

CORRESPONDENCE

Market Forces and Union Decline: A Response to Paul Weiler

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In the Summer 1991 issue of *The University of Chicago Law Review*, Professors Robert LaLonde and Bernard Meltzer squared off against Professor Paul Weiler on how to explain the rapid union decline since the 1950's. Professors LaLonde and Meltzer offered empirical data about the frequency and success of Section 8(a)(3) and 8(a)(5) complaints under the NLRA.¹ Their data indicated that "some commentators [had] overestimate[d] the incidence and significance of employer lawlessness" as a factor to explain the decline in membership of American unions.²

By "some commentators," of course, they were referring in particular to Professor Weiler, who has been the strongest proponent of what LaLonde and Meltzer called the "rogue employer thesis": that the decline of private sector unionization is attributable to unlawful employer opposition.³ Professor Weiler responded to LaLonde and Meltzer's empirical observations primarily by declar-

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¹ Robert J. LaLonde and Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U Chi L Rev 953 (1991). Section 8(a)(3) of the National Labor Relations Act (the "NLRA") forbids employers to fire employees for unionizing activity. 29 USC § 158(a)(3) (1988). Section 8(a)(5) of the NLRA requires employers to bargain in "good faith" with a union representing a majority of the employees. 29 USC § 158(a)(5) (1988).

² LaLonde and Meltzer, 58 U Chi L Rev at 1006 (cited in note 1).

³ Id at 954. For exposition of his "rogue employer thesis," see Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv L Rev 1769 (1983); Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard, 1990).

ing that, even granting "the validity of LaLonde and Meltzer's numbers," he was still "perfectly prepared to rest [his] case for major surgery on the NLRA."⁴ Debate about the future of the NLRA, he concluded, would be "more useful and more illuminating than this debate about whether 5 percent or 'just' 3 percent of union voters are being fired by their employers during the representation contest."⁵

So Professor Weiler invited readers of the controversy between him and Professors LaLonde and Meltzer to put aside the statistical debate over Section 8(a)(3) and 8(a)(5) complaints and reflect on "what difference this all makes" to explaining the decline of private unionism and bargaining (what I term the "Old Unionism").⁶ My reaction is that it makes little difference in explaining what happened to the Old Unionism. Professor Weiler's theory of employer opposition is at best marginal to the explanation of union decline. Instead, the explanation lies primarily in natural market forces: structural changes in the American economy, increased domestic and foreign competition; and, yes, even increased employee opposition to private unionization.

I. THE INADEQUACY OF WEILER'S EMPLOYER OPPOSITION THEORY

Despite the sophisticated econometrics of Weiler's social science colleagues in Cambridge and elsewhere,⁷ employer opposition to new organization could not possibly account for the huge losses of membership and density for the Old Unionism. Private union density is now less than one-third of its historic peak of 35.7 percent in 1953⁸; it is even below its level of 12.0 percent in 1929.⁹ As these data show, unions' market penetration has steadily slipped over the past forty years, forfeiting gains of earlier decades. And there are no signs of reversal.

⁴ Paul Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U Chi L Rev 1015, 1025 (1991).

⁵ Id at 1032.

⁶ Id at 1025.

⁷ Id at 1028 ("The reason I was originally persuaded that the rise in employer unfair labor practices had a real impact on the decline in union victories is that I had the good fortune of being introduced to sophisticated work by my social science colleagues at Cambridge and elsewhere that demonstrated precisely that fact.").

⁸ Leo Troy and Neil Sheffin, *Union Sourcebook A-1* (Industrial Relations Data & Information Services, 1985). LaLonde and Meltzer similarly report in the first paragraph of their article that "[f]rom 1953 to 1989, density fell from 35 percent to 12 percent, and the absolute number of union members in the private sector shrank from more than 14.8 million in 1953 to 10.5 million in 1989. 58 U Chi L Rev at 953-54 (cited in note 1).

⁹ Troy and Sheffin, *Union Sourcebook* at A-1 (cited in note 8).

Indeed, when we cross into the Twenty-First Century, I estimate that private union density will have fallen to its 1900 rate of about seven percent. Organized labor in private markets will have slipped backward by a century. Membership losses of that magnitude could not be made up by organizing the unorganized, even absent rogue employers.

II. STRUCTURAL CHANGE: THE UNITED STATES AND CANADA COMPARED

A. Structural Change in the United States

The explanation for this virtual holocaust in the Old Unionism is to be found in the marketplace, specifically in structural change and more intense domestic and international competition. In the 1950s, the United States shifted from a goods-dominated to a private service-dominated economy. (Incidentally, this shift coincided with the peak in union density in the 1950s.) Because the labor market in private services is largely non-unionized, this structural change naturally drove down the Old Unionism's market share. Indeed, even if the Old Unionism had not lost one member since peaking at seventeen million members in 1970, its market share today still would be only about eighteen percent—less than in 1937 and only about one-half of its all-time peak in 1953.¹⁰

Moreover, international competitive forces—accelerated by the high exchange rate of the dollar from 1979 to 1985—have devastated the organized manufacturing industries—the core of the Old Unionism. And the decline in the exchange rate of the dollar after 1985 has brought no relief for the battered automobile, steel, clothing, and other manufacturing industries. Instead, foreign output, whether originating from U.S.-owned establishments abroad (outsourcing), or from foreign-owned companies, has continued to provide significant competition for U.S.-located manufacturers, and to reduce employment and union ranks, albeit it at a slower pace.

At the same time, non-unionized manufacturers of high-tech goods have survived these competitive conditions, and so have steadily transformed the American industrial base. This transformation, another example of structural change, belies the claim that the U.S. has suffered “de-industrialization” and so is in need of an

¹⁰ Id.

“industrial policy.” The U.S. has not suffered de-industrialization, but large-scale de-*unionization* of its industrial base.

In general, the decline in unions in many industries can be attributed to such market forces as I have described. Deregulation of the previously highly regulated transportation and communication industries has cost unions hundreds of thousands of members. Structural change in the transportation industry—the shift from rail to road to air—has cost railway unionism some 1.2 million members since the end of World War II.¹¹ And employer opposition in railways (where labor relations are subject to the Railway Labor Act, a forerunner of the NLRA) is at most a faint memory of the 1920s. Similar accounts could be told about how the market has hurt construction and mining, two other industrial strongholds of the Old Unionism.

The future only portends more of the same for American unions. Environmental regulation—which tends to stifle economic growth—will only hurt such unionized industries as logging and mining.¹² All the while, international competition will only accelerate under the Free Trade Agreement with Canada and the prospective one with Mexico. In short, structural change in the American labor market has caused, and will continue to cause, the decline in the Old Unionism.

B. The Politically Correct Response: The Canadian Example

To those who reject or minimize structural change (LaLonde and Meltzer regard it as only one factor),¹³ let me recall the unequivocal claims of Freeman and Medoff, on whose work Weiler and others relied so extensively in rejecting structural change and em-

¹¹ Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 Harv J L & Pub Pol 583, 617, 619 (1990).

¹² A good example is the recent spotted owl controversy. Last year, a federal judge in the state of Washington enjoined the U.S. Forest Service from selling timber on 66,000 acres until it submitted a plan to protect the spotted owl that inhabited that land. In March, the Forest Service submitted such a plan, estimating that it would cause a loss of 20,700 jobs in the northwest states. The lumber unions have estimated losses closer to 40,000. See Charles Abbott, *Rare Owl in Battle for Land and Jobs in U.S.*, Reuter Library Rep (Mar 28, 1992); *New Polls Show Few Northwest Voters Willing to Sacrifice Jobs for Owls*, Daily Rep Exec (BNA) A9 (Mar 24, 1992); *Forest Service Says Spotted Owl Plan Would Cost 20,700 Jobs in West Coast States*, Daily Lab Rep (BNA) A6 (Mar 9, 1992); Louise Kehoe, *The Cost of Saving the Spotted Owl*, Fin Times 30 (Jan 15, 1992).

Also, Senator Dale Bumpers recently has sponsored a bill which would impose a 5% royalty on minerals mined from public lands in the West. The mining industry estimates that this bill would cause a loss of 30,000 jobs in the Western states. See Dirk Johnson, *Digging for Ore Still Pays; Should Miners Pay, Too?*, NY Times A1 (Feb 12, 1992).

¹³ LaLonde and Meltzer, 58 U Chi L Rev at 957-58 (cited in note 1).

bracing employer opposition as the definitive explanation for the decline of the Old Unionism.¹⁴

After Freeman and Medoff found that structural change “would have reduced the union density by . . . 72 percent of the observed decline” between 1954 and 1979,¹⁵ they nevertheless rejected their own results. (By the way, since the data they used included the public sector, they actually *understated* the effects of structural change in the private sector.) Freeman and Medoff rejected their own findings because “[i]f structural changes were the chief factor behind the decline in unionism, the proportion [of] organized [workers] would [have] fall[en] everywhere.”¹⁶ Union decline would have been universal, they claimed, because “[t]he major structural changes in the U.S. labor market . . . have occurred in virtually all major western economies.”¹⁷ Most telling, they continued, was Canada, “the country most like the United States.”¹⁸ In Canada, “where many of the same unions and firms operate, the percentage unionized went from below the U.S. percentage unionized to above it.”¹⁹ In light of this parallel structural change, Freeman and Medoff theorized, employer opposition in the U.S. had to be the culprit.

This misinformation found its way into Weiler’s (in)famous Figure I of *Promises to Keep*²⁰ to become the quantitative basis for the divergence theory of Canadian-U.S. unionism, and for Weiler’s and others’ demand for a more interventionist NLRA. But this was not yet all. Freeman later repeated his rejection of structural change on these same grounds:

If “post-industrial” or structural changes inexorably reduce unionization, density would have fallen in Canada and other developed countries, all of which have experienced essentially the same structural changes as the United States, as well as in the United States.²¹

To upset the structural argument, Freeman challenged doubters to provide “[a] persuasive explanation of the decline in union density

¹⁴ See note 7.

¹⁵ Richard B. Freeman and James L. Medoff, *What Do Unions Do?* 225 (Basic, 1984).

¹⁶ *Id.* at 227.

¹⁷ *Id.* at 226-27.

¹⁸ *Id.* at 227.

¹⁹ *Id.*

²⁰ Weiler, 96 Harv L Rev at 1772 (cited in note 3).

²¹ Richard B. Freeman, *Contraction and Expansion: The Divergence of Private and Public Sector Unionism in the United States*, 2 J Econ Persp 63, 70 (Spring 1988).

in the United States," which, he wrote, "should also explain why density did not decline in Canada in the same time period [from 1970 to 1985]."²²

That view was echoed and re-echoed by academics across the U.S., Canada, and Europe. The influence of these academic views on the AFL-CIO is self-evident. The AFL-CIO found the

Canadian experience . . . instructive [because] Canada has roughly the same type of economy, many similar employers, and has undergone the same changes [as] the United States. But in Canada . . . the percentage of the civilian labor force that is organized increased . . . at the same time that the percentage of organized workers declined in the United States²³

C. The Realities About the United States and Canada

But what are the realities about Canada? In point of fact, the structural changes in the Canadian labor market have not been "essentially the same," but "essentially different" from those in the U.S.²⁴ And the structure of the Canadian economy remains "essentially different" to this day.

To begin, Canada lagged the U.S. by more than a decade in changing from a goods- to a services-based economy.²⁵ Thus one should also expect Canada to have lagged in the decline of the density of its private unions. And it did, as I have shown elsewhere.²⁶

Moreover, Canada has developed a far larger public labor market—and, correspondingly, a much smaller private labor market—than the U.S., measured in relative terms. (In relative terms, Canada's public labor market is more than double the size of the American.²⁷) As a result, a larger fraction of Canada's employment is virtually immune to market forces. This implies, of course, that

²² Id at 69.

²³ AFL-CIO Committee on the Evolution of Work, *The Changing Situation of Workers and Their Unions* 15 (Feb 1985).

²⁴ Indeed, the same can be said of all other advanced industrial economies. For fuller treatment of this argument, see Leo Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?*, 11 J Labor Res 111 (Spring 1990); Troy, 13 Harv J L & Pub Pol 583 (cited in note 11); and Leo Troy, *Convergence in International Unionism, etc.: The Case of Canada and the USA*, 30 British J Indus Rel 1 (Mar 1992).

²⁵ Id.

²⁶ See generally Troy, 11 J Labor Res 111 (cited in note 24); Troy, 13 Harv J L & Pub Pol 583 (cited in note 11); Troy, 30 British J Indus Rel 1 (cited in note 24).

²⁷ Troy, 30 British J Indus Rel at 16 (cited in note 24).

the unions for these public employees are also sheltered from competitive forces, in contrast to the Old Unionism.

At the same time, in relative terms, pro-union Canadian policy has generated a much larger public sector union movement (the "New Unionism") compared to the U.S. Indeed, Canadian policies have transformed the Canadian union movement from one dominated by the Old Unionism to one dominated by the New Unionism. Currently, perhaps as much as two-thirds of the entire Canadian union membership is accounted for by the New Unionism.²⁸ In contrast, about sixty percent of all U.S. union members still are part of the Old Unionism.²⁹

Therefore, any comparison of the densities averaging the New and the Old Unionism of two countries must yield misleading results. Such, in fact, is how the politically correct line made its comparison of the U.S. and Canada. If ever there was a statistical case of comparing apples to oranges, the politically correct comparison of Canadian and U.S. unionism is the exemplar.

When the New and Old Unionism are separately compared across the two countries, I found that Canada's Old Unionism has tracked the American, but with a lag. Canadian density peaked in 1958, five years after the U.S. peak, and membership topped out in 1979, nine years after the U.S.³⁰ (A statistical breakdown of private and public unionism is available for the U.S., but not for Canada, which doubtless explains the basic fault of the politically correct analysis.³¹) Therefore, as for the impact of markets on the Old Unionism (and the labor law)—well, I believe one can say "Q.E.D."

III. EMPLOYEE OPPOSITION

But is there more to be said about the decline of unionism? Why don't nonunion workers join? Yes, employers oppose the organization of their workers for fundamental economic and financial reasons,³² but I believe there is something else ignored by Weiler's arguments: *employee* opposition.

Yes, it is possible that workers simply and rationally don't wish to join. Oddly, in his references to polls, Weiler made no mention of the Harris poll (done for the AFL-CIO at the end of 1984),

²⁸ Id at 7; Troy, 11 J Labor Res at 127 Table 4, 132 (cited in note 24).

²⁹ Troy, 30 British J Indus Rel at 7 (cited in note 24).

³⁰ Id.

³¹ Troy and Sheffin, *Union Sourcebook* at A-1 to A-2 (cited in note 8).

³² See Barry T. Hirsch, *Labor Unions and the Economic Performance of Firms* 3, 123-24 (Upjohn, 1991).

which found that about two-thirds of nonunion workers said "no" to representation when asked if they would vote for a union in a secret ballot election.³³ When Harris asked them why, fear of the employer ranked near the bottom of nearly two dozen reasons.³⁴ (A *Washington Post* poll similarly found that three-fourths of the unorganized would not vote for a union in a secret ballot election; sixty-two percent reported that they were not afraid of employer retaliation.³⁵) Ranked at the top of the reasons for rejecting unions, to the dismay of the Harris pollsters, was the perception that unions and bargaining were irrelevant.³⁶

Apparently these workers have become "free marketeers" in this, the New Age of Adam Smith. Bad as this news had to be to Weiler, et al, let's make a return visit to Canada, the epitome of so much that they hold politically correct. The Canadian Federation of Labour³⁷ conducted a Harris-type poll in 1991 among unorganized workers and discovered, lo and behold, that about two-thirds would not support a union.³⁸ If that's the real Canada

CONCLUSION

To sum up, Weiler is correct that the statistical debate about the extent of employer opposition is not that relevant to explaining union decline. But he is correct for reasons that he would reject. The explanation lies in the natural market forces that I have briefly described: structural changes in the American economy, which have occurred at different times than in Canada; increased competition for the heavily unionized American manufacturing industries; and employee opposition to union organization.

Perhaps Weiler came to recognize the obstacle of employee opposition when he advocated legislatively-mandated works councils, what he calls his "Constitutive Model": "[I]t is necessary," he said, "to take away from the employees (and also the employer) the choice about whether such a participatory mechanism will be pre-

³³ Louis Harris and Associates, Inc., *A Study on the Outlook for Trade Union Organizing* 63 (submitted to The Labor Institute for Public Affairs and The Future of Work Committee, Nov 1984) (on file with U Chi L Rev) ("*Harris Poll*").

³⁴ *Id.* at 65.

³⁵ Peter Perl, *The Lifeline for Unions: Recruiting*, Wash Post H1 (Sep 13, 1987).

³⁶ *Harris Poll* at 2, 12, 15, 29 (cited in note 33).

³⁷ A group of AFL building trade unions that seceded from the Canadian Congress of Labour over jurisdictional matters.

³⁸ Canadian Federation of Labour, *Assessment of General Public and Membership Attitudes Toward Labour Unions, the Canadian Federation of Labour and Related Issues* 3 (Jun 1990) (on file with U Chi L Rev).

sent.”³⁹ Unlike reforming the NLRA, which he recognized could be treated as special interest legislation (the ghost of Roscoe Pound’s legal immunities), Weiler would compel representation, and representation with the right “of internal participation in a specified range of decisions in all enterprises.”⁴⁰ In one way or another, workers—for their own good—must have some form of “industrial representation,” or “voice,” even if it has to be forced on them. State corporatism, not industrial democracy, is the new goal of the neo-mercantilist, politically correct position in labor relations.

³⁹ Weiler, *Governing the Workplace* at 282 (cited in note 3).

⁴⁰ *Id.*

