the face of union movements traditionally dominated by industrial workers. In the U.S. the locus of power in the AFL-CIO is shifting to public sector organizations while the non-affiliated National Education Association has achieved considerable national influence. In Italy, the new autonomous public sector organizations and quadri pose a challenge to the three traditional confederations. In Sweden and Denmark the white collar unions have shown an increasing willingness to develop their own economic agenda rather than to follow the lead of blue collar manufacturing unions.[142]

V. Conclusions

The relationship between public policy and the decline of private-sector unionism has been presented in the question: "Has American labor law failed?"[143] This format skews the analysis because the answer for those who ask it is implicit in the framing of the question. To them, the implication is that public policy and its administration are solely responsible for the decline of private-sector unionism. This deftly sidetracks the role of markets, competition, and technological and structural change in labor markets. It is not that labor law has failed, but that markets have "repealed" labor law, and intervention

142. R. Freeman, Divergence, *supra* note 2, at 7.

143. *See Oversight Hearings on the Subject "Has Labor Law Failed?", supra* note 2.

will thus lead to renewed "repeal" tomorrow. Thus, a lagged relationship will emerge, just as it has with the minimum wage law. The mercantilists of our time, however, on finding that their prescription for stimulating unionism in the private sector has failed, will not be daunted. They will not fault their analysis, but will find shortcomings in the scope and scale of previous intervention and advocate fresh and more comprehensive intervention. Whenever regulation fails, the typical response of latter-day mercantilists is to amplify intervention with enhanced regulation. In the long run, labor law reform could yield asymmetrical results. In the presence of competition in the private sector, a more interventionist public policy will not stem the decline of unionism, but in labor markets shielded from competition (the public sector), public policy will stimulate the growth and power of unionism.

Paul Weiler, perhaps the point man in demanding a more interventionist NLRA, pictured contemporary labor law in this country as an "elegant tombstone for a dying institution" because current procedures in representation elections—the secret ballot election after a "protracted" campaign—"creates a setting that elicits employer coercion of . . . employee choice . . . [that] [t]he current system of unfair labor practice remedies has proved powerless to contain . . . or to undo."[144] Professor Weiler's argument on the unkept promises of the NLRA claims that representation elections take too long, that employers are engaging in large scale discrimination against workers who support unionization, and that for these reasons, unions are losing most elections and remain unable to halt the continuing loss of membership and union penetration of the labor market.

If, indeed, the NLRA is an "elegant tombstone for a dying institution," then the mausoleum must be of gargantuan size and fabulously rich in ornamentation: It will have to entomb more than 10.5 million private-sector members whose unions possess some $6 billion in net assets. And the epitaph might read, THE REPORT OF MY DEATH WAS AN EXAGGERATION. Despite its reversals, the "dying institution" is still the largest and wealthiest union movement in the free world.

Professor Weiler and others cite the Canadian "certification" model as evidence for their claims and hold it up as a standard

144. Weiler, *Promises to Keep*, *supra* note 2, at 1769-70.

for United States public policy to emulate. That model, they claim, has not been buffeted as has the United States system. Data and analysis presented here have undermined those claims. In fact, it has been shown that Canada's system has succumbed to market forces just as did the United States system. Indeed, because the Canadian "certification" model is so much more subject to regulation and protection than the United States model, it serves *a fortiori* as a model for what happens when markets and regulatory public policy collide. It shows the futility of enhanced intervention. The real lesson gained from the Canadian model is the long-run inability of regulation to contain competition.

Even on its own terms, the contention of the employer-opposition school that Canada is an appropriate model for the United States is outlandish. Why should an economy whose total nonagricultural labor market numbers fewer workers than the State of California be the standard for a larger, more diversified economy that is more attuned to the market than to government intervention? As Adam Smith pointed out more than two centuries ago, the wider the market, the more diversified will be the labor market. It is evident that since World War II the labor markets of the United States have grown faster and have become more diversified in comparison with Canada and Western Europe. As emphasized in this Article, the labor markets of the United States and other advanced industrial nations are not the same.

The data and analysis assembled here point to the conclusion that revising the NLRA's election procedures will make little difference to the private-sector union movement in the long run. Market forces have eroded—perhaps "repealed" is a better word—the regulatory protection afforded by the NLRA, and increasing its regulatory power would only reinvigorate the contest between the two forces. Like the minimum wage law, interventionists will periodically demand fresh regulations to overcome the effects of markets. Nevertheless, can there be any doubt which will prevail?