Law and Union Power: Thoughts on the United States and Canada

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COMMENTARY

Law and Union Power: Thoughts on the United States and Canada

JAMES B. ATLESON*

The decline in the strength and vigor of American labor unions has led to a valuable outpouring of scholarly writing analyzing the causes and offering possible cures. Many have stressed changes in the national and international economy as well as other economic or social causes, but the primary focus of this essay is on the explanations which attribute much of labor’s decline to the inadequacies of public law.

Although legal rules certainly affect union strength and vitality, formal law is also a reflection of societal pressures and imbalances of power. Legal rules can increase union strength, but supportive legal change is unlikely to occur in the absence of union power, at least the power to disrupt. If labor is perceived to be weak, there is less need to interpret labor statutes broadly to either lessen the incidence of strikes or to institutionalize labor conflict.

Most analyses, however, view law as a critical source of union strength rather than a reflection of social and economic power. Thus, a number of writers have stressed Canada’s more supportive labor legislation, relying upon existing structures and rules, as an explanation for its stronger labor movement. The argument made is that Canadian unions are stronger because Canadian labor legislation is more congenial to union organization and bargaining than that of the United States. The interest in Canada’s labor policies has grown as union density rates between the two countries seem to grow more disparate. Today, approximately 35% of Canada’s non-agricultural workforce is unionized compared to 17% or less in the United States.1 Charts 1 and 2 show the relative situation.

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* Professor of Law, State University of New York School of Law. An earlier version of this paper was presented to the Canadian-American Legal Studies Program at SUNY Law School in Spring, 1990, and the 1991 Law and Society Meeting in Amsterdam. The author wishes to thank Judy Fudge of Osgoode Hall Law School, James Pope of Rutgers-Newark Law School, and Cynthia Eslund of Texas Law School for their comments.

CHART 1

UNION DENSITY IN THE UNITED STATES AND CANADA, 1935–1980

CHART 2

UNION MEMBERSHIP BASED ON CPS SURVEYS 1977-1991

<table>
<thead>
<tr>
<th>Year</th>
<th>Eligible (in 000's)</th>
<th>Organized (in 000's)</th>
<th>Percentage Covered</th>
<th>Number Organized (in 000's)</th>
<th>Percentage Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>81,334</td>
<td>19,335</td>
<td>23.80%</td>
<td>21,535</td>
<td>26.50%</td>
</tr>
<tr>
<td>1980</td>
<td>87,480</td>
<td>20,095</td>
<td>23.00</td>
<td>22,493</td>
<td>25.7</td>
</tr>
<tr>
<td>1983</td>
<td>88,290</td>
<td>17,717</td>
<td>20.10</td>
<td>20,532</td>
<td>23.3</td>
</tr>
<tr>
<td>1984</td>
<td>92,194</td>
<td>17,340</td>
<td>18.80</td>
<td>19,932</td>
<td>21.6</td>
</tr>
</tbody>
</table>

[hereinafter Chaison & Rose, New Directions].

<table>
<thead>
<tr>
<th>Year</th>
<th>Number Eligible (in 000's)</th>
<th>Number Organized (in 000's)</th>
<th>Percentage Organized</th>
<th>Number Covered (in 000's)</th>
<th>Percentage Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>94,500</td>
<td>17,000</td>
<td>18.00</td>
<td>19,400</td>
<td>20.5</td>
</tr>
<tr>
<td>1986</td>
<td>96,903</td>
<td>16,900</td>
<td>17.50</td>
<td>19,300</td>
<td>19.9</td>
</tr>
<tr>
<td>1987</td>
<td>99,303</td>
<td>17,600</td>
<td>17.00</td>
<td>19,050</td>
<td>19.2</td>
</tr>
<tr>
<td>1988</td>
<td>101,407</td>
<td>16,960</td>
<td>16.80</td>
<td>19,240</td>
<td>19.0</td>
</tr>
<tr>
<td>1989</td>
<td>103,480</td>
<td>16,704</td>
<td>16.40</td>
<td>19,198</td>
<td>18.6</td>
</tr>
<tr>
<td>1990</td>
<td>103,905</td>
<td>16,704</td>
<td>16.10</td>
<td>19,058</td>
<td>18.3</td>
</tr>
<tr>
<td>1991</td>
<td>102,786</td>
<td>16,568</td>
<td>16.10</td>
<td>18,734</td>
<td>18.2</td>
</tr>
</tbody>
</table>

Chart 1 reveals that organizational levels in Canada and the United States, that is, union membership as a percentage of the workforce, were approximately equal between 1955 and 1965, but U.S. membership as a percentage of the non-agricultural workforce began a steady decline in 1955, until it experienced a precipitous fall in the 1980s. It is during this period that the absolute number of U.S. workers in unions fell for the first time since 1950. Katherine Stone notes that a 25 percent loss was suffered by unions in the 1980s despite the fact that there had been a 15 percent gain in the 1970s. Moreover, the 1980s decline is most pronounced in the private sector where membership declined from 16.8 percent of the non-agricultural workforce to 12.4 percent. The long term decline cannot be explained simply by the Reagan-Bush years, the PATCO debacle, a hostile Supreme Court and NLRB or the specific problems.


There was a marked decrease in union election activity in the 1980s. A 1985 report of the AFL-CIO's Committee on the Evolution of Work suggested a variety of techniques to reverse the downward trend in the number of representation elections and the growth of membership via elections. The federation created the Organizing Institute in 1989 to assist unions in coordinating organizing drives and in recruiting and training organizers. The number of representation elections continued to decline, however, and evidence suggests that organizing is of secondary importance to servicing current members. Paul Jarky et al., Embracing the Committee on the Evolution of Work Report: What Have Unions Done, in 44 Indus. Rel. Res. Ass'n Proc. 500, 506-07 (1992).


After 14 years of decline, the number of union members rose during 1993 according to the Bureau of Labor Statistics. The modest growth of 200,000 or 1.3% from the 1992 level was primarily due to public sector increases. Indeed, because of declines in public sector unionism, the portion of all employees in unions remained at 15.8%. 145 [1 News & Background Information] Lab. Rel. Rep. (BNA) 207 (Feb. 21, 1994).
labor encountered the last 12 years, although these specific events do seem related to labor's precipitous decline in the 1980s. [See Chart 2]

A very useful chart of Canadian and American levels since 1945 has been composed by Brian Langille of the University of Toronto Law School.5 Chart 3 reveals that American unions reached their highest levels of organization in the early 1950s and then began their decline, while Canadian unions either held steady or increased organizational levels. The significantly higher Canadian density rate reflects a high level of organization in the public sector. Indeed, the three largest unions in Canada represent federal and provincial employees.6

**CHART 3**

**UNION MEMBERSHIP IN CANADA AND THE UNITED STATES 1945-1990**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Membership (000)</th>
<th>Canada</th>
<th>U.S.</th>
<th>As a % of Non-Agricultural Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Canada</td>
<td>U.S.</td>
<td></td>
</tr>
<tr>
<td>1945</td>
<td></td>
<td>711</td>
<td>12,254</td>
<td>24.2</td>
</tr>
<tr>
<td>1946</td>
<td></td>
<td>832</td>
<td>12,936</td>
<td>27.9</td>
</tr>
<tr>
<td>1947</td>
<td></td>
<td>912</td>
<td>14,067</td>
<td>29.1</td>
</tr>
<tr>
<td>1948</td>
<td></td>
<td>978</td>
<td>14,272</td>
<td>30.3</td>
</tr>
<tr>
<td>1949</td>
<td></td>
<td>1,006</td>
<td>13,936</td>
<td>30.2</td>
</tr>
<tr>
<td>1950</td>
<td></td>
<td>-</td>
<td>14,294</td>
<td>-</td>
</tr>
<tr>
<td>1951</td>
<td></td>
<td>1,029</td>
<td>15,139</td>
<td>28.4</td>
</tr>
<tr>
<td>1952</td>
<td></td>
<td>1,146</td>
<td>15,632</td>
<td>30.2</td>
</tr>
<tr>
<td>1953</td>
<td></td>
<td>1,220</td>
<td>16,310</td>
<td>32.6</td>
</tr>
<tr>
<td>1954</td>
<td></td>
<td>1,268</td>
<td>15,809</td>
<td>33.6</td>
</tr>
<tr>
<td>1955</td>
<td></td>
<td>1,268</td>
<td>16,127</td>
<td>33.7</td>
</tr>
<tr>
<td>1956</td>
<td></td>
<td>1,352</td>
<td>16,446</td>
<td>33.3</td>
</tr>
<tr>
<td>1957</td>
<td></td>
<td>1,386</td>
<td>16,498</td>
<td>32.4</td>
</tr>
<tr>
<td>1958</td>
<td></td>
<td>1,454</td>
<td>15,571</td>
<td>34.2</td>
</tr>
<tr>
<td>1959</td>
<td></td>
<td>1,459</td>
<td>15,438</td>
<td>33.3</td>
</tr>
<tr>
<td>1960</td>
<td></td>
<td>1,459</td>
<td>15,516</td>
<td>32.3</td>
</tr>
<tr>
<td>1961</td>
<td></td>
<td>1,447</td>
<td>15,401</td>
<td>31.6</td>
</tr>
</tbody>
</table>


7. Chart 3 is reproduced from Langille, supra note 5, at 8.
<table>
<thead>
<tr>
<th>Year</th>
<th>Canada</th>
<th>U.S.</th>
<th>As a % of Non-Agricultural Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Canada</td>
<td>U.S.</td>
<td>Canada</td>
</tr>
<tr>
<td>1962</td>
<td>1,423</td>
<td>16,894</td>
<td>30.2</td>
</tr>
<tr>
<td>1963</td>
<td>1,449</td>
<td>17,133</td>
<td>29.8</td>
</tr>
<tr>
<td>1964</td>
<td>1,493</td>
<td>17,697</td>
<td>29.4</td>
</tr>
<tr>
<td>1965</td>
<td>1,589</td>
<td>18,269</td>
<td>29.7</td>
</tr>
<tr>
<td>1966</td>
<td>1,763</td>
<td>18,922</td>
<td>30.7</td>
</tr>
<tr>
<td>1967</td>
<td>1,921</td>
<td>19,668</td>
<td>32.3</td>
</tr>
<tr>
<td>1968</td>
<td>2,010</td>
<td>20,017</td>
<td>33.1</td>
</tr>
<tr>
<td>1969</td>
<td>2,075</td>
<td>20,186</td>
<td>32.5</td>
</tr>
<tr>
<td>1970</td>
<td>2,173</td>
<td>20,990</td>
<td>33.6</td>
</tr>
<tr>
<td>1971</td>
<td>2,231</td>
<td>20,711</td>
<td>33.6</td>
</tr>
<tr>
<td>1972</td>
<td>2,388</td>
<td>21,206</td>
<td>34.6</td>
</tr>
<tr>
<td>1973</td>
<td>2,591</td>
<td>21,881</td>
<td>36.1</td>
</tr>
<tr>
<td>1974</td>
<td>2,732</td>
<td>22,163</td>
<td>35.8</td>
</tr>
<tr>
<td>1975</td>
<td>2,884</td>
<td>22,207</td>
<td>36.9</td>
</tr>
<tr>
<td>1976</td>
<td>3,042</td>
<td>22,153</td>
<td>37.3</td>
</tr>
<tr>
<td>1977</td>
<td>3,149</td>
<td>21,632</td>
<td>38.2</td>
</tr>
<tr>
<td>1978</td>
<td>3,278</td>
<td>21,757</td>
<td>39.0</td>
</tr>
<tr>
<td>1979</td>
<td>-</td>
<td>22,025</td>
<td>-</td>
</tr>
<tr>
<td>1980</td>
<td>3,397</td>
<td>20,968</td>
<td>37.6</td>
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<tr>
<td>1981</td>
<td>3,487</td>
<td>20,647</td>
<td>37.4</td>
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<tr>
<td>1982</td>
<td>3,617</td>
<td>19,571</td>
<td>39.0</td>
</tr>
<tr>
<td>1983a</td>
<td>3,563</td>
<td>18,634</td>
<td>40.0</td>
</tr>
<tr>
<td>1983b</td>
<td>3,563</td>
<td>17,717</td>
<td>40.0</td>
</tr>
<tr>
<td>1984</td>
<td>3,651</td>
<td>17,340</td>
<td>39.6</td>
</tr>
<tr>
<td>1985</td>
<td>3,666</td>
<td>16,996</td>
<td>39.0</td>
</tr>
<tr>
<td>1986</td>
<td>3,730</td>
<td>16,975</td>
<td>37.7</td>
</tr>
<tr>
<td>1987</td>
<td>3,781</td>
<td>16,913</td>
<td>37.6</td>
</tr>
<tr>
<td>1988</td>
<td>3,841</td>
<td>17,002</td>
<td>36.6</td>
</tr>
<tr>
<td>1989</td>
<td>3,944</td>
<td>16,960</td>
<td>36.2</td>
</tr>
<tr>
<td>1990</td>
<td>4,031</td>
<td>16,740</td>
<td>36.2</td>
</tr>
</tbody>
</table>

It is common to use relative union density rates as a rough estimate of union strength. Obviously, though, the level of union organization is not the same as the measure of the impact of unions on the political and economic system. Although serious questions have

been raised concerning the determination of actual density rates,9 Canadian and United States rates are a reasonably accurate reflection of the scope of collective bargaining and the extent to which employees are covered by collective agreements.10

EXPLANATIONS OF UNION DECLINE

There are many possible nonlegal explanations for the decline of unionization in the United States. For example, many analyses have pointed to cyclical variations in the economy, the closing or reduction of many plants in heavy industry where American union strength has traditionally been centered, the increasing capital transfer to less friendly environs in the south or southwest or the shift of production abroad.11 Others stress changes in the nature of

modest gain and suffered a 3.4% drop in density. In the 1978-1985 period Canadian unions again had over a 20% gain but density remained constant. U.S. unions, however, declined 15-25% in membership, depending upon which set of statistics is used, and suffered a 5-8% drop in density. See Robert Price, Trade Union Membership, in INTERNATIONAL LABOUR STATISTICS: A HANDBOOK, GUIDE AND RECENT TRENDS 146, 154 (R. Ronald Bean ed., 1989).

9. Serious issues of methodology have been raised about studies relying upon aggregate union membership data. Gary Chaison and Joseph Rose, for instance, believe that union membership data are compiled from flawed sources, generally from union reports, dues receipts or from household or firm surveys. The first may be intentionally inflated and the second may include union or agency shop dues payers. Second, there are differences in national studies concerning which unions and employees to count as well as how to estimate potential union members. The various Canadian data series, for instance, "differ in the inclusion of small local independent unions and unaffiliated professional and public employee associations." Chaison & Rose, Union Growth, supra note 8, at 7.

Changes in union density are not simply the result of successful organizing and bargaining efforts or of losses to technological or capital changes, because the pool of potential union members is important. The Bureau of Labor Statistics reported in a review of 1989 membership data that "the number of union members has been virtually unchanged since 1985, while employment has been increasing," thus accounting for the decline in union density between 1985 and 1989. Id. at 9 (citing U.S. DEPARTMENT OF LABOR, NEWS: UNION MEMBERS IN 1989 (1990)).

10. David Kettler et al., Unionization and Labour Regimes in Canada and the United States: Considerations for Comparative Research, in 25 LABOUR/LE TRAVAIL 161 (1990). Leo Troy, however, argues that the structural realities in Canada and the United States are not the same. First, he argues that Canada lags behind the United States by more than a decade in changing from a goods- to a service-based economy. Moreover, he argues that Canada has a far larger public labor market than the U.S. in relative terms which is virtually immune from market forces. Leo Troy, Will a More Interventionist NLRA Revive Organized Labor?, 13 HARV. J. L. & PUB. POLY 583 (1990); Leo Troy, Market Forces and Union Decline: A Response to Paul Weiler, 59 U. CHI. L. REV. 681 (1992). See also DRACHE & GLASBEK, supra note 6, at 180-97. See infra text accompanying note 23.

the workforce, especially the move from labor's traditional bases of support to a workforce containing more white collar, service sector, southern or women workers. Such analyses are based on assumptions of the difficulty of organizing these types of workers or, at least, organized labor's historically limited success among such groups.12

These analyses often omit any reference to the increasing concentration and mobility of capital. Yet, the growth of conglomerates and multinational corporations drastically affect the power relationships of labor and capital. As early as 1975, Charles Craypo determined that at least fifteen percent of the leading 300 firms in American manufacturing, including eight of the top fifty, were conglomerate, multi-national employers.13 As I have noted elsewhere, "[u]nions find themselves dealing increasingly with conglomerates and multi-national corporations that can more easily weather economic struggles, conceal information, and transfer, or more credibly threaten to transfer, work to other locales, or, indeed, other countries, than could their predecessor counterparts."14 While the conglomerate form may not directly affect union density or success in representation elections, the difficulties union face in terms of information and influence seem vital to union growth. More importantly, concentration upon international aspects of capital might weaken purely domestic explanations of labor's decline.

Nevertheless, some of the economic or social explanations for labor decline, despite their straightforward attraction, have been

Jonathan Leonard has found, for instance, in a sample of California manufacturing plants, that employment tends to grow more slowly in organized plants and this slower growth "accounts for 61 percent of the decline...in the proportion of the (California manufacturing) workforce unionized." Jonathan Leonard, Unions and Employment Growth, 31 INDUS. REL. 80, 88 (1992). For a listing of studies on union growth and decline see Chaison & Rose, Union Growth, supra note 8, at 12-36. See also WILLIAM B. GOULD IV, AGENDA FOR REFORM, ch. 2 (1993); CHARLES CRAVER, CAN UNIONS SURVIVE? 34-55 (1993).

12. Recent predictions suggest that if the rate of union decline continues, unions may represent only five percent of the non-farm workforce by the year 2000. Such a decline would match in ten years the reduction experienced for the last 20 years. Predictions are always risky, and often fail to note that private employment may well grow at a substantially reduced rate throughout the 1990s. In addition, the forces which buffeted unions in the 1980s may not be repeated, i.e., the greatest fall in union density occurred during the 1981-83 recession and the deregulation which occurred in the trucking and airline industries. In addition, the tighter labor market projected for the 1990s may lead to greater union organizing. See Charles McDonald, U.S. Trade Union Membership in Future Decades: A Trade Unionist's Perspective, 31 INDUS. REL. 13, 15 (1992).


discounted. For instance, one common explanation is that the stronghold of unionism, older, male, blue collar workers employed in manufacturing industries in the north, has constituted a declining percentage of the workforce while other sectors, such as service industries with younger, female and white collar workers have grown, often in geographic areas where the traditions of unionism are weak. Yet, white collar and service workers are not inherently opposed to collective bargaining nor have they been in Europe or Canada. Even in the United States, organization in the predominantly white collar government sector has grown remarkably in the last 25 years. In addition, white collar organizations predominantly include female or service workers, but pro-union sentiments are high in these groups, much higher than their rate of organization.

Michael Goldfield has forcefully argued that neither economic nor demographic explanations can adequately explain labor's decline and he, like others, stresses the role of American labor law which makes union organization difficult. In focusing on some of the economic explanations, Goldfield argues, for instance, that the southwestern United States has actually been an area of “high union success,” although unionization in the U.S. has concededly been primarily a regional phenomenon. As he notes, “in the Northeast, the Midwest, and along the west coast, labor unions have had until recently a density quite favorable in comparison to those in other countries. . . .”

One of the arguments often raised to discount economic explanations is that Canada, with a workforce and industrial base similar to the United States, has not experienced the same rapid decline in union organization. For instance, the AFL-CIO Committee on the


18. GOLDFIELD, supra note 3, at 94-112.

19. Id. at 235. Goldfield also denigrates the importance of cyclical variations in the economy or in the occupants of the White House. Id. at 224.

20. Indeed, unions in all industrialized countries faced unprecedented challenges in the 1970s and 1980s due to the slowdown in growth, the shift from more highly unionized
Evolution of Work stated that with "roughly the same kind of economy," "many similar employers," and comparable changes affecting the labor market, "the percentage of the civilian labor force that is organized [in Canada] increased in the period 1963-1983 from roughly 30% to 40%, at the same time that the percentage of organized workers declined in the United States from 30% to 20%." In contrast to the continuing union decline in the U.S., many note that the Canadian upturn in the early 1960s represents a long term phenomenon. [See Charts 1 and 3] In addition, some studies discount the notion that the differences between the two countries can be explained by the type of industries present in each country. Indeed, Noah Meltz found that "if Canada were more like the United States in its employment distribution there would be a greater difference in the overall rates of organization." The differences in union density in the two countries also cannot be explained by differences in occupational groups. It is true that there is more extensive unionization of the public sector in Canada, and this may account for a good deal of the seeming difference in union rates in the two countries. Nevertheless, Meltz reports that "all broad occupational sectors were more highly unionized in Canada in 1980 than in the U.S." Indeed in both countries there has been a similar relative decline in the manufacturing sector and a relative growth of government and service related sectors. But even so, the patterns of unionization in the two countries reveals a sharp contrast.

Concededly, the problem with single country analyses is that they may overlook cross-national economic forces. Indeed, since union density is declining in a number of industrialized nations, national discussions may overstate local factors. On the other hand, sectors to traditionally lesser organized white collar and service industries and the internationalization of labor markets. Nevertheless, the precipitous decline in U.S. union density rates was not matched in most continental European countries, Canada or Australia. David Blanchflower & Richard Freeman, Unionism in the United States and Other Advanced OECD Countries, 31 INDUS. REL. 56 (1992).
international forces do not explain why union decline in England, Italy and France has not been matched in Sweden and Germany.\(^\text{25}\) Although an explication of international market and technological changes is beyond the scope of this article, the fact that union decline has not been pervasive suggests that institutional structures in each nation constitute important variables.

Lowell Turner argues, on the other hand, that "changes in world markets and new technologies are driving the reorganization of production and the introduction of 'new production concepts,' which increasingly decentralize labor-management negotiations and undermine traditional national bases of union strength."\(^\text{26}\) Turner concludes, however, that union influence remained stable in countries in which unions were "integrated into processes of managerial decisionmaking, as in West Germany and Japan."\(^\text{27}\) When labor participation is not established by law or integrated into managerial decisionmaking, as in the U.S., unions have little political leverage and are forced to deal with decentralized bargaining. Turner’s thesis, therefore, stresses the effects of the new employer offensive, and he relies, in part at least, on domestic factors to explain why international pressures have different national effects.

**LEGAL REGULATION AND UNION DENSITY**

Various authors conclude that the precipitous fall in American union density is at least partly due to legal and administrative policies in the U.S. involving the enforcement of unfair labor practices or the certification of unions as bargaining agents. Explicit or implicit, these analyses tend to assume that labor law is more favorable to union organization in other countries. More favorable legislation or substantive rules in the U.S., it is argued, would blunt employer opposition and arrest the decline of American unions.\(^\text{28}\) The obverse


\(^{26}\) Lowell Turner, *Democracy at Work: Changing World Markets and the Future of Labor Unions* 7 (Peter J. Katzenstein ed., 1991). Changing managerial strategies for reorganizing work have confronted unions with new challenges. At the same time, unemployment and managerial resistance has weakened union ability to protect jobs and secure increased purchasing power. *Id.* at 10.

\(^{27}\) *Id.* at 26.

\(^{28}\) For a discussion of the studies taking this position see Chaison & Rose, *Union Growth*, supra note 8, at 20-22.
argument is that the decline of American unions is due to relatively
less supportive labor laws or more hostile interpretations of existing
statutes.\textsuperscript{29}

The use of law as an explanatory device is problematic. It is
perhaps odd to differ with social scientists on this point, but I tend
to believe that formal law is more of a reflection of societal pressures
or reality than a cause of social phenomena. This is not to say that
law has no effects of its own. When unions have sought to deal with
concentration of capital in conglomerate firms, for instance, the law
has provided serious obstacles. Unions have frequently sought to co-
operate with other unions facing the same employer or to impose
economic pressure on non-struck parts of a conglomerate. Unions
learn, however, that the National Labor Relations Act (NLRA) often
bars attempts to equalize bargaining power for reasons that have
never been clearly expressed. Despite the professed aim of the
NLRA to equalize bargaining power, unions are informed that they
do not have a sufficient community of interest despite their own de-
sire to seek joint protection and strength. In sum, American law
limits the extent to which the worker community can protect itself
against corporate structures that drastically alter power relations-
ships.\textsuperscript{30}

Moreover, the Taft-Hartley Act of 1947 restricted certain tact-
cics, some of which were very effective when used for organizing or

\textsuperscript{29} An econometric study of the decline of union density in the United Kingdom
during the 1980s concludes that “the vast bulk of the observed 1980s decline in union
density in the U.K. is due to the changed legal environment for industrial relations.”
Richard Freeman & Jeffrey Pelletier, \textit{The Impact of Industrial Relations on British Union
Density}, 28 BRIT. J. INDUS. REL. 142, 156 (1990) (emphasis omitted). Richard Freeman
and Jeffrey Pelletier find that the union decline in the United Kingdom, 1.4 percentage
point per year in the 1980s, cannot be explained by shifts in employment from highly un-
ionized to less unionized groups of workers, worsening public opinion or to changes in
business cycle. Indeed, public opinion of unions rose in the 1980s and union density con-
tinued to fall during an economic upswing. \textit{Id.} at 142-45. \textit{But see} Richard Disney, \textit{Expla-
nations of the Decline in Trade Union Density in Britain: An Appraisal}, 28 BRIT. J. INDUS.

\textsuperscript{30} See Atleson, \textit{Reflections}, supra note 14. This is only one of many possible situ-
ations in which the labor law system varies from what Gunther Teubner calls a reflexive
approach. Reflexive law, he states, approaches problems from a procedural rather than a
substantive standpoint. Thus, “[i]t seeks to structure bargaining relations so as to equal-
ize bargaining power,” but the parties “are free to strike whatever bargains they will. Re-
flexive law affects the quality of outcomes without determining the agreements that will
be reached.” Gunther Teubner, \textit{Substantive and Reflexive Elements in Modern Law}, 17
LAW & SOCY RSV. 239, 256 (1983). Teubner clearly prefers a system of legal restraint to
one of “comprehensive regulation of substantive legal rationality.” \textit{Id.} at 274. An Ameri-
can labor lawyer would recognize the “reflexive potential” in U.S. collective bargaining
law, for the privatization of contractual solutions has long been a staple of industrial re-
lations theory. Yet, although outcomes are shaped by power relations, power is shaped
and restricted by the same legal system.
bargaining.\(^{31}\) Mass picketing\(^{32}\) and, especially, certain kinds of secondary pressure were outlawed,\(^{33}\) and hot cargo agreements were barred by the Landrum-Griffin Act in 1959.\(^{34}\) Importantly, a mandatory injunction provision\(^{35}\) was included for certain union unfair labor practices, and the amendments also provided a damage remedy against unions permitting employers to bring actions directly to federal courts, skirting the NLRB entirely. These amendments, especially the secondary boycott provisions, forced unions to focus primarily on the struck firm during the period when the conglomerate form was becoming more common.\(^{36}\)

Restrictive legislation such as the Taft-Hartley Act or hostile NLRBs also have symbolic effects, making organization psychologically more difficult.\(^{37}\) Furthermore, it is impossible to oppose the ar-

\(^{31}\) President Truman's veto message stated his belief that Taft-Hartley would convert the NLRA "from an instrument with the major purpose of protecting the rights of workers to organize and bargain collectively into a maze of pitfalls and complex procedures." 93 CONG. REC. 7500 (1947) reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 915, 915 (1947). The bill, he stated, would deprive workers of "vital protections which they now have under the Law" and "would go far toward weakening our trade union movement." Id. at 915, 1921.


\(^{36}\) There is some reason to believe, however, that the American focus on single-employer bargaining precedes the Taft-Hartley Act. Jeffrey Haydu of the Department of Sociology at Syracuse argues that the victory of the open shop movement in most American enterprises before WWI meant that by the 1930s most firms administered labor relations by professional managers at the plant level. By this time, labor policies had long been negotiated on an industry-wide basis in many European industries. Once American unions did gain recognition, the development of personnel management tended to favor single-employer bargaining. The employer's structure of rules became the subject of bargaining at the plant level. When negotiations occur at the plant level, and competitive pressures arise, employers are pitted more directly against unions. Jeffrey Haydu, Trade Agreement vs. Open Shop: Employers' Choices Before WWI, 28 INDUS. REL. 159, 171 (1989).

\(^{37}\) A major part of the law's impact may be through the psychological/symbolic effect passage of a RTW (right-to-work) law may have on workers. Successful organization requires that a few workers inside a plant take a highly visible and activist role. The costs to these activists can be enormous, ranging from harassment to loss of their jobs. Even those who are not activists must take the highly visible step of signing an authorization card. And in considering whether or not to vote for a union, workers often fear they will lose their jobs or suffer other costs if their company is hostile. Thus the perceived strength of the union may be critical to the willingness of activists and others to become involved in an organizing drive. A highly visible defeat such as the passage of RTW law (or the crushing of PATCO) may severely damage the union's credibility and appeal to workers. There is at least some evidence that the psychological impact may be important. In Missouri, for example, after a RTW law was defeated, new organ-
argument that the Reagan Board was especially unsympathetic to unions. Many aspects of the Reagan era seem incredible in retrospect and, indeed, seemed incredible at the time. It would have been inconceivable, one would have thought, for a Republican administration to refuse to renew a black Republican on the labor board and, even more incredibly, to actually appoint as solicitor a prior staff counsel of the National Right to Work Association.

The Reagan Board, however, routinely based its reversals of prior holdings on decisions of the past. Some previous Boards could legitimately be characterized as less than sympathetic to the goals of the Act, although one would have to go back at least to the 1950s to find one even approaching this level of unconcern. Yet, the difference is one of degree, for the courts, usually the appellate courts and recently the Supreme Court, have historically restricted the potential scope of the Act. A limited historical focus, therefore, tends to exaggerate the effects of recent decisionmaking.

Thus, although U.S. labor law has obviously negatively affected union vitality, the problem is linking labor's decline primarily to these changes or weaknesses in substantive law. One of the leading voices for reform of American labor law is Paul Weiler. Like others, Weiler places much of the blame for labor's current decline on the National Labor Relations Act, the NLRB, and the continued opposition of American employers to unionism. Although many things affect a worker's decision to vote for a union, Weiler persuasively explains the pressures often brought to bear on the worker at the time the decision is made and the ineffective response of the law. The number of workers certified by NLRB elections as a percentage of the private, nonagricultural workforce fell steadily from 0.61 percent in 1966 to 0.09 percent in 1986. In addition, as Chart 4 indicates, the average number of workers won by unions per election has also

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38. As noted by Carl Gersuny, "[d]uring the year beginning in September 1983, when Reagan appointees first comprised a majority of the National Labor Relations Board, '60 percent of contested unfair labor practice and representation complaints were decided in favor of the employer' and that ratio rose to 65% in the first quarter of 1985." Gersuny, supra note 37, at 191 (quoting AFL-CIO News). The ratios under Presidents Ford and Carter were 29% and 27% respectively. Id.

39. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) [hereinafter ATLESON, ASSUMPTIONS].

40. See Weiler, Promises, supra note 2. See also Goldfield, supra note 3, at 197.

dropped,\textsuperscript{42} and the union victory rate in U.S. certification elections fell from 74\% in 1950 to 48\% in 1980.\textsuperscript{43} Again, note that the 1950 to 1955 period is the point at which union density in the U.S. begins its long, steady fall.

\begin{center}
\textbf{CHART 4}\textsuperscript{44} \\
\textbf{THE CONTRIBUTION OF NLRB ELECTIONS TO UNION GROWTH, 1950-1980}
\end{center}

\begin{table}[h]
\begin{tabular}{|c|c|c|c|c|}
\hline
Year & Certification Elections (Eligible voters) & Union Victory Rate & Fraction of Voters (Number of voters) in Union Victories & Fraction of Nonagric. Work Force in Union Victories \\
\hline
1950 & 5619 (890,368) & 74\% & 85\% (753,598) & 1.92\% \\
1955 & 4215 (515,995) & 68\% & 73\% (378,962) & 0.87\% \\
1960 & 6380 (483,964) & 59\% & 59\% (286,048) & 0.62\% \\
1965 & 7576 (531,971) & 61\% & 61\% (325,698) & 0.64\% \\
1970 & 7773 (588,214) & 56\% & 52\% (307,104) & 0.53\% \\
1975 & 8061 (545,103) & 50\% & 38\% (208,313) & 0.33\% \\
1980 & 7296 (478,821) & 48\% & 37\% (174,983) & 0.24\% \\
\hline
\end{tabular}
\end{table}

\textsuperscript{42} See Chaison & Rose, \textit{Union Growth}, supra note 8, at 26-27.

\textsuperscript{43} Although the Bush NLRB has been more accommodating to labor than the prior Reagan Board, changes in legal doctrine have been modest. Nevertheless, in 1989 "a nine year high was reached in the number of employees organized via the NLRB. The win rate of 49.5 percent was a 14-year high." McDonald, supra note 12, at 16. Recent NLRB data, analyzed by the research division of the Bureau of National Affairs, indicates that unions won more elections, and more employees secured union representation, in the first half of 1992. Although the number of representation elections continued to fall, unions won 49.5 percent of the 1,324 elections held in the first half of 1992. The rate increased 5.2 percent from the corresponding period in 1991. The increased win rate resulted in a corresponding increase, 26.5 percent, in employees winning representation rights. See 141 Lab. Rel. Rep. (BNA) 312 (Nov. 9, 1992).

\textsuperscript{44} Chart 4 is reproduced from Weiler, \textit{Promises}, supra note 2, at 1776.
The failure of union election victories to maintain or increase union density may be explained by continued or even renewed employer resistance which has never dissipated despite the hopes of the Wagner Act's drafters in 1935. Without discounting employer opposition, Weiler argues that "the decline in union success in representation campaigns is in large part attributable to deficiencies in the law." Specifically, he argues that employees are not adequately protected from employer pressure and violations of the Act during election campaigns. Whereas one well-known empirical study suggested that the election campaign has little effect upon employee voting, there is a substantial amount of empirical data to suggest that employer violations of the Act have had very damaging effects.

Certainly the most stunning figure in the welter of numbers generated by the debate over the role of law in union decline is the finding that nearly 40 percent of currently nonunion, non-managerial employees said that they would not join a union because of company pressure. Moreover, a 1988 Gallop poll found that employees believed that a union representation campaign would produce significant tension in their workplaces.

In election campaigns, which usually last between a month and a half to two months, employers often mount vigorous campaigns to persuade employees to vote against the union. The referendum often focuses not upon the willingness of employees to seek collective representation but, rather, whether they wish to maintain their employment. The evidence clearly establishes that both employer resistance and unlawful activity have increased. Thus, as Weiler notes, "[p]erhaps the most remarkable phenomenon in the representation process in the past quarter-century has been an astronomical increase in unfair labor practices by employers." As Charts 5 and 6 indicate, there has been a stunning and disturbing rise in employer violations since 1957 especially involving discharges of union activists. "From 1957 to 1965, unfair labor practice charges against employers increased by 200%, while the number of certification elections increased by only 50%." As indicated by Chart 5, the number of certification elections was slightly lower in 1980 than 1965, but between 1965 and 1980 unfair

45. Weiler, Promises, supra note 2, at 1776-77.
47. Paul C. Weiler, Milestone or Tombstone: The Wagner Act at Fifty, 23 HARV. J. ON LEGIS. 1, 11 & n.18 (1986).
48. PAUL C. WEILER, GOVERNING THE WORKPLACE 117 n.25 (1990) [hereinafter WEILER, GOVERNING].
49. Weiler, Promises, supra note 2, at 1778.
50. Id. at 1779-80.
labor practice charges against employers increased another 200%. This first increase clearly occurred before the internationalization of markets and subsequent pressure on U.S. manufacturers. Moreover, the percentage of these charges found meritorious by the NLRB remained roughly constant. The conclusion is inescapable—employers are increasingly violating employees' rights, especially the right to engage in union activities. Even the increase in back pay awards, noted in Chart 6, has not stemmed the tide of employer lawlessness.

**CHART 5**

**UNFAIR LABOR PRACTICES BY EMPLOYERS**

<table>
<thead>
<tr>
<th>Year</th>
<th>Certification Elections</th>
<th>Charges Against Employers</th>
<th>§8(a)(3) Charges</th>
<th>Fraction Found Meritorious</th>
<th>Backpay Awards (Average Amount)</th>
<th>Reinstates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>5619</td>
<td>4472</td>
<td>3213</td>
<td>NA</td>
<td>2259 ($477)</td>
<td>2111</td>
</tr>
<tr>
<td>1955</td>
<td>4215</td>
<td>4362</td>
<td>3089</td>
<td>NA</td>
<td>1836 ($428)</td>
<td>1275</td>
</tr>
<tr>
<td>1957</td>
<td>4729</td>
<td>3655</td>
<td>2789</td>
<td>NA</td>
<td>1457 ($354)</td>
<td>922</td>
</tr>
<tr>
<td>1960</td>
<td>6380</td>
<td>7723</td>
<td>6044</td>
<td>29.1% (overall)</td>
<td>3110 ($335)</td>
<td>1885</td>
</tr>
<tr>
<td>1965</td>
<td>7576</td>
<td>10,931</td>
<td>7367</td>
<td>35.5% (overall)</td>
<td>4644 ($599)</td>
<td>5875</td>
</tr>
<tr>
<td>1970</td>
<td>7773</td>
<td>13,601</td>
<td>9290</td>
<td>34.2% (overall)</td>
<td>6828 ($403)</td>
<td>3779</td>
</tr>
<tr>
<td>1975</td>
<td>8061</td>
<td>20,311</td>
<td>13,426</td>
<td>32.3% (employer)</td>
<td>7405 ($1524)</td>
<td>3816</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>30.2% (overall)</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>7296</td>
<td>31,281</td>
<td>18,315</td>
<td>39.0% (employer)</td>
<td>15,642 ($2054)</td>
<td>10,033</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>35.7% (overall)</td>
<td></td>
</tr>
</tbody>
</table>

51. This chart appears in Weiler, *Promises*, supra note 2, at 1780.
### Chart 6

**Employer Opposition to Unions as Reflected in Unfair Labor Practice Cases, 1950-1980**

<table>
<thead>
<tr>
<th>Year</th>
<th>Section 8(a)(1)</th>
<th>Section 8(a)(3)</th>
<th>Reinstatees</th>
<th>Number of Backpay Cases</th>
<th>Backpay Amount (thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>4,472</td>
<td>3,213</td>
<td>2,111</td>
<td>2,259</td>
<td>$1,078</td>
</tr>
<tr>
<td>1955</td>
<td>4,362</td>
<td>3,089</td>
<td>1,275</td>
<td>1,836</td>
<td>785</td>
</tr>
<tr>
<td>1960</td>
<td>7,723</td>
<td>6,024</td>
<td>1,885</td>
<td>3,110</td>
<td>1,041</td>
</tr>
<tr>
<td>1965</td>
<td>10,931</td>
<td>7,367</td>
<td>1,875</td>
<td>4,530</td>
<td>2,699</td>
</tr>
<tr>
<td>1970</td>
<td>13,601</td>
<td>9,290</td>
<td>3,779</td>
<td>6,706</td>
<td>2,639</td>
</tr>
<tr>
<td>1974</td>
<td>17,978</td>
<td>11,620</td>
<td>4,778</td>
<td>6,806</td>
<td>8,156</td>
</tr>
<tr>
<td>1975</td>
<td>20,301</td>
<td>13,426</td>
<td>3,816</td>
<td>7,405</td>
<td>11,286</td>
</tr>
<tr>
<td>1976</td>
<td>23,496</td>
<td>15,090</td>
<td>4,442</td>
<td>7,238</td>
<td>11,636</td>
</tr>
<tr>
<td>1976q</td>
<td>6,223</td>
<td>3,982</td>
<td></td>
<td></td>
<td>(the transitional quarter)</td>
</tr>
<tr>
<td>1977</td>
<td>26,105</td>
<td>16,697</td>
<td>4,458</td>
<td>7,552</td>
<td>17,373</td>
</tr>
<tr>
<td>1978</td>
<td>27,056</td>
<td>17,220</td>
<td>5,533</td>
<td>8,623</td>
<td>13,439</td>
</tr>
<tr>
<td>1979</td>
<td>29,026</td>
<td>17,220</td>
<td>5,837</td>
<td>14,627</td>
<td>16,538</td>
</tr>
<tr>
<td>1980</td>
<td>31,281</td>
<td>18,317</td>
<td>10,033</td>
<td>15,566</td>
<td>32,136</td>
</tr>
</tbody>
</table>

Employees entitled to reinstatement in 1980 numbered over 10,000, a 1000% increase from the lowest point in 1957. What is most important is that the "merit" factor, that is, the percentage of cases in which the Board found that a violation had occurred, increased substantially over this period of time. [Chart 5] In other words, not only are more unfair labor practice charges being filed against employers, but a higher percentage of them are found to be meritorious. In 1980, for example, about 10,000 employees were unlawfully fired for their involvement in unionizing efforts. In that year, unions obtained less than 200,000 votes in representation elections. Weiler concludes: "Astoundingly, then, the current odds are about one in twenty that a union supporter will be fired for exercising rights supposedly guaranteed by federal law a half-century ago." These are, I should add, conservative numbers for they ex-

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52. Reproduced from Goldfield, supra note 3, at 196.
53. Id. at 1781. Robert LaLonde and Bernard Meltser challenge Weiler's one in twenty assessment, but they nevertheless concede that there has been a sharp increase in the number of discharged union supporters since the mid-seventies. Overall, however, the authors challenge the thesis that employer actions or the state of labor law account either for the falling union success rate in elections or the decline in union density. Robert J. LaLonde & Bernard D. Meltser, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953 (1991). *See also* Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. Chi. L. Rev. 1015 (1991).
clude those employees who did not file charges, and the large number of employees who settle for a monetary award prior to any holding by an administrative law judge or the Board that the employee had a right to reinstatement.\textsuperscript{54}

Recent studies indicate that employer unfair labor practices affect the outcome of representation elections. William Dickens, for instance, studied attitudinal data from 966 workers participating in 31 elections from 1972-73. Using a simulation model, he found that unions would win 53-67\% of the time if employers engaged in a modest anti-union campaign. With an intense anti-union campaign, however, Dickens found only a 22-34\% chance of union victory. If the employer violated the NLRA, moreover, there was only a 4-10\% chance of winning.\textsuperscript{55} Other recent studies support these findings. For instance, a study of 130 elections in retail grocery outlets indicates that the use of employer consultants decreased the probability of union victory, at least to the extent that it altered the outcome in closely contested elections.\textsuperscript{56}

Finally, and most relevant, other studies have tried to explain why unions, after successfully winning certification rights in Board elections, fail to secure a collective agreement in one out of every four first contract negotiations. William Cooke found that employer discrimination against union activists and unlawful refusals to bargain had substantial negative effects on the probability that a first contract would be reached. Negative effects also resulted from the lengthy delay in the NLRB's resolution of employee challenges to lost elections. In a study of one NLRB region, for instance, Cooke found that the incidence of one or more discrimination violations substantially reduced the probability that an agreement would be reached. Moreover, in 17\% of his sample, the union filed meritorious charges of discriminatory behavior.\textsuperscript{57}

In 1969 the Supreme Court upheld the NLRB's decision to permit employers confronted with a union's presentation of signed authorization cards to ignore this evidence of majority support and demand an election.\textsuperscript{58} No longer would the NLRB inquire into an


\textsuperscript{57} William N. Cooke, Union Organizing and Public Policy: Failure to Secure Union Contracts 98 (1985).

employer's "good faith belief" that the cards did or did not accurately reflect the wishes of a majority of employers. Even the discarded "good faith" test had restricted the seeming scope of the NLRA's requirement that employers bargain with a representative "designated or selected . . . by the majority of the employees." Indeed, the Supreme Court itself recognized in *Gissel* that "a union is not limited to a Board election," and "it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.'" The Court seemed unaware of the conflict between this recognition and its decision upholding of the NLRB's new approach. Indeed, the Court made clear five years later that even a strike for recognition by a majority of employees would not be sufficient to require mandatory recognition.

Instead, the NLRB, with the Court's support, virtually guaranteed that representation questions will be settled by elections. The result is seemingly based upon the dubious proposition that the outcome of elections will more accurately reflect workers' uncoerced will than their signed authorization cards. In assuming the existence of union or group pressure to sign authorization cards, the courts seem oblivious to the more obviously perceived risks of card signing. Instead, the safety valve in the new approach was that, should an employer commit unfair labor practices during the election campaign so serious that an election and the use of NLRB remedies could not erase the effects and insure a "fair election," the NLRB could issue a bargaining order if the union had secured majority support before the election.

The standard sounded fair as worded, but how would the Board ever prove that the effects of employer unfair labor practices could not be erased by normal remedies and a new election? One could have predicted difficulties, especially in the appellate courts where the unreliability of authorization cards has long been a staple of faith. Indeed, we have Judge Gibbons of the Third Circuit to thank for explaining the inability of the NLRB to successfully justify bargaining orders in some courts. Gibbons noted in an extraordinary dissent that "at least a significant minority of the members of this court believe that the Supreme Court . . . in [*Gissel*] erred." His court, said Gibbons, was engaging in "guerrilla warfare" because

60. *Gissel*, 395 U.S. at 596.
63. *Id.* at 471.
"the real concern is for employers."64

Yet, even if a bargaining order under Gissell is granted, the order is a weak reed upon which to build a strong, credible bargaining position. A study of 49 bargaining orders granted between January 1981 and July 1984 found that contracts were reached in only 19 (39%) of the cases.65 These figures could be interpreted in various ways but should be compared to the 78% success rate for first negotiation situations following certifications.

Certainly these studies indicate that the outcome of elections and the securing of first collective bargaining agreements is affected by employer resistance and unfair labor practices. This suggests that the law does not serve as a very effective deterrence and, just as importantly, that the remedial measures of the Board are not sufficient to overcome the value to employers of unlawful action.66 Employee willingness to join unions is in part a reflection of the costs or risks of such action. In a 1984 Harris poll of nonunion workers, 43% believed that their employer would either discharge or otherwise discriminate against union supporters in an organizing campaign.67 Thus, it is certainly reasonable to argue that the open resistance of American employers to unionization plays a substantial role in employee decisions.68

Although these studies indicate that legal rules may affect the success rate of union organizational drives, the relationship of increased employer resistance to falling density is nevertheless problematic. Despite the hostility of the Reagan Board and recent economic developments:

a union's chances of winning representation elections has changed remarkably little. In the 1973-78 period, unions won approximately 47 percent of all private sector representation elections and in the 1980s, through the first half of 1988, unions won approximately 45-48 percent of all representation elections. Despite all the changes in the economy, the composition and philosophy of the Board, the commission of unfair labor practices and delay in case processing, unions have fared nearly the same during the entire period.69

64. Id. at 474.


66. Paul Weiler's argument is that given the strong resistance of employees to unions, labor law's failure to constrain employers "bears a substantial share of the responsibility for the general decline of unionization." WEILER, GOVERNING, supra note 48, at 118.

67. Id. at 114.

68. Id.

Furthermore, Dickens and Leonard conclude that “even if unions had continued to win representation rights for the same percentage of voters in certification elections as they did in 1950-54, their share of employment would still have fallen over this period [1954-1980] nearly as much as it actually did.” Although some believe that union election success or failure is an essential component in the decline in union density, other scholars, like Robert Flanagan, argue that “the results of representation elections have only a small bearing on the growth of union membership,” noting that changes in employment levels at organized firms, plant closures and union organizational activity affect density and, indeed, have “contributed to the decline of union membership.” In turn, however, union success rates, affected by the legal regulatory structure, may well have an impact on the volume and intensity of labor’s organizational efforts.

The “employer opposition” explanation for labor’s decline has been attacked most strongly by Leo Troy who argues that private sector unionism will continue to erode irrespective of amendments to the NLRA, primarily because of structural changes in the American economy and increased foreign and domestic competition. Troy challenges the notion that employer hostility is a relevant factor, relying instead on “the invisible hand of other market forces.”

70. The authors conclude that “only if both organizing and success rates had continued at their early 1950s level could the unions have come close to maintaining their share of the work force.” Dickens & Leonard, supra note 16, at 323, 332. The challenge facing unions is revealed by one astounding statistic—to reach the previous levels of union organization of 35%, unions would have to recruit 23 million new members. AM. LAB. Y.B. - 1993, 16 (1993).


72. Robert J. Flanagan, The Economics of Unions and Collective Bargaining 29 INDUS. REL. 300, 308 (1990). In 1991 unions won election victories in bargaining units totaling over 62,000 workers. When, however, this number is reduced to account for decertification elections, agency shops, and situations in which no first collective agreement is obtained, only a net of 23,400 new workers are represented via elections. In the same year, more than 195,000 union jobs were lost. If labor wins every NLRB representation vote at the “current pace of organizing and brings every worker under contract, it would add roughly 180,000 new members a year - yet union density would still fall.” 61 ECON. NOTES (Lab. Res. Ass’n.) 7 (April, 1993).

73. Leo Troy, supra note 10, at 583. See also Leo Troy, Market Forces and Union Decline: A Response to Paul Weiler, 59 U. CHI. L. REV. 681 (1992). Troy states that when the United States shifted from a goods-dominated to a private service-dominated economy in the 1950s, density declined because services were largely non-unionized. In addition, international competitive forces, accelerated by the high exchange rate of the dollar from 1979 to 1985, have devastated the organized manufacturing industries, and the decline in the exchange rate of the dollar after 1985 has not helped as foreign output from foreign-owned companies or U.S.-owned companies abroad has continued to provide significant
effect of legal rules may be overstated, but it is doubtful that the law is "irrelevant." Troy's strongly supported analysis usefully directs attention away from an exclusive NLRA focus, but it assumes that the "market" somehow exists independent of legal regulation and public policy. Moreover, Troy's stress on employee opposition to union membership seems to ignore the climate of fear and uncertainty caused by employer opposition and governmental hostility which have been made crystal clear over the past twelve years to even the most inattentive observer. Moreover, the "employee resistance" argument fails to account for the relative success of public sector unions operating in a sphere where employer resistance to unionization is often minimal.

LABOR LAW IN CANADA

Canadian federal and provincial labor statutes are more supportive of union organization and generally provide more effective remedies. In most Canadian jurisdictions, for instance, certification of a bargaining agent results from a simple count of membership cards. In those jurisdictions which do require a vote, the election is held soon after the application for certification is filed, perhaps 5-10 days. Just as important, the law of the federal sector and five provinces provide for binding arbitration if the parties are unable to negotiate an agreement following union certification. Canadian legislation generally gives public agents greater power to regulate and enforce unfair labor practices and stronger mandates to foster union growth. Thus, Peter Bruce notes that:

Canadian labor boards have the authority to: (a) certify unions without formal union representation elections; (b) make quick and final decisions in ULP cases with little intervention from the courts; and (c) impose first contracts when employers refuse to bargain with newly certified unions. Compared to the U.S., Canadian labor laws also have given public sector workers more rights to strike, to compulsory arbitration, and to bargain over wages. Numerous studies show that these institutions have curbed employer ULPs more effectively and have given workers in Canada more competition for U.S.-located manufacturers. He argues that even if unions had not lost one member since peaking at 17 million members in 1970, its market share today would still be only about 18 percent, less than in 1937, and only about one-half of its all time peak in 1953. He denies that the U.S. has suffered deindustrialization, but argues that there has been a large scale deunionization of its industrial base.

74. H. P. Ralph & Mark Crestohl, The Union Knocks at the Door: The Canadian Perspective, 41 LAB. L.J. 569, 570 (1990) [hereinafter Ralph & Crestohl]. For a detailed discussion of Canadian labor law see GOULD, supra note 11, at ch. 7.

75. Ralph & Crestohl, supra note 74, at 574.
incentives to unionize.\textsuperscript{76}

In Ontario, for instance, the most industrialized and populated Canadian province since 1930, containing 35\% of Canada's unionized workers, judicial review is limited, unions may be certified without elections,\textsuperscript{77} and the burden of proof is placed on management in discrimination cases, a development that would be considered extremely radical in the United States. Ontario also permits strikers to reclaim their jobs for up to six months after the beginning of the strike, even if replacements hired in the interim must be let go.\textsuperscript{78} In the U.S., however, strikers who exercise the statutory "right" to strike under NLRA section 7 can be permanently replaced.\textsuperscript{79}

\textbf{THE ROLE OF PUBLIC OPINION}

But if Canada's laws are generally more effective, more pro-organization, we have to ask how this situation arose. We cannot assume that one nation's laws can be transported to another to produce similar results despite cultural differences for those cultural differences may explain why legal systems are distinctive.\textsuperscript{80} Assuming Canada's statutes are more supportive of union organization, and even accepting the notion that the law affects union density rates, the critical issue is why Canada is more hospitable, and the U.S. more hostile, to unions. One thing seems clear—it is not because of national differences in public opinion. Concededly, the sympathetic light in which American unions were viewed in the 1930s


\textsuperscript{79} This doctrine is criticized in Atleson, \textit{Assumptions}, \textit{supra} note 39.

no longer exists. In 1981, for instance, the approval/disapproval rating of labor unions (55%/35%) in U.S. polls stood at the lowest level since the Gallop Poll first asked that question in 1936. In ratings of the perceived ethical and moral practices of various occupational groups in the early 1980s, labor leaders ranked at the bottom, although recent public opinion polls reflect more support for unions.\textsuperscript{81}

These views could be based on a belief that unions are part of the reason for the U.S. economic decline, the perceived lack of internal democracy in unions or the feeling that union corruption is rampant. I suspect the latter, but AFL-CIO representatives believe that polls do not show that public views of possible corruption affect approval rates. I am somewhat skeptical—the pre-Carey Teamsters, I would think, have affected the way Americans think of unions. The parade of union officials before congressional committees in the late 1950s, the Kennedy-Hoffa wars, and widely disseminated pictures of officials like the late Teamster President Jackie Presser being carried into a Las Vegas convention à la Julius Caesar, no doubt leave indelible albeit misleading impressions on the American mind. Interestingly, reports of employers who negligently or intentionally kill, maim or damage the environment do not seem to have the same effect on the perceptions Americans have of corporations.

It would be a mistake, however, to overstress public opinion, as if it were a valid starting point for considering national differences or labor's decline. Public perceptions, after all, are also formed by the media, which has never been sympathetic to unions. This concern is part of a larger problem involving the increasing concentration of control over the avenues of communication. Moreover, as I have argued elsewhere, the media is a prime force in constricting the range of discourse in America.\textsuperscript{82} The spectrum of political debate is ex-

\textsuperscript{81} Public opinion shifts, and the public is not immune to the impact on labor of the events of the past decade. A Roper Poll released in February, 1990, prepared for the AFL-CIO Executive Council, indicated that 50% of Americans had a "high" or "fairly good" opinion of labor leaders compared with 37% in 1982. Stockbrokers and politicians ranked below labor leaders. An increasing number felt that unions "need to do a great deal more to improve the quality of life for workers." The number who felt excessive union demands make the cost of living rise too much fell from 60% in 1981 to 40%. In addition, 33%, as compared with 28% in 1977, said they instinctively side with unions when they learn of a strike. This is the highest level of support for unions received since Roper began asking these questions over 12 years ago. BUREAU OF NATIONAL AFFAIRS, Labor Image Improves, Roper Poll Shows, 133 Lab. Rel. Rep. (BNA) 273 (Mar. 5, 1990).

Recent scandals in the political and financial arena may account for some of these results, combined with the lack of any newsworthy labor corruption stories. But it may not be a coincidence that the last two years has involved a resurgence of labor militance at, for instance, Pittston, International Paper, Hormel and Eastern Airlines.

\textsuperscript{82} Television and the press are the prime means of communication, but these avenues are accessible only to those groups able to reach into deep pockets. The media, unfortunately, tends to be controlled by a handful of persons who have similar viewpoints,
tremely narrow, and media attention to unions tends to stress the "problems" they cause and, more recently, their serious reduction in both size and power. These perceptions are important because they affect the likelihood that Congress or the courts will respond affirmatively to employee and union concerns.

Although the drop in the public approval rating of unions is important, Chart 7 indicates that approval of unions is not higher in Canada. Indeed, Peter Bruce notes that Canada's proportion of favorable attitudes to unions has generally been 5% or more below that of the United States. In sum, Bruce states that as far as pro-union sentiments are concerned, "Canadians have consistently been less favorable than people in the United States." 83

CHART 7
PUBLIC ATTITUDES TOWARDS UNIONS IN CANADA AND THE U.S.

and, increasingly, a smaller handful. See Atleson, Reflections, supra note 14, at 841.

83. See Peter Bruce, supra note 76, at 115-41. Indeed, "public attitudes are not significantly different among countries with declining and stable union density rates." Chaison & Rose, Union Growth, supra note 8, at 30.

84. Bruce, supra note 76, at 120.
Thus, the Canadian unions seem to have been more successful and seem to have gained more favorable legislation, even though their public approval rating is no higher than in the United States. One must obviously look elsewhere for an explanation. Even if it were otherwise, there is not always a clear connection between public opinion and the responses of legislatures, courts or administrative agencies.

BLAMING THE VICTIM: THE DECLINE IN UNION ORGANIZING

If differences in national approval rates cannot explain relative union success, one might focus on the behavior of American unions. Many American unions do seem to be less aggressive and socially conscious than unions in other western societies, although they have historically been very militant, and the U.S. strike rates have often been higher than those of western Europe. United States labor history has also been filled with instances of violence, although much of this violence has been due to the opposition of employers and the intervention of the state. The state has often intervened in repressive ways, and in a manner that would be anathema in Europe. And, it is almost cliché to add, American employers are more strongly resistant to unions than employers elsewhere.85

It is relevant that in the 1950s, at the time when the union decline in the United States began, unions started to reduce their expenditures on union organization. At the same time, the composition of the work force began to change dramatically, in directions which created problems for established unions.86 As noted earlier, unions have traditionally been weakly represented in white collar and service industries. In addition, unions were not well positioned to meet the challenge of the growth of southern industry.87 In the 1970s and 1980s, unions suffered great losses, especially in the heavily unionized manufacturing centers of the north and east. Employers, at the same time, seem to have become more interested in worker morale and satisfaction, partly to motivate and retain

86. Richard Edwards and Michael Podgursky believe that union difficulties derive "from a process of institutional decay and transition that is more general and long lived than would be suggested by focusing only on high unemployment and industrial decline." Richard Edwards & Michael Podgursky, The Unraveling Accord: American Unions in Crisis, in UNIONS IN CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES 15 (Richard Edwards et al. eds., 1986) [hereinafter Edwards & Podgursky].
87. "Had the organizing and success rate held constant, most of the secular decline in the unionized share of the labor force would have been arrested." Id. at 17-18. It cannot, obviously, be known whether continued expenditure levels for organization would have been successful in terms of maintaining union density.
workers, and partly to lessen the chance that workers would choose unionization as the vehicle for workplace improvements.

Yet, union organizing efforts decreased substantially in the 1970s and 1980s. Freeman and Medoff conclude that "possibly as much as a third of the decline of union success through NLRB elections is linked to reduced organizing activity." Indeed, union organizing expenditures per nonunion worker fell 9% between 1963 and 1960, and between 1961 and 1971 they dropped another 21%. Although gains were made among governmental workers, these successes did not offset the decline of organized workers as a percentage of the work force, a percentage which fell from 26% to 21% between 1970 and 1980. It is also in the 1950s that many union activists, often possessing a far broader social vision than remaining union leaders, were removed from the workforce by McCarthyism, either directly or as a defensive measure by unions.

American unions operate in a system far more hostile than in any other western democracy. American employers have always been hostile to union organization, and they often act in ways that shock European observers. Moreover, with the exception of the Wagner Act in 1935, the federal and state governments have often been hostile to union organization, and in some instances acting through the militia, the army or courts have actively suppressed labor movements. There is no doubt, however, that employer opposition increased in the 1970s and 1980s when employers no longer saw the advantages of the post-war "labor accord" outweighing the disadvantages. American employers shifted to a more militant union posture, including fervent, often illegal opposition to union organization, greater assertiveness in bargaining, and strategies in personnel relations intended to blunt the attractiveness of unionism to employees. In Canada, on the other hand, union acceptance generally exists among large Canadian firms.

89. See FREEMAN & MEDOFF, supra note 76, at 228-30. See also Goldfield, supra note 3, at 205-07. I do not wish to be seen as "blaming the victim." As Joel Rogers notes, unions organize strategically and would "be quite reluctant to organize in sectors where they did not already command significant power." Joel Rogers, In the Shadow of the Law: Institutional Aspects of Postwar U.S. Union Decline, in LABOR LAW IN AMERICA 283, 295 (1993). Moreover, the inadequate protections offered by the NLRA force unions to seriously consider the expected level of employer resistance.
92. See Edwards & Podgursky, supra note 86, at 32-33; see also Rogers, supra note 89.
93. Anil Verma & Mark Thompson, Managerial Strategies in Canada and the U.S.
Walter Korpi has noted that strikes in the United States in the post-war period tended to be of relatively long duration, approximately 3 weeks. That same duration was found in other western nations up to World War II, but since then it has been cut by more than 50%. Korpi notes that "employers in the United States have also retained the strong, somewhat vehement, resistance to unions common in most countries in earlier decades." We would expect, says Korpi, that where the disparity of economic power between management and labor is great, industrial conflict will be intense and will affect the basic rights of collective bargaining, primarily on the level of the workplace. However, when the gap in power resources is decreased, due to the increased organizational strength of workers, employers gradually are forced to accept the basic rights of employees. Over time, employer opposition to collective bargaining tends to disappear. Korpi concludes that the explanation for American exceptionalism is that unions have remained weak and have not been able to achieve the changes which have taken place in many other countries.

It is hardly news that American unions are relatively weak, and that their weaknesses are reflected in less sympathetic or even hostile laws. Except for France, union density in the U.S. is lower than in all other western democracies, a situation which existed prior to recent domestic and international economic shocks. Moreover, as Joel Rogers has noted, "no other system displays the postwar U.S. pattern of uninterrupted decline during the post-war years."

Rather than placing the blame on the weaker party, it seems more realistic to stress the continued and often vehement opposition of American employers to unions and the fact that the state, generally through its courts, has often aided that opposition. Thus, while American unions may have contributed to some extent in their own decline, union tactical decisions have always been made in the context of inferior power positions.

in the 1980s, IRRA PROC. (Barbara Dennis ed., 1988). See also Chaison & Rose, Union Growth, supra note 8, at 23-24.
95. Id. at 176.
96. Id.
97. Rogers, supra note 89, at 288.
98. Joel Rogers has argued that faced with the threat of employer opposition and the weak protection of the NLRA, unions acted rationally, concentrating their efforts only in sectors where they already had achieved substantial power. This argument deemphasizes political choices made by unions in the 1940s and 1950s and stresses that a period of genuine stability existed in the immediate post-war period. Rogers does not deny that union density has been falling since the mid-1950s, but he stresses that the unionized sector remained stable until recently. Joel Rogers, Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Law, 1990 Wis. L. Rev. 1, 113-17 (1990).
As Chaison and Rose note, moreover, "the present low level of organizing is caused by both the political and financial decisions made within unions and such exogenous factors as employer resistance to unionization of the workforce and the public policy framework of union organizing." As union membership and dues fall, the resources that can be devoted to organizing obviously decline as well. Moreover, extensive organizing efforts may not seem wise to union officials facing stiffer employer resistance and the uncertainties of a more hostile NLRB and judiciary.

POLITICAL SYSTEMS AND UNION MILITANCE

It is all too common to view American values and culture through the lens of often hostile judicial decisions. Throughout American history, employees and unions have expressed a set of values radically different from those traditionally possessed by courts. In addition, legislatures often reflected sentiments which were sympathetic to collective action, reacting supportively to organizational campaigns and to union militance, whether in the area of safety, injunctions or collective bargaining itself. The alleged historical exceptionalism of the United States is substantially based upon judicial activism in the late 19th and early 20th centuries which invalidated a significant number of state and federal statutes. But not all statutes were struck down and, most important, in every case where courts invalidated a statute, legislatures had acted upon a quite different set of values. Therefore, one must be

99. Chaison & Rose, Union Growth, supra note 8, at 28.
100. Charles McDonald, Assistant to the AFL-CIO's Secretary-Treasurer, has candidly acknowledged that union organizers were challenged by the situation existing in the 1960s and 1970s. Since union membership seemed relatively stable and even grew in some unions, little thought was given to altering tactics and strategies for organizing the new workforce. Indeed, the "impetus to organize was in the hands of local leadership" and some "viewed new organizing as a potential threat to their ability to be re-elected." McDonald, supra note 12, at 20. This situation has recently been seriously addressed by the AFL-CIO, especially with the creation of its Organizing Institute charged with the responsibility to recruit and train union organizers.

McDonald has estimated that to maintain an organized level of 12.4 percent of the private sector workforce, assuming a growth of 1.1 million workers per year, unions would have to secure a yearly net gain of 136,000 workers. Unions, however, are gaining approximately 90,000 new members yearly via NLRB elections, although new agreements are secured in only 75 percent of the situations in which representation is secured. Given a yearly loss of 10,000 members by decertification elections, McDonald concludes that "we have to nearly double our current victories to achieve a gross addition of 136,000 new members per year through NLRB processes" even excluding losses through plant closings and other causes. Id. at 22. See also KORPI supra note 94 and accompanying text.
102. See Melvin Urofsky, State Courts and Protective Legislation During the
careful of the tendency to assume that the labor views of certain judges are the predominant statement of American values or culture. Employees and unions, and sometimes legislatures, often express a quite different set of values which recognize the need for protection of employees and collective action to counteract the powerlessness of individual workers.

The recent legislation dealing with plant closings, family leave, and the use of polygraphs, for instance, reveals continued legislative willingness to intervene in the employment relationship. Indeed, the experience of the last 25 years suggests the continued possibility of federal and state legislation to protect important aspects of the employment relationship. The tolerance among legislators for labor legislation is clearly limited, however, since the political cost is considered high. 103 Indeed, although Congress has been willing to intervene in areas of occupational health and safety, plant closings, discrimination, and pensions, prospects for reform of the National Labor Relations Act may be slight even with a Democratic administration.

In general, special circumstances have been necessary to pass any legislation dealing with unionization and collective bargaining. It is difficult to believe that the Wagner Act would have been passed, for instance, and perhaps even declared constitutional, without the massive and collective action of committed and courageous workers in the 1930s. 104 The Taft-Hartley Act, on the other hand, was passed

103. James Pope has perceptively noted that unlike other groups whose interests may conflict with portions of the business community, “labor is locked in an adversarial one-on-one relationship with business—the interest group acknowledged by even the most enthusiastic pluralists as unquestionably the strongest.” James Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Tex. L. Rev. 1071, 1122-23 (1987).

104. There is a rich literature dealing with the reasons for the Wagner Act’s passage. In addition to pluralist, corporate liberal and other theories, some have stressed the extent to which the state is autonomous in relation to social and economic forces. Kenneth Finegold & Theda Skocpol, State, Party and Industry: From Business Recovery to the Wagner Act in America’s New Deal, in STATEMAKING AND SOCIAL MOVEMENTS 169 (Charles Bright & Susan Harding eds., 1984); Theda Skocpol, Political Responses to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal, 10 Pol. & Soc'y 2, 168 (1980). The latter view, especially, necessarily plays down the role of working class disruption, and the “state autonomists” have recently been challenged by Michael Goldfield. See Michael Goldfield, Worker Insurgency, Radical Organization, and New Deal Labor Legislation, 83 Am. Pol. Sci. Rev. 1257 (1989). Goldfield stresses the rise of labor militancy and the increased influence of radical organizations and the interaction of these groups with liberal and governmental reformers. The strikes of 1934 in Minneapolis, Toledo, and San Francisco were led by radicals and many believed or feared that this was only the beginning of further revolutionary activity. Goldfield is critical of approaches that slight the importance of the social context of political events.
just after the wave of post-war strikes. The statute, however, also reflected hostility to unions and the NLRA which had surfaced as early as 1937 and 1938, and passage also was a result of wartime strikes, primarily those of the United Mine Workers, which had weakened labor's political support. Practically, of course, Taft-Hartley was a response to the Republican capture of both Houses of the Congress. Finally, the passage of the Landrum-Griffin Act of 1959 was primarily a response to the televised revelations of Senator McClellan's hearings on union corruption. This history suggests that although there may be hope for legislative reform affecting employment in certain areas, amendments to the National Labor Relations Act favorable to unions will be politically difficult.

Beyond national differences in substantive law and procedure, the Canadian experience has historically "proceeded more frequently through attempts at multipartite negotiations at the highest level, or through ad hoc interventions which regulate or supersede the outcomes of collective bargaining in designated classes of cases, especially in the public sector, than through a systematic weakening of the competitive position of organized labor within the adversarial system."¹⁰⁵ David Kettler, et al., argue that because Canada has been relatively willing to intervene directly, it has been less inclined to affect actual bargaining outcomes by manipulating bargaining strengths or legal rules. Compulsory union recognition, however, came only during wartime, rather than, as in the United States, during a serious and prolonged depression. The popular support for the Cooperative Commonwealth Federation, forerunner of the New Democratic Party, combined with an enormous strike wave led to P.C. 1003, which imposed a structure similar to the Wagner Act, including compulsory union recognition and collective bargaining, on a system which already had experienced extensive intervention.¹⁰⁶

Peter Bruce persuasively argues that Canada's legal environment is more sympathetic to unions because of systematic differences in political party systems. He stresses the presence of a social democratic party operating in a parliamentary system which mag-

nifies the effect of a third party. The Liberal Party, for instance, often supports labor legislation in order to ward off, or co-opt, the votes that might otherwise go to the NDP. Indeed, Liberals have tended to support labor legislation when they were most at risk rather than most secure. In sum, Canadian labor law reforms have tended to be implemented in situations when the major parties have felt least secure.

Interestingly, in focusing on the 1965 attempt to repeal the NLRA's "right to work" provision, section 14(b), and the attempt to pass the relatively pallid Labor Reform Bill of 1978, Bruce found that the representatives from America's most unionized and populated states tended to vote overwhelmingly in favor of organized labor's positions, while those from less unionized and less densely populated states generally opposed such reforms. While this, in itself, is hardly surprising, he stresses the unrepresentative nature of the U.S. Senate. The pro-union senators in 1965, and those who failed to overcome the filibuster against the labor reform statute in 1978, "represented nearly twice as many voters as their triumphant opponents." In short, these two pro-union efforts would have been successful if based solely upon the voters represented. Again, in conjunction with my argument that some institutions, for instance, legislatures, have often been more sympathetic to unions than the courts, the conclusion is that institutional and political differences between the two countries are extremely important. Comparative analysis is made exceedingly difficult by such political and social differences, and they caution against the assumption that the laws of one nation can easily be exported to another.

107. As many writers have noted, an important feature of "American exceptionalism" is the absence of a social democratic political party. See Ferguson & Rogers, supra note 88. "Lacking political vehicles of their own, American workers have long been disappearing as even a presence in the electoral system." Rogers, supra note 87, at 59. As Rogers argues, union membership alone means little without effective organization and coordination. As early as 1953, V.O. Key noted that U.S. labor lacks "proportionate durable power as a class." V. O. Key, Politics, Parties and Pressure Groups 52 (4th ed., 1958). For a discussion of the importance of political ties to the NDP, see Kettler, supra note 10, at 174-76.

108. Bruce argues that Canada's major parties introduce labor law reforms "at lower thresholds of pressure than would be required in the U.S.," but they do so only when under intense electoral pressure, and not when governing with comfortable majorities. Bruce, supra note 76, at 127.

109. Id. at 126.

110. Lawrence Rothstein has contrasted the quite different responses of steelworkers facing plant shutdowns in Youngstown, Ohio, and Longwy, France. Lawrence E. Rothstein, Plant Closings: Power, Politics, and Workers 115-85 (1986). The French workers' struggle involved militant, collective action whereas Youngstown steelworkers, at least initially, ceded responsibility to an organization of area clergy and, except for two occupations of US Steel Offices, primarily opted for a litigation-
In Canada, as in the United States, organized labor appeared to approach its high water mark in the 1950s. Huxley notes that, after 1956, "escalating unemployment and anti-union provincial legislation frustrated union hopes for expansion. Unemployment in Canada between 1957 and 1962, which was more prolonged and severe than in the United States, increased the pressure for restrictive legislation and facilitated its passage." But economic recovery, combined with the political leverage for labor gained by the New Democratic Party, permitted labor to "reverse dramatically this pattern of union decline during the remainder of the decade." From 1961 on, "Canada experienced a cycle of union growth and militancy... beyond any level of unrest in the U.S." Large and long strikes during the 1960s and early 1970s ended the use of the ex parte injunction as provincial governments tended to adopt conciliatory approaches.

As Roy Adams argues, "[t]he reason for the more liberal nature of Canadian labour policy seems... to lie in the different nature of the two political systems and in particular, in the adoption by the Canadian labour movement of a viable partisan political strategy," one more like that of European movements which have a social philosophy as well as a political arm.

Union militance, however, is not necessarily incompatible with cooperation. A number of Canadian provinces have mandated the creation of joint employee-employer committees, elected by unorgan-
ized employees or designated by a union representative, to deal with issues such as occupational health and safety. The spread of these committees, similar in some ways to European works councils, and the transformation of arbitration from a private to a public process, reflect a move to a more European model of industrial relations. Differences in political structure and union militancy, therefore, are crucial in any understanding of the contrast between the substantive law of Canada and that of the United States.

There is little reason to believe that Canadian employers, many of whom are based in the U.S., have less of a desire to "escape from the fetters imposed by collective bargaining." The absence of a corporate offensive in Canada can be explained by the militancy of Canadian unions and a state that "has been much more insistent that employers respect the letter and the spirit of the law." Huxley concludes that:

the most striking differences between the Canadian and American movements during the past two decades is the increasing importance of more adversarial and political unionism in Canada, marked above all by the interdependence and effective mutual aid between key unions and the New Democratic Party in English Canada, and analogous developments in Quebec.

During this time in the U.S., union concerns were only intermittently of interest to the Democratic Party and at present are commonly referred to as "special interests," akin to sugar producers and toothpaste manufacturers.

**LAW AND THE PERCEPTION OF UNION POWER**

Both Congress and the courts in the U.S. seem to respond affirmatively to unions only when they are seen as troublesome. Concededly, legislative reform in American history has often been restrictive of unions rather than supportive, the most noteworthy exception being the Wagner Act of 1935. Even this statute, however, was not passed solely to protect the interests of employees, for one of the primary concerns was the felt need to decrease the incidence of strikes by promoting collective bargaining and by resolving representation disputes by peaceful administrative means. Recent studies have argued that increases in unionization may lead to more strikes, but, importantly, unionization is also a consequence of

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118. *Id.*

strikes.\textsuperscript{120} That is, unions tend to grow and expand when they are seen as active protectors and militant representatives of employees. Critically, it may be only at such times that the law responds to expressions of collective vigor.\textsuperscript{121} Thus, it is relevant that union density declines in tandem with reduced organizational efforts.

Even judges seem to react to union militance, for many judicial decisions seem to be based upon perceptions of union power. In the 1944 \textit{NLRB v. Hearst Publications, Inc.}\textsuperscript{122} decision, for instance, the Supreme Court upheld a broad definition of "employee" in order to include within the Act all those who \textit{needed} protection, whether or not they would be treated as "employees" or "independent contractors" under traditional common law rules. The Supreme Court stressed that the NLRA should be read broadly so that it could:

\begin{quote}
bring industrial peace by substituting ... the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established.\textsuperscript{123}
\end{quote}

The stress on industrial peace and interruption of commerce clearly reflects the Court's understanding that the NLRA, passed in the midst of the turbulent depression, could not fulfill its goals without a liberal, inclusive interpretation. Such a message was especially clear during wartime when there was a felt need to institutionalize labor relations within an administrative system.

\begin{footnotes}
\item[121] It is common to explain the upsurge in public sector organization in the 1960s and 1970s "by the passage of laws (executive orders) that have sought to bring the private sector industrial relations model to the public sector." Richard Freeman, \textit{Unionism Comes to the Public Sector}, 24 J. Of Econ. Literature 41, 42 (1986). Michael Goldfield has challenged this thesis noting, for instance, that the 1962 Federal Executive Order 10988 was in large part a response to, rather than a cause of, the dramatic increase in union organization. Moreover, initial growth in teachers' unions seems to have \textit{preceded} state collective bargaining statutes. Referring to both the growth in federal and state employee organization, Goldfield concludes that "it was the initial takeoff in public sector union growth that stimulated the passage of collective bargaining laws." Michael Goldfield, \textit{Public Sector Union Growth and Public Policy}, 18 Pol'y Stud. J. 404, 415 (Winter 1989-90).
\item[122] 322 U.S. 111 (1944).
\item[123] \textit{Id.} at 125.
\end{footnotes}
Recently, however, in *NLRB v. Bell Aerospace Co.* and *NLRB v. Yeshiva University*, the Supreme Court has, without any supporting legislative history, excluded from the statute perhaps hundreds of thousands of employees deemed to be "managerial employees," employees who are in a position to formulate and effectuate managerial policies. This judicial policymaking has profound effects, especially given the changing nature of the workplace and increased concern about decentralizing "managerial" decisionmaking. Not a word will be found in these recent opinions about industrial strife or the need to institutionalize labor conflict within the beneficial embrace of the statute. Perhaps the Court no longer sees a need to read the NLRA broadly because it no longer fears the "industrial strife which prevails where these rights are not effectively established." 

The same pattern can be seen in other areas. The Court in the 1960s, for instance, included subcontracting within the mandatory scope of bargaining because one of the primary purposes of the act is to promote a peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.

It is true that the Court continually refers to industrial peace as if it were the only policy of the Act, ignoring other policies such as

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127. Hearst, 322 U.S. at 125.
128. Fibreboard Paper Prods. Corp., v. NLRB, 379 U.S. 203, 211 (1964). The Supreme Court distinguished between "mandatory" and "permissive" matters of bargaining. The former must be discussed and, most importantly, cannot be altered before good faith negotiations take place. Employers, however, can unilaterally alter permissive terms without bargaining and can refuse to bargain about them. Unions, in addition, may not strike over a permissive issue. By placing most critical capital-based decisions in the permissive category, the Court has negated any assumption that labor and employers are equal partners in the enterprise.

For an insightful article contrasting Canadian and American approaches see Brian Langille, "Equal Partnership" in Canadian Labour Law, 21 Osgoode Hall L.J. 496 (1983). Langille notes that Canada has rejected a permissive/mandatory dichotomy although employers can refuse to bargain over any particular item no matter how critical. *Id.* at 504. Nevertheless, unlike United States law, the union can insist upon any item to the point of impasse and strike over the matter. The result is to permit the economic battle to encompass any issue, a laissez-faire position not followed in the United States. See, e.g., Atleson, Assumptions, supra note 39, at 111-35.
industrial democracy and equality of bargaining. Nevertheless, industrial peace was often employed up to the 1970s to justify a fairly liberal interpretation of the NLRA. As late as 1979, the Court upheld a NLRB ruling holding that the prices of Ford Motor Company's in-plant food service was a subject of mandatory bargaining. The employees had boycotted the food service, and the Court referred to that action as an example of the kind of labor strife that might occur if the scope of bargaining were not read in an expansive fashion. Yet only two years later in First National Maintenance Corp. v. NLRB the Court held that a partial closing of the enterprise, obviously much more important to employees than cafeteria food prices, was *not* within the scope of mandatory bargaining.

The Bell, Yeshiva, and First National Maintenance cases are consistent with the view that courts no longer feel a need to read the Act broadly so as to institutionalize labor conflict and reduce strikes. Thus, it is reasonable to assume that the likely responses of the courts, the NLRB, and Congress are related to the perception of weakened union power. Courts as well as Congress, therefore, are affected by what is happening in bargaining rooms, the workplace, and in the streets. Current decisions of the courts not only embody certain values which resonate throughout American legal history, but the state of the law also *reflects* the perceived relative strength of unions just as much as the hostility or indifference of any current administration.

In a study of the remarkable outpouring of labor legislation in Western Europe between 1968 and 1977, Alan Hyde concluded that legislation is likely when "a perceived upsurge in worker discontent or unrest leads to a perception on the part of the governing elite that some concession is desirable in order to restore worker loyalty to the regime, restore order, or simply 'cool down' the situation." The significant legislation of this period followed widespread labor unrest; yet, as Hyde notes, "none of the legal changes overtly addressed the problem of strike control," although most could be thought of as concessions to organized workers.

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131. A similar observation has recently been made by David Feller concerning judicial action in a quite different area. Traditionally, courts have viewed arbitration to be a substitute for the strike, and for this reason, Feller believes, courts have been reluctant to overturn awards. In recent years, however, Feller finds a greater judicial willingness to set aside arbitration awards, a result he attributes to the perception that a strike is not likely to be chosen as a vehicle to resolve a dispute. Donald Weckstein, *Feller Visits "The Classics" with a Vintage Review of Three Articles*, THE CHRONICLE, Jan. 1994, at 9.
133. *Id.* at 423.
Unlike other Western European industrialized countries, the United States has rarely responded to labor unrest by enacting supportive or ameliorative legislation. With the exception of the 1935 Wagner Act, there has been no statutory activity supporting unions or collective bargaining. The Taft Hartley Act of 1947 can be seen, as Hyde notes, as “the last effective labor legislation in an advanced industrial economy which is wholly repressive of union power and contains no element of concessions to workers.”

CONCLUSION

Obviously, union power is adversely affected by NLRB and Supreme Court decisions, and the political structure of Canada is unlikely to be transported to the United States, despite “free trade” arrangements. The point I wish to stress is that the law, whether we look at legislative reform possibilities or court decisions, also reflects the current (and perhaps accurate) perception of union strength and militance. This perception has been affected by the failure of both the Labor Reform and Situs Picketing Bills in the 1970s, Reagan’s behavior, especially in regard to the air controllers, and the strong employer attack of the last decade. Yet, as was the case with the passage of the Wagner Act, it is only when unions are perceived to be a force to be reckoned with that the legal system responds in favorable ways. Although the legal system sometimes acts repressively, there will be little possibility of a positive response unless unions are perceived to be vital and troublesome economic actors. It is, thus, quite possible to view the current U.S. legal situation as the result of the perception of union weakness and not simply a cause of that weakness. Importantly, unions have focused so much of their efforts on formal law and governmental regulation that they may tend to forget that the system favors the strong and the troublesome.

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134. Id. at 443-44.
135. See supra note 81 and accompanying text.
136. Prognostication has not generally been a strong point of academic legal analysis, however some recognition of possible legal change is necessary. Some reform of the NLRA is possible under the Clinton administration, especially as a trade-off for the modification or repeal of section 8(a)(2), which limits the employer creation of certain types of “participation” structures.