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KEITH N. HYLTON

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**LAW AND THE FUTURE OF ORGANIZED LABOR  
IN AMERICA**

**Keith N. Hylton**

*Abstract*

This paper, prepared for “The Future of Organized Labor” conference at Wayne State University, examines two questions: what are the implications of the decline of unions for the future of labor law, and what are the implications of labor law for the decline of unions? After documenting the recent trends (decline in the private sector coupled with slight growth in the public sector), I argue that the change in the public-versus-private composition will lead unions to pursue legislative strategies that will further reduce the share of the private sector workforce in unions. A law reform program that has any chance of success in reversing the decline of private sector unions will have to aim to reduce the competitive disadvantage to firms from unionization. I offer two general proposals in this vein: making labor law more predictable and removing the NLRB from regulating the substantive terms of labor contracts.

Professor of Law and Paul J. Liacos Scholar, Boston University, Boston, 02215; [knhylton@bu.edu](mailto:knhylton@bu.edu). This paper was prepared for a conference titled “The Future of Organized Labor in America,” held at Wayne State University Law School, April 11, 2003. I benefited from comments at the conference by Professor Harry Hutchison and Professor William Gould. I thank Shafaq Islam for research assistance.

## I. Introduction

A student of labor law should be reluctant to make predictions about the future of unions.<sup>1</sup> The law, by itself, does not tell us much about how unions will fare. To be sure, the law serves instrumentalist purposes, but these purposes are narrow and dependent on the legal issues involved in each case that helps define it. Since labor law does not aim exclusively to promote unions, studying labor law should be of little use in predicting the rise or fall of unions over the long term.

The central and inescapable fact of American unionism in our time is decline. After reaching a high of 35 percent in 1953, *private-sector union density*, i.e., the percentage of private sector workers in unions, has fallen continuously to its current level of 9 percent.<sup>2</sup> There is no obvious reason to believe that this decline will not continue in the foreseeable future.

No one contends that law is totally irrelevant to the future of unions, though there is a lively debate about its importance in arresting their decline.<sup>3</sup> I will focus here on two questions: (1) what are the implications of the decline of unions for the law, and (2) what are the implications of the law for the decline of unions? In other words, how is “union decline” likely to change our employment and labor laws; and is it possible for the law to reverse or slow the decline in union density?

## II. Decline

Table 1 presents statistics on private and public-sector union density in 1983 and 2000. The basic message of decline is conveyed by the first cell of the table, showing private and public-sector densities for the nation as a whole. The private-sector union density fell from 16.5 in 1983 to 9 percent in 2000, a decline of 45 percent. The public-sector union density increased modestly from 36.7 to 37.5 percent, a rise of 2 percent.

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<sup>1</sup> I confess to having spent a lot of time studying labor law cases. Most of my work has tried to provide a positive economic theory of labor law doctrine. See, e.g., *Rent Appropriation and the Labor Law Doctrine of Successorship*, 70 B. U. L. Rev. 821 (1990); *Efficiency and Labor Law*, 87 Northwestern U. L. Rev. 471 (1993); *An Economic Theory of the Duty to Bargain*, 83 Geo. L. J. 19 (1993); *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 Tex. L. Rev. 1741 (1996); *Rational Decisions and Regulation of Union Entry*, 34 Vill. L. Rev. 145 (1989).

<sup>2</sup> See, e.g., Seymour Martin Lipset and Ivan Katchanovsky, *The Future of Private Sector Unions in the U.S.*, in James T. Bennett and Bruce E. Kaufman, *The Future of Private Sector Unionism in the United States* (2002), at page 10.

<sup>3</sup> See William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (Cambridge: MIT Press, 1993); Paul Weiler, *Promises to Keep: Securing Workers' Rights under the NLRA*, 96 Harv. L. Rev. 1769 (1983); Robert J. LaLonde and Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegality*, 58 U Chi. L Rev 953 (1991). The most rigorous examination of the relative importance of labor law is Henry S. Farber and Bruce Western, *Round up the Usual Suspects: The Decline of Unions in the Private Sector, 1973-1998*, Working Paper No. 437, Industrial Relations Section, Princeton University, April 2000. See also, Henry S. Farber and Bruce Western, *Ronald Reagan and the Politics of Declining Union Organization*, 40 British J. Industrial Relations, pp.385-401, September 2002.

Union density statistics for the nation show that in the private sector unions shrank substantially from 1983 to 2000. In the public sector, unions experienced a slight gain. Thus, use of the word “decline” to describe the experience of unions should be understood to apply to the private sector. There is no evidence of decline in the public sector.

Union density data for the whole nation mask inter-regional shifts that can be observed only by looking at the data on a state-by-state level. The remaining cells of Table 1 permit us to examine state level changes in union density in addition to inter-regional shifts in organization rates.

TABLE 1

State	1983		2000		% Diff		State	1983		2000		% Diff	
	Priv.	Pub.	Priv.	Pub.	Priv.	Pub.		Priv.	Pub.	Priv.	Pub.	Priv.	Pub.
All States	16.5	36.7	9.0	37.5	-45	+2	Missouri	21.5	17.7	12.1	19.6	-44	+11
Alabama	15.3	23.5	5.8	29.5	-62	+25	Montana	14.8	30.1	8.2	33.8	-45	+12
Alaska	17.3	41.6	12.8	43.3	-26	+4	Nebraska	9.7	29.0	4.6	27.2	-53	-6
Arizona	8.6	25.9	4.2	18.0	-51	-30	Nevada	19.6	39.0	13.8	39.6	-30	+1
Arkansas	10.2	14.3	4.0	14.6	-61	+2	New Hampshire	7.5	35.8	6.3	37.4	-16	+4
California	17.7	43.4	9.7	50.3	-45	+16	New Jersey	21.1	55.8	13.1	62.4	-38	+12
Colorado	11.2	24.1	6.0	25.8	-46	+7	New Mexico	10.1	15.6	5.5	15.7	-45	0
Connecticut	16.7	62.9	9.4	62.4	-44	0	New York	24.0	69.3	15.3	70.6	-36	+2
Delaware	15.9	41.6	8.9	38.9	-44	-6	North Carolina	5.4	17.9	2.4	11.1	-55	-38
D.C.	15.2	26.1	9.5	28.0	-37	+7	North Dakota	9.5	25.6	3.7	16.4	-61	-34
Florida	7.1	27.4	3.3	28.5	-53	+4	Ohio	22.5	39.3	12.3	49.0	-45	+25
Georgia	11.1	15.4	4.6	16.1	-58	+4	Oklahoma	9.1	21.8	4.4	16.8	-52	-23
Hawaii	21.9	51.6	14.4	61.7	-34	+2	Oregon	16.4	46.3	9.8	53.8	-40	+16
Idaho	10.3	20.5	5.5	17.4	-47	-1	Pennsylvania	23.2	51.4	11.2	54.7	-52	+6
Illinois	21.5	38.4	14.1	46.9	-34	+22	Rhode Island	13.7	68.1	9.9	68.5	-28	0
Indiana	25.0	24.4	13.1	31.5	-45	+29	South Carolina	3.9	14.3	2.8	10.0	-28	-30
Iowa	14.6	26.5	10.5	29.6	-28	+12	South Dakota	8.0	22.6	2.5	18.5	-69	-18
Kansas	12.2	20.1	8.0	13.3	-34	-34	Tennessee	12.4	28.2	6.7	21.4	-46	-24
Kentucky	18.2	16.7	10.1	22.0	-44	+32	Texas	8.1	18.6	3.8	16.3	-53	-12
Louisiana	11.0	23.5	5.5	14.8	-50	-37	Utah	11.3	30.3	4.5	21.6	-60	-29
Maine	14.2	50.3	8.0	46.7	-44	-7	Vermont	6.7	45.4	5.1	39.5	-24	-13
Maryland	14.4	29.9	7.8	36.7	-46	+23	Virginia	10.2	16.6	3.9	12.2	-62	-26
Massachusetts	17.6	60.4	7.9	55.4	-55	-8	Washington	22.0	47.9	11.8	48.1	-46	0
Michigan	25.3	56.8	15.7	53.9	-38	-5	West Virginia	26.1	22.0	12.4	23.2	-52	+5
Minnesota	17.1	51.4	12.3	53.7	-28	+4	Wisconsin	19.8	44.6	11.7	55.4	-41	+24
Mississippi	9.0	13.2	5.4	9.0	-48	-32	Wyoming	10.4	23.6	5.5	16.8	-47	-29

Figures represent the percentage of each state's nonagricultural wage and salary employees who are union members.

Sources: All States: U.S. Census Bureau, Statistical Abstract of the United States, 2000.

State Level: Union Membership and Coverage Database from the Current Population Survey,  
Barry Hirsch, Trinity University & David Macpherson, Florida State University  
<http://www.trinity.edu/bhirsch/unionstats/contents.htm>

Public sector union density rates show a mixed pattern in Table 1, increasing in slightly more than half of the states while falling in 21 of them. The state-level figures show precisely why the overall increase in public sector union density since 1983 is only 2 percent: public sector unions have gained in roughly half the states and lost in the other half. Taking a closer look, the table shows that public sector unions have suffered the biggest losses in the West. Public sector densities declined substantially in Arizona (-30 percent), North Dakota (-34 percent), South Dakota (-18 percent), Oklahoma (-23 percent), Texas (-12 percent), Utah (-29 percent), and Wyoming (-29 percent). Outside of the West, losses in the public sector have been evenly shared among the South, Northeast, and Midwest.

Private sector union density rates show a uniform pattern of decline in all states. To be sure, private sector unions have done less badly in some states than in others, but the consistent pattern of losses suggests a bleak future. The largest decline in the private sector density is observed in South Dakota, with a nearly 70 percent drop. The smallest decline is observed in New Hampshire, at 16 percent. But New Hampshire's starting point in the sample, its 1983 private sector density of 7.5 percent, was relatively small.

Among regions, private sector density rates have fallen most in the West and the South. Private sector densities in the South now average less than five percent. Unions failed to hold their ground in all sectors. However, unions fared better in the Northeast (see, e.g., Rhode Island, Vermont, New York, New Hampshire, New Jersey) than in the other regions; most of the northeastern states experienced declines that were less than the national decline of 45 percent. The big exceptions in the Northeast were Maine and Massachusetts, both experiencing large declines in the private sector (-44 percent and -55 percent respectively).

### III. Implications of Decline for Law

#### A. Statute Law

The decline of private sector unionism is likely to make efforts to change statutory law a more important part of the labor movement. Organized labor, interpreted broadly, has always shifted between alternative strategies of promoting its interests. One, political activism, involves lobbying and promoting laws that benefit workers. The other strategy, Samuel Gompers' "voluntarism," emphasizes decentralized collective bargaining. The period from roughly 1935 to 1981, when the private sector union density rate exceeded 15 percent, represents the high point of the voluntarism period. Today's private sector union density of 9 percent is closer to the long-run historical norm since 1850.

Given the enormous difficulty unions have today in controlling wage competition in any substantial industry, the legislative front will have to appear more attractive as a means of securing benefits for their constituents. It follows that with low and declining

private sector density rates, unions have greater incentives to divert their resources toward promoting legislation that increases labor costs for all firms (e.g., minimum wage legislation, family leave) and reduces low-wage competition (e.g., tariff legislation). To some extent, this is a return to the strategy of some early species of unions, such as the Knights of Labor. These early species were eventually overtaken by unions that operated under Gompers's voluntarism model.

However, there is a significant problem with relying on legislative action to secure greater benefits for union members. Much of the union movement's strength has moved from the private to the public sector. Forty four percent of union members work in the public sector today,<sup>4</sup> and that percentage is increasing. This has implications for the type of legislation unions are likely to seek.

Given the high and growing percentage of public sector workers in the pool of organized labor, unions are likely to put more effort in seeking legislation that raises labor costs rather than reducing wage competition. Why? Public sector workers are already shielded from wage competition. Public school teachers, for example, are not worried about losing their jobs to private sector teachers who are willing to work for lower pay. The public sector really has no incentive to seek legislation that reduces competition.

While public sector workers have no incentive to block competition, they do have incentives to promote legislation that raises labor costs. Indeed, their incentives are greater than those of their private sector counterparts, for two reasons. First, the lack of competition from other firms means that public sector unions do not have to worry about losing work to foreign competitors or to domestic firms that can evade the effects of cost-increasing legislation. Second, if a public sector union seeks a contract that guarantees pay for family leave time, there is a substantial probability that it will meet little opposition from public sector management. After all, public sector managers will be looking to those very same employees for support when they run for public office. In this process, public sector benefits have a secure foundation, and are likely to ratchet upward over time.

Once public sector unions have secured a particular benefit in the collective bargaining agreement, they will seek to make that benefit mandatory for the private sector as well. The reason is that once a benefit becomes mandatory for private sector workers, voters will not be able to save as much by substituting private sector workers for public sector workers. Efforts to privatize public services or "voucherize" government become less attractive when private sector costs are the same as public sector costs.

Private sector unions have well known incentives to seek legislation that increases labor costs. They are always in competition with non-unionized firms. To the extent they can raise the costs of labor for all firms, they can reduce competition from the non-

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<sup>4</sup> See Table 2-4, titled "National Union Membership by Industry," in *Progress of Women and Minorities in the Illinois Workforce*, by Barry Hirsch and David Macpherson of Florida State University, available at <http://www.state.il.us/agency/idol/wm/2001/Book/CH2.htm> (last visited July 15, 2003).



union sector. Moreover, some types of labor-cost increasing legislation have the effect of splitting the votes among the business community. For example, many firms already pay high wages, and can only gain by a law imposing a wage floor well below what they already pay. Firms that already offer generous benefits are likely to support, or at least have no incentive to oppose, legislation that raises minimum benefits required by all firms.

All of this has troubling implications for the future of private sector unions. There will be little effort from the union movement to block competition in the private sector, while unions (both public and private sector) will continue to and perhaps increase their efforts to seek legislation that increases labor costs. Benefits to public sector unions will increase in this setting until they reach the point at which voters are no longer willing to shoulder the burden. Benefits to private-sector workers are likely to be far less secure in this new world.

As long as low-wage competition is permitted to flourish as it does in this country, private-sector unions will live under the threat that their success could be their undoing. High labor costs invite foreign competitors to target domestic markets in internationally traded goods. If, as seems likely, the union movement increasingly pursues a strategy of raising labor costs without blocking competition, the end result could easily be further and more drastic erosion in the private sector union density.

The end result of this hypothetical legislative strategy will depend on two factors. First, raising labor costs for all firms (e.g., minimum wages) reduces competition from domestic low-wage competitors. That provides a benefit to unions and enhances their growth. Second, raising labor costs invites competition from foreign firms (think China) and domestic firms that can evade legislatively-imposed minimum terms. This weakens unions. The net result will depend on which of these two factors dominates. In view of the increasing levels of trade with low-wage countries, the more probable event is that the latter effect dominates, weakening unions.

## B. Labor Common Law

In addition to statute law, the decline of private sector unions has implications for the labor law doctrine. The first result of decline is a loss in transactional work for labor lawyers – the work of drafting and advising on union contracts. It is not clear that this has any implications for the substance of labor law. First, many contract-based disputes will be resolved within arbitration, which implies that the much of the litigation that has disappeared as a result of decline would not have been the subject of federal court cases in any event. Second, labor law doctrine continues to develop at a substantial pace in federal courts, in spite of the union density decline observed over the past fifty years. This is due in part to the fact that a relatively high percentage of labor disputes wind up in federal appellate courts, since the NLRB resolves disputes through adjudication rather than rule making.

The second key implication of private sector decline is that the threat of Supreme Court intervention is extremely small. I am not suggesting that the Supreme Court regards labor law as less important merely because unions have declined substantially in the private sector. That may be a correct description of the subjective preferences of most members of the Court, but no Court opinion has ever suggested that the Court's attention to labor law issues is dependent on the share of the private sector workforce represented by unions.

The threat of Supreme Court intervention is small probably for the following reason. Since unions are shrinking in the private sector, they are not continually raising questions about the application of the statute in new settings. As unions shrink, they become concentrated in their core industries and geographical regions. These are the areas least affected by competition from the non-union sector – indeed, this is one of the lessons suggested by the state-level data in Table 1. These are also the areas in which most of the really difficult labor law issues have already been settled by courts. As a result, relatively few labor law disputes arising today show the sort of complexity and novelty that would attract the interest of the Supreme Court.

What does the low threat of Supreme Court intervention imply for the development of labor law doctrine? Since the probability of a labor law dispute reaching the Supreme Court is extremely small, labor law will for the most part be developed within the federal courts. The process by which labor law develops has therefore become more decentralized. Federal appellate courts will reach different conclusions on some issues. They will have a chance to experiment, and some courts will learn from the mistakes of others. Labor law will evolve through small steps, in a decentralized trial-and-error process, at least in comparison to the time when the likelihood of Supreme Court intervention was substantial.

The decentralized evolutionary process observed today is probably a good thing for labor law doctrine.<sup>5</sup> Under today's decentralized process, there is a greater chance for federal courts to correct their own mistakes over time before the Supreme Court gets involved. If one appellate court issues a decision that seems questionable in light of its incentive effects or settled labor law doctrine, another appellate court has a high chance of considering the same issue and avoiding the first court's error. As a majority of circuits coalesce around the most defensible interpretation of the statute, the first court (the one that issued the questionable decision) is likely to reconsider its earlier decision. Indeed, as other circuits coalesce around the more defensible interpretation of the statute, litigants will have an incentive to challenge the interpretation of the first court in order to get the first court to reverse itself.

Why should one consider it a good thing that the federal appellate courts have a longer time to examine an issue before it goes up to the Supreme Court? The reason is that the decentralized process produces more information and tends to be narrowly tailored to the problem at hand. Having more information is preferable in this context, because courts can compare, in concrete cases, the effects of different conclusions on

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<sup>5</sup> Hylton, *Efficiency and Labor Law*, *supra* note 1.

statutory interpretation. With better information on effects in concrete cases, courts are more likely to find the resolution that imposes the lowest costs on management and labor. Another benefit of decentralized process is that lower courts are likely to confine themselves to narrow holdings that apply with surgical precision. The alternative process, in which the likelihood of Supreme Court intervention is high, introduces the risk that the Supreme Court will issue broad, sweeping decisions that upset the expectations of management and labor with respect to many issues.

To be sure, this argument may seem to prove too much by suggesting that Supreme Court intervention is a bad thing. The argument goes against an article of faith among lawyers and law students that Supreme Court intervention is always desirable. But this is a questionable proposition, in spite of its general acceptance among law professors. Every court makes mistakes, including the Supreme Court. We have a choice between two processes; one that leads to the Supreme Court at a relatively high rate, and the other leading to Supreme Court intervention at a low rate. A priori, it is not at all clear which process should be preferred.

The Supreme Court is always right, goes the saying, because it is final.<sup>6</sup> But serious students of law have to have a different standard for deciding rightness. The standard implicit in this discussion is minimizing the joint employment relationship costs of management and labor – where costs are understood broadly to include incentive costs.<sup>7</sup> A regime that minimizes wage costs, but robs workers of incentives to invest in human capital would clearly be undesirable because of its incentive costs. It follows that labor law serves a useful purpose to the extent it aids unions in lowering some of the incentive costs of the employment relationship. Interpretations of the statute that are consistent with this goal should be considered “right” irrespective of the status of the deciding court.

Under the joint-cost minimization standard, the Supreme Court can obviously make mistakes – even allowing for its finality. Moreover, it follows under this standard that the question about the desirability of Supreme Court intervention requires a comparison of the Supreme Court’s rate of error with that of federal appellate courts. A high rate of Supreme Court intervention (early and often) could be bad if the Court’s error rate is high, or no better than that of the average federal appellate court. Allowing cases to percolate longer within federal courts allows more time for those courts to correct their own mistakes, and for the Supreme Court to gain more information, lowering its error rate, before intervening.

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<sup>6</sup> *Brown v. Allen*, 345 U.S. 946 (Justice Robert Jackson concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

<sup>7</sup> In particular, wage costs are not necessarily included in this objective. Wages, rather than being “joint costs,” are sums transferred between the employer and the employee. For example, suppose the employee’s compensation package is set in a manner that gives the employee poor incentives to take care at work. The compensation package itself is just a transfer between the employer and the employee. However, the reduction in both the quantity and quality of output that results from the poorly-designed compensation package is part of the joint cost of the employment relationship.

#### IV. Implications of Law for Decline

Many labor scholars have looked to the law as an instrument to prevent or slow the decline of unions in the private sector. This is a quixotic enterprise. The decline of unions is largely due to economic pressures that the law can hardly control or withstand. Indeed, efforts to use the law to prevent the decline of private sector unions could easily backfire, hastening the decline. For example, efforts to change the law to make it more difficult for employers to question the majority status of a union could enhance employers' incentives to challenge the formation of unions in the first place, generating further shrinkage among private sector unions.

##### A. The Competition Tax

Assuming employers are rational, they will oppose unions as long as having a union puts an employer at a serious competitive disadvantage relative to a non-union competitor. The rational employer will make some effort to determine the cost of the "competition tax" imposed by the union, and will invest in an anti-union campaign up to the point where the marginal dollar spent on the campaign just equals the expected competition tax avoided. The larger the competition tax, the more employers will spend on efforts to block the formation of unions. Moreover, the larger the competition tax, the more likely employers will be to engage in unfair labor practices in order to forestall unionization.

This theory suggests that employers should have devoted more resources to blocking unionization as the economy has become more competitive. This is also consistent with the claims of some labor scholars that the reason unions have declined in the private sector is that employers have adopted more hostile tactics in the face of union organizing.<sup>8</sup> However, the employer-hostility thesis runs into the problem that hostility, carried to excess, is potentially costly to the employer – alienating and driving away some of his most productive employees. As the market becomes more competitive, the cost of employer hostility should increase, just as the competition tax of unionism increases. These cost increases exert opposing pressures on the employer.

Given the range of potential employer responses to union organization, the rational employer would avoid the cost of employer hostility, and at the same time minimize the risk of a union forming, by trying to ascertain employee preferences and meet them – and these investments should be made well before a union organization drive begins on the worksite. Once a union organization drive begins, a policy of aggressive hostility, divorced from any effort to inform employees about the competitive effects of unionization, would appear to be foolish for many employers.

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<sup>8</sup> Weiler, *supra* note 3, 1769-70; Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984); Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. Econ. Perspectives 63, 79-86, Spring 1988.

My claim that increased competition should drive up the cost of employer hostility is consistent with the data on union win rates in NLRB certification elections. Since the mid 1970s, union win rates in NLRB certification elections have stood at a surprisingly consistent level of 50 percent (see Figure 1).<sup>9</sup> Before then, the union win rate exceeded 50 percent, with a level close 80 percent in 1940.<sup>10</sup> In short, the union win rate declined steadily from roughly 80 percent in 1940 to 50 percent in the mid 1970s, and then remained at 50 percent up to the present.

What explains this pattern? If employer hostility motivated by competitive pressure were the reason for the pre-1975 downward trend in the union win rate, one would expect the win rate to continue declining after 1975. After all, domestic firms probably felt continuing, and increasing, competitive pressure after the mid 1970s. To take one measure of competitiveness as an example, the share of imported goods in the U.S. economy continued to increase after 1975.<sup>11</sup> One could argue that the data on total NLRB certification elections held, the other line shown in Figure 1, shows employer hostility because it declines continually after 1970. But the decline in total elections could just as easily be due to employer efforts to make unionization unnecessary by meeting employee preferences, or to a recognition by union organizers that the expected gains from unionization in a competitive industry are not worth the costs.

What the data suggest is that in cases today in which employees clearly prefer the union, say the level of support is 80 percent, employers are generally caving in and voluntarily recognizing the union. Only the most uncertain cases are going all the way to an election, and that is why the outcome has been a consistent 50 percent – like a coin toss. The high win rates observed from 1940 to the mid 1970s exhibit employer hostility because employers over this period were forcing employees to go through campaigns and elections even in cases in which the union clearly had majority support. The union win rate data suggest that increasing competitive pressure has dampened employer hostility, as a general rule, after the filing of an election petition. Note that this is the reverse of the belief that many labor scholars hold that the historical win rate pattern of falling to 50 percent has resulted from increasing employer hostility. The fall-to-50 percent pattern in the union election win rate is more consistent with a decline in employer hostility, at least in the period after the filing of an election petition.

It is surprising that no one has called attention to the consistent 50 percent union win rate. The result is analogous the consistent 50 percent plaintiff win rate observed in trial courts. The 50 percent win rate observed in general litigation is now understood, following the contribution of George Priest and Benjamin Klein, to result from the selection of cases for trial in the settlement process.<sup>12</sup> Since cases that both parties know

<sup>9</sup> See, e.g., Farber and Western, in Bennett and Kaufman, at page 37-38.

<sup>10</sup> Lipset and Katchanowski in Bennett and Kaufman (2002) at 19.

<sup>11</sup> See, for example, the World Trade Organization's statistics on "Merchandise trade" at [http://www.wto.org/english/res\\_e/statis\\_e.htm#worldtrade](http://www.wto.org/english/res_e/statis_e.htm#worldtrade) (visited July 14, 2003).

<sup>12</sup> See George Priest & Benjamin Klein, The Selection of Disputes for Litigation, *J. Leg. Studies*, 1984. For an extension of the "Priest-Klein theorem" based on asymmetric information, see Keith N. Hylton, Asymmetric Information and the Selection of Disputes for Litigation, 22 *J. Leg. Studies* 187 (1993); Keith N. Hylton, An Asymmetric Information Model of Litigation, 22 *Intern. Rev. Law & Econ.* 153 (2002).

are strong, or weak, are likely to be settled, only the most uncertain cases make it all the way to judgment in court. The end result is a process that operates like a coin toss. In the same sense, a rational employer-employee pair will “settle” obviously weak and obviously strong cases – by the union organizers decision not to file a petition for an election (weak case), by a Board finding that the union lacks substantial support (weak case), or by the employer caving in and recognizing the union (strong case). The end result is that the recognition cases that go all the way to election are the most uncertain. This explains the consistent 50 percent union election win rate.

The decline in total elections (Figure 1) reflects a different process, one that cannot be analogized the settlement process in trials. Rather, the decision to petition for an election is analogous to the filing of a lawsuit. Lawsuits are filed when the expected payoff, which is equal to the probability of plaintiff victory multiplied by the expected award, exceeds the plaintiff’s cost of litigation. Similarly, union election petitions are filed when the expected payoff, which is the probability of union victory multiplied by the expected gain, exceeds the cost of union organization and maintenance.<sup>13</sup> Since the costs of organization and maintenance have not increased, and indeed have likely fallen with the advent of the internet and new communication technology, the decline in total elections observed in Figure 1 must be due to an a reduction in the expected payoff from unionization. The graph of total elections suggests that around 1970, the expected payoff from unionization reached a high point and then started falling. As I said before, this could be due to several factors in addition to employer hostility.

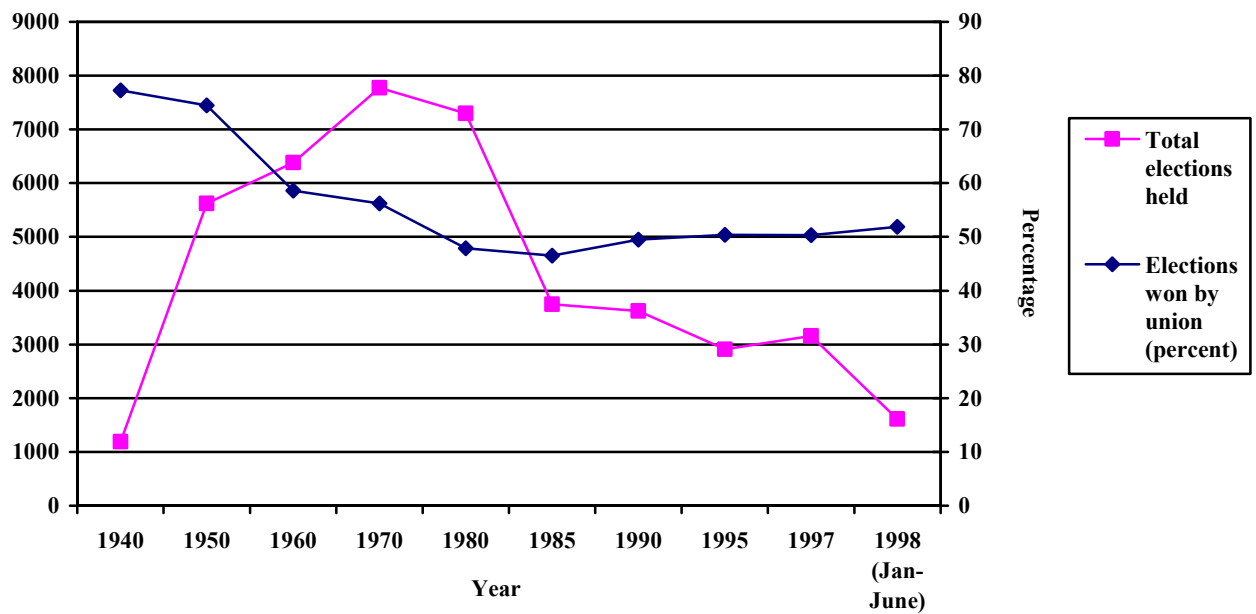
One important feature of my claim regarding the union win rate is that it is falsifiable. If the claim that the 50 percent union election win rate reflects the end product of a settlement process similar to that observed in litigation is wrong, then it will be disproved over time, as we observe union election win rates that move substantially above or below 50 percent.

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Under the asymmetric information hypothesis, the high pre-1975 union win rate could reflect cases in which employers were simply unable to assess the degree of union support. I find this explanation less plausible than one based on employer hostility.

<sup>13</sup> The same point is made by Farber and Western, *supra* note 3, at p. 41.

**Figure 1**  
**NLRB Certification Elections**



Source: Lipset and Katchanovsky in Bennett and Kaufman (2002), at 19.

## B. Reform and the Future

To be successful, a program of labor law reform that aims to slow the decline of unions should attempt to reduce the perceived competition tax associated with unions.<sup>14</sup> This is difficult to do, because most of the competition tax probably results from contract provisions secured by unions through the collective bargaining process. However, anyone familiar with labor law should be aware of various pockets of the law in which the rules exacerbate the competitive disadvantage of unionization.

The most important type of reform aiming to reduce the decline of unions would address the “policy oscillation” problem.<sup>15</sup> As every labor law student knows, the Board’s composition changes with every presidential administration and even within a single administration. Given the five year terms of Board members, a one-term president could substantially change its composition through new appointments. Although a policy of reserving seats for the party out of power has been in place for a long time, this has not been enough to prevent new Boards from overruling large parts of the law handed down by previous Boards.

Policy oscillation has been a long standing feature, and it is arguably a part of the statutory design. Some scholars have defended it on the ground that it puts flexibility or “play” into the joints of labor law, allowing the regulations to change as the nation’s preferences changes – and as those preferences are reflected in presidential elections.<sup>16</sup> Because the law changes as new administration’s come into office, goes the argument, there is less pressure to amend the NLRA. The amendment process itself is costly, and it is difficult to predict its result. An amended statute could be inferior in many respects to the original design.

The problem with oscillation by design is that it is fundamentally inconsistent with the notion of labor law as law, in the sense of being a set of predictable rules. Unpredictable law imposes enormous costs on contracting parties. If the parties cannot predict with accuracy how the courts will rule on their actions and contract provisions, they will have incentives to stick to their most conservative contract offers. For contracting parties, the “bid-ask” spread widens when the law is unpredictable, which makes contract settlement more difficult and the terms more onerous to the party in the weakest bargaining position. To take a concrete example, suppose employers cannot predict whether the Board will hold that their bargained-for contract terms violate the duty to bargain in good faith – i.e., Section 8(a)(5) of the NLRA – because they are below what the Board thinks any self-respecting union would accept. An employer in this

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<sup>14</sup> This general position differs greatly from that of former NLRB Chairman William B. Gould, who offered several reform suggestions in his 1993 book, see Gould, *supra* note 3, 151-79. Most of Gould’s reform proposals, however, would increase the competitive disadvantage of unionization (e.g., increasing employer information disclosure requirements, expanding the scope of mandatory bargaining, providing greater monetary relief to workers in discriminatory discharge cases). Rather than increasing union representation, Gould’s proposals would probably reduce the private sector union density if implemented.

<sup>15</sup> Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Admin. L. Rev. 163 (1985).

<sup>16</sup> *Id.* at 167.



position would protect itself against the risk of disappointment at the Board – specifically, being in violation of Section 8a5 – by reducing its wage and benefit offers to levels that effectively hedge against this risk. This increases the cost of reaching a contract, and gives unions a factual basis for believing that the employer is not seriously committed to the bargaining process.

Policy oscillation should be seen as a problem that should be minimized in order to reduce the rate at which unions are declining. Since the statutory reform process is costly and unpredictable, the most efficient method of dampening policy oscillation is for the Board itself to adhere more closely to a policy of *stare decisis* or for the appellate courts to force such a policy onto the Board.

The Board is unlikely to adopt a policy of *stare decisis* on its own. Once a policy of overruling without second thoughts sets into an institution, there is no clear internal motivation to arrest it. Why should a new Board respect the decisions of the immediate predecessor Board when the previous Board did not respect the decision of its immediate predecessor? Indeed, forcing current Board members to adhere to a policy of *stare decisis* could be counterproductive, forcing them to jump quickly toward overruling prior decisions in order to create a set of lasting precedents that would bind future Boards.

The more likely route toward dampening oscillation is through the federal appellate courts. Federal appellate courts should, in effect, push the Board toward a *stare decisis* policy by forcing the Board to provide a persuasive rationale for overruling earlier Board decisions. Federal courts should adopt a rule requiring substantial justification in order to uphold Board reversals of earlier Board policy.

A substantial justification rule is on its face inconsistent with the *Chevron* doctrine,<sup>17</sup> though that doctrine is arguably flexible enough to accommodate such a rule. Under *Chevron*, a federal appellate court is supposed to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable, within the agency's discretion, and governing an issue that is not settled by the express terms of the statute. The *Chevron* rule seems to be defined to permit an agency such as the Board to change its policies in line with new administrations.

*Chevron* may make sense in the familiar context in which an agency is designed to set up rules regulating the conduct of individual firms within an industry. For example, the Food and Drug Administration designs rules governing sellers of drugs, cosmetics, and medical devices. Although some allowance should be made for firms to rely on previously-issued agency rules, it seems clear that courts should give such an agency leeway to update its rules as new information comes in.

The labor context is different because it involves contracting parties, and in this context the *Chevron* doctrine is far less defensible. In the labor setting, the Board acts as a specialized court. It is setting up rules which form the foundation for contracts. If the Board changes those rules, or adopts a policy under which those rules appear to be

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<sup>17</sup> *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

unstable, the costs of contracting go up. *Chevron*-style deference on the part of federal appellate courts is inappropriate in this setting. A new statutory interpretation adopted by the Board should not be accepted by a federal court unless the Board can show that the new interpretation is clearly preferable in terms of its incentive effects on the parties. The rules of the game have to be set and remain stable in order to encourage parties to accept the collective bargaining process.

More generally, a reform of labor law to prevent the decline of unions should make predictability an important priority. In addition to dampening policy oscillation, the Board should avoid reviewing the substance of contracts under Section 8(a)(5). Except for a few special types of contract provisions that go against the core goal of free choice as to bargaining representative,<sup>18</sup> the Board should quit the business of micro-managing labor contracts.

The special types of contract provisions that the Board should continue to view as inconsistent with the duty to bargain in good faith are those that have the flavor of yellow dog contracts. At core, the NLRA seeks to protect the employee's free choice as to bargaining agent. This extends to protecting employees from agreeing to waive or sign away their right of collective choice under the statute. Employer proposals that conflict with this basic right should continue to be viewed as permissive topics of bargaining, and in some cases as per se violations of the statute. For example, a provision, similar to the one at issue in the *Republic Aviation* case,<sup>19</sup> in which the employer agrees not to speak or agitate in favor of unionization falls in this category.

The types of contract provisions that the Board should leave entirely to the parties are those governing the substance of the contract. The employer's proposal in *McClatchy Newspapers, Inc. v. NLRB*<sup>20</sup> falls in this category. The employer, McClatchy, owner of a newspaper, proposed to the union representing editorial and other employees that wages be determined entirely by its determination of merit. The employer and union reached an impasse and the employer implemented its final offer. The union filed an unfair labor practice charge on the ground that McClatchy's implementation of its merit pay plan violated its duty to bargain over wages. The Board agreed and the D.C. Circuit eventually upheld the Board.

*McClatchy* is a striking example of a contract provision that seems to have the effect of stripping the union of almost all of its power. The Court rhetorically suggested an extended version that gives the employer full discretion as to all terms of employment and includes a no-strike clause. But the conflict between the union and the employer in *McClatchy*, and in the court's rhetorical example, is simply a question of bargaining power. A decision that seeks to enhance the union's bargaining power by requiring some minimum substantive provision – e.g., a requirement that the employer agree to some definite wage standard – does little in reality to alter the balance of bargaining power,

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<sup>18</sup> Hylton, Minimum Terms, *supra* note 1.

<sup>19</sup> *Republic Aviation Corp. v. NLRB*, 432 U.S. 793 (1945).

<sup>20</sup> *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997).

since the Board cannot insert itself into the workplace as a monitor of every contract proposal, while making the employment relationship more costly for the employer.

With the general aim of reducing the competition tax, I could propose changes to several other areas of labor law – for example, the rules governing waiver of certain statutory rights,<sup>21</sup> the impasse rule,<sup>22</sup> or the law governing subcontracting and relocation decisions.<sup>23</sup> But the two areas examined to this point, policy oscillation and regulation of substantive contract terms, are perhaps the most general problems confronting all unionized workplaces. The problems in these areas are likely to be anticipated by firms when they consider the costs of unionization.

## V. Conclusion

It may seem inappropriate and inconsistent with the purpose of the NLRA to lay out a program for the survival of unions that counsels courts and legislatures to try to minimize the competition tax created by unions. Isn't the purpose of unions to tax competition by cartelizing the labor force?<sup>24</sup> While that may be one of the goals of unions, it is not a goal that the law has to respect. Monopolization of product markets was declared unlawful by the Sherman Act in 1890, and was disfavored by the common law long before that. Labor law has adopted some of the same anti-monopolization principles – for example, the *Mackay Radio* rule allowing permanent replacements of striking workers,<sup>25</sup> and the rules governing secondary boycotts. Both the survival of labor law and the survival of private sector unions depend on the law seeking to support unions in the activities that serve the long term interests of both firm owners and employees. Labor law should avoid aiding cartelization for its own sake and regulating the substantive terms of contracts. The law should limit itself to protecting employee choice as to bargaining representative and facilitating the union's role as guardian against employer opportunism in the bargaining process.

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<sup>21</sup> *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (requiring clear and unmistakable waiver).

<sup>22</sup> *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>23</sup> *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (subcontracting); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (partial closure). For discussion of these cases as areas of reform (from a perspective that differs from this paper), see Gould, *supra* note 3, 178-79.

<sup>24</sup> Richard A. Posner, *Some Economics of Labor Law*, 51 U Chi. L. Rev. 988 (1984).

<sup>25</sup> The rule allowing replacement prevents an incumbent union from gaining monopoly power over the pool of employees available to a particular employer. For the anti-monopolization theory of *Mackay Radio*, see George M. Cohen and Michael L. Wachter, *Replacing Striking Workers: The Law and Economics of Approach*, in *Proceedings of New York University's 43<sup>rd</sup> Annual National Conference on Labor* 188 (Bruno Stein ed., 1990).