

SOLIDARITY FOREVER: THE POWER INVESTED IN WORKER COLLECTIVES UNDER UNITED STATES LAW

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THE PECULIAR ENTERPRISE OF ORGANIZED LABOR

We have now reached a state where [unions] have become uniquely privileged institutions to which the general rules of law do not apply.

—Friederich A. Hayek, Nobel Laureate

OF THE MANY INSTITUTIONS in United States society, the labor union is one of the most intriguing.¹ The popular view of these organizations could

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¹My own early influences and experiences on this subject were decidedly pro-union side given my family and work background. My grandfather was heavily pro-union, a member of the carpenter's union for most of his life. As a man who served as a medic for three years during World War II and then returned to raise seven children, he is someone I do not remember (he died when I was three years old) but greatly respect. My father and mother were both members of the Teacher's Union in Missouri, though my father crossed the boundary when he began working in human resources at the McDonnell Douglas Company (now Boeing).

This experience has also been characterized by some resentment towards unions as well. I remember my father switching cars to an older one to take to work during a machinists' strike at McDonnell Douglas because there were rumors of picketers keying cars. One of my uncles by marriage, a union member, is the foreman for a construction company. He has complained more than once that his crew will finish a job faster than another crew on the job site who will work more slowly since the contract guarantees pay for a certain time period. There exists little incentive to work faster since competition cannot

be summed up as: labor unions are groups of workers who have organized into a singular unit and collectively engage management in contracting mainly on wages but also benefits, working conditions and other related matters. Labor unions are needed usually for jobs that have traditionally had low wages and employed the poorest of the society. The need arises from the fact that management can take advantage

force them to (nor coincidentally as my uncle complains, is there much of a reward for doing the job quicker).

My own union experience was limited to four summers when I worked for Schnucks Markets, a chain of grocery stores in the St. Louis area. It was a condition of employment that I had to join the United Food & Commercial Workers International Union, Local 655. The union probably benefited me when I first got the job as I had had trouble finding one that summer despite it being during the economic boom at the end of the decade. Schnucks was hurting for teenage workers since its wages for “customer service associates” (a euphemism for “bagger,” a job in which teens under 18 supplied most of the labor) were fixed in the union contract and could not adjust to meet other such jobs (they wound up hiring me on the spot before I even knew if they were looking for workers; I was also assisted by the fact that the store was located in a fairly wealthy area).

I did not have much experience with the union until the contract came up for renewal later that first summer. I went to a union meeting involving employees from all over St. Louis at five AM. The meeting resembled a political gathering with the union representatives explaining the contract they had negotiated and drawing fire from the all the employees. Though many people spoke in the open forum to ask questions to the reps (actually fairly entertaining), the one I remember was a young kid like myself, who might have been a bagger or checker (an individual who takes the money for the products in the store). He said, in a somewhat brave move in front of the rest of the workers, that he appreciated all the stuff about pension and benefits, but as a teenage worker, he wanted to see a rise in his wages, which for the jobs teens were in, were not really forthcoming. The union president more or less blew him off, stating that he himself had started as a bagger and then rose through the ranks to his current position. His point: one does not know the future, so you should not complain about deferring wages to more senior workers so they can have other benefits because you could one day be a senior.

For the vast majority of teens like myself who worked there, we had no intention of working at Schnucks any longer than a few summers. This brings up the obvious point of why we were forced to join a union and defer wages to allow senior workers to reap benefits if we never planned on even being in a position to receive those benefits. Obviously one could appeal to community values or that we didn't need the extra money or that we were being shortsighted (as the union president implied); but there is still something that bothers me about the situation and makes me want to ask the same question that kid did roughly six years ago.

of the workers' poverty and force them to accept an unconscionably low salary. They are able to do this because there is an abundance of poor workers and management can fire any of those who agitate for better working conditions and readily replace them. Likewise, since the loss of a job could cause great harm to a poor person, the threat of expulsion carries great weight and is immoral for the management to use in this situation.

Other characterizations might include the fact that unions always act in the best interest of the workers in their struggle against management. Indeed, the relationship between workers and management must be characterized as a struggle over the profits of a company. The idea coincides with one that the products created by labor have an inherent value, to which workers are entitled, at least in part. Workers cannot gain this entitlement unless supported by unions; that is, union action is action on behalf of a worker's rights to the fruit of their labor. Any of the problems that unions may cause for management or the consumer, due to strikes, higher prices, or slow pace of work, are reasonably acceptable for in light of the fact of this struggle for the greater good.

Workers also fight for a voice in management's decisions. Again poor workers, given that there is an abundance of them, cannot effectively communicate with management on an individual basis and through the threat of quitting. John Sweeney, in his challenge to AFL-CIO leadership in the mid-1990s, stated:

The problem isn't just money. It's a sense of powerlessness—and voicelessness—in a new economy where the old rules no longer apply. Traditional ties of loyalty between employers and employees have been cut, and too many working people know they can't count on regular raises—or even on secure jobs. Working Americans know they have little say over their jobs, their paychecks, or even how they divide their time between earning their livings and raising their children.²

It is evident that much of the debate in favor of unions is emotional. That is, the government and society at large has a duty to protect the poor and raise their standard of living. Unions are one of the tools to achieve this end and their power under law facilitates the process.

But what exactly are the legal rights of unions? One of the interesting facets of the societal view towards these organizations is that many people probably could not accurately describe how they operate and what they can do.³ There are several pieces of legislation that give labor

²Sweeney, *America Needs a Raise*, p. 3.

³At the end of my stint (roughly 14 months total) in a UFCW job, I knew little of what my rights were and what the powers of the union. Granted, I was a part-time,

alliances their impressive legal rights while two in particular, the Norris-LaGuardia and the Wagner Acts, provide the substantial boost to union power. Though the Clayton Act of 1914 was hailed as the first major step as it exempted unions from the Sherman Anti-trust Act, it was quickly nullified by a series of court rulings.⁴ On a more limited basis, a segment of organized labor was assisted by the Railway Labor Act of 1926.

The Act, with an amendment in 1934, basically mandated collective bargaining for all interstate railroads and set up machinery for governmental intervention. This was an obvious case of government enforcement of monopoly arrangement in an industry. . . . The Interstate Commerce Commission, in turn, fixed freight rates for railroads based on 'costs,' which were higher due to unions. Thus, railroad wage and price determinations were effectively transferred from the economic marketplace to the political marketplace.⁵

The Railway Act not only produced effective power for railroad unions but also paved the way for government agencies to mediate the labor conflict.

The National Industry Recovery Act was passed in 1933 in the midst of the depression and "broke important ground for national labor policy by declaring 'the right [of employees] to bargain collectively through representatives of their own choosing without interference, coercion, or restraint on the part of the employer.'"⁶ NIRA was also eventually declared unconstitutional by judicial rulings in 1935.⁷

The year before, the Norris-LaGuardia Act was passed. Both acts were passed under the assumption that empowering unions would jumpstart the economy.⁸

The Norris-LaGuardia Act did four things. It gave legal standing to unions in labor disputes even when they have no members who are employees of the firms involved in the disputes (Section 13); it banned all federal injunctions in all labor disputes under all circumstances (Sections 1, 7-12); it granted labor unions blanket immunity to all

summer worker and perhaps the union privileges meant little to me, I had still attended two contract meetings and twice voted on whether or not to strike. (In the interest of full disclosure, I voted against the majority both times; first not to strike, then to strike) Thus, my lack of knowledge on unions was somewhat the result of my own lack of interest but also the fact that the union did not need me to be informed to operate.

⁴Reynolds, "Economic Analysis," p. 229.

⁵Ibid., p. 230.

⁶Ibid.

⁷Ibid., p. 280.

⁸Baird, "American Union Law," p. 277; Reynolds, "Economic Analysis," p. 230.

antitrust laws (4-5), and it made union-free contracts between employees and employers unenforceable in federal courts.⁹

Norris-LaGuardia was the first step to confer a special status upon unions in general. In effect, unions were exempt from antitrust law. There is an issue on whether antitrust law is just in the first place. The vague and unclear nature of the law makes its application rather arbitrary. Moreover, some economists believe that monopoly only arises when it is enforced by the government;¹⁰ that is, collusion to restrain trade is not monopoly as long as all actions are voluntary.¹¹ Regardless of this issue, however, the problem with the exemption of unions is that it subverts law by claiming that some groups are above it.

This privilege allowed labor collectives to be immune to more than antitrust prosecution: “Legitimate or *bona fide* unionists are not only immune from laws prohibiting combinations and agreements in restraint of trade, they own an effective writ to interfere actively with commerce, immune from the equity injunction.”¹² Not only were unions not considered monopolies but were given monopoly power to bargain for labor contracts.

Many saw the now-prohibited injunctions as abuses by employers and courts on behalf of the propertied to restrict the voice of the unpropertied. However, if one is to believe the common assertion that employers used force to break picket lines and against strikers, then the unions themselves could gain injunctions against the employers. Yet this rarely ever happened. Unionists may claim the same reasoning: courts were biased toward the richer and more influential employer party.

The real answer is that union suits for equitable relief simply could not pass the standard legal criteria for issuance. In virtually all labor disputes, unions, as the aggressors, could hope to demonstrate neither: (1) unlawful conduct by employers, nor (2) threat of irreparable injury, nor (3) lack of alternative, adequate remedies at law.¹³

⁹Baird, “American Union Law,” p. 277.

¹⁰Examples include the post office, certain utilities, most roads and their management.

¹¹A copious discussion of this tangential topic can be found in Murray Rothbard’s *Man, Economy and State*, chapter 10, “Competition and Monopoly” (available online: <http://www.mises.org/resources/ba728334-2f53-402b-bc2d-e9793811c6a3>). See also: Block, Walter. “Austrian Monopoly Theory—A Critique.” *Journal of Libertarian Studies*. Vol.1 No. 4, pp. 271-9. (available online: http://www.mises.org/journals/jls/1_4/1_4_1.pdf).

¹²Reynolds, “Economic Analysis,” p. 233.

¹³*Ibid.*, p. 236.

If this is the case, there has to be some logical reason why unions would need to use force and employers would not. Employers would seem to have little reason to use force against unions unless the unions were wholly preventing the firm from employing any other workers (strikebreakers) which they could legally not do until the changes in the law. This assumes one of two things: either all the prospective workers were members of the union or the union was preventing willing workers from engaging in employment. The latter was most certainly the case.¹⁴ Thus, unions often resorted to the use or abuse of force to achieve their aims.

But the Norris-LaGuardia Act was not the final word on union power. In order to achieve “industrial peace,” the Wagner Act was passed in 1935 and further amended in 1959. Its official name is the National Labor Relations Act, a nomenclature that would have been proper if had indeed brought peace in relations between management and labor. But the legislation did the opposite, making labor-management almost by law hostile and adversarial.¹⁵

The Wagner Act supplied six principal services to unionists:

1. creation of a political board, the National Labor Relations Board, to enforce the Act,
2. limiting buyer resistance to unionization by specifying “unfair labor practices” by employers,
3. NLRB enforcement of majority elections for union representation,
4. NLRB determination of eligible voters,
5. NLRB enforcement of exclusive (monopoly) bargaining rights for certified labor representatives, and
6. NLRB enforcement of union pay scales for all represented employees, whether union members or not.¹⁶

The Wagner Act ended any notion of voluntary free association for employees of firms that had been unionized. Indeed, the practice of exclusive representation is unique to the United States,¹⁷ gained by a union when the majority of workers within a bargaining unit select in an election a particular union to represent them. Those workers who

¹⁴Ibid.

¹⁵Baird, “American Union Law,” p. 281.

¹⁶Reynolds, “Economic Analysis,” p. 238.

¹⁷Ibid., p. 283.

did not choose to have that union or any union, no matter how large a segment (as long as it is less than a majority), have no choice but to accept the union as their bargaining representative. Moreover, the NLRB, a fourth party and government agency, can involve itself in labor-related decisions of a unionized firm.¹⁸

The theory is that unfair [labor] practices are akin to common law torts—an invasion of publicly declared rights or, more strictly speaking, behavior contrary to declared public policy. The notion is that the Act created rights and duties which were public and, therefore, enforceable by public agencies rather than private parties.¹⁹

Even if various practices made unfair by the act were indeed unfair, they cannot be judged so and acted upon by the individual employee by himself. The employee must use both the union and governmental machinery to register this dissatisfaction—in effect, the individual’s private grievances have now become a matter of public action; personal rights have been amalgamated into a vague concept of “public good.”

Judicial rulings in regard to the twin acts have made this distressing fact very clear. In one instance, a union member sought punitive damages from a union for failure to properly file a grievance, which is naturally one thing a union should do properly. However, the majority opinion of the Supreme Court was that:

Any remedy for victims of union misconduct must be consistent with the “overarching legislative goal” of the National Labor Relations Act, namely, “to facilitate collective bargaining and to achieve industrial peace.” Punitive damage awards would not “comport with national labor policy” because they could “deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents,” might curtail the broad discretion afforded unions in handling grievances, and could “disrupt the responsible decision-making essential to peaceful labor relations.”²⁰

Reynolds interprets this decision to view unions as above the law. Though this interpretation is not faulty, it leaves out an important notion that may allow the justification of union power to make some sense.

If one were to take a sort of Marxist view of the situation, in that “management” and “labor” were two separate, distinct classes and that they were dialectically in conflict, then union representation as such would necessarily follow. Indeed, a lot of union power and concepts

¹⁸Ibid.

¹⁹Reynolds, “Economic Analysis,” p. 239.

²⁰Ibid., p. 238.

would make sense. For instance, assuming that there was limited bargaining power due to a large group of very similar, very poor workers would coincide with the concept of a well-defined and coherent “Worker class.” To return to the point on law, such a class-oriented view would mean that unions and firms are not necessarily “above” the law but subject to a different sort of law—a Marxist type—that would ensure “peace” between “management” and “labor.” Moreover, in reference to the specific case, just as in many communist countries the notion of free speech and a plurality of information was not needed since the state newspaper represented the voice of “the People,” individual choice to join and pay for a union, as well as individual problems with the operation of the union, are of little consequence since the union *de facto* operates for the benefit of “the Worker.”

Another view, albeit likewise emotional and extreme, would conclude that large corporations had somehow garnered their profits illicitly or even illegally; that the system favored the firm.²¹ Unions were merely groups of working people using similar power as the firm had used to retrieve their rightful share from the industrial barons. This mentality is referred to by several authors as similar to “Robin Hood” and that is not entirely far off the mark. But would not unions be justified in this action if the facts of the case were true and that the “system” prevented them from getting their fair allowance without coercion? Even the Harvard professors Freeman and Medoff, basing their conclusions on statistical analysis, maintain that this is the case in certain sectors:

Indeed comparisons of highly unionized concentrated industries and less industries show basically the same profitability. What unions do is to reduce the exceedingly high levels of profitability in highly concentrated industries toward normal competitive levels. In these calculations, the union profit effect appears to take the form of a reduction of monopoly profits.²²

The phrases “exceedingly high”, “normal competitive” and “monopoly profits” all signal that the firm is engaging in some kind of illicit practice and should be punished; that is, unions in their Robin Hood role are accomplishing a social good by dispersing monopoly bounties.

²¹This may be an extreme notion to economists and some other groups of people. However, as I tried to do at the beginning of the paper, the general perception of big businesses (who are the ones subject to union pressure) is that they have gotten their profits illicitly or illegally. It is fair to say that most people would acknowledge this though accept it as “the way things are.”

²²Freeman-Medoff, p. 186.

However, this goes back to the discussion of what constitutes a monopoly and what would then constitute illicit profit. Again, it seems that the only illicit profit would arrive due to government privilege—whether it is management or labor or both who gain. Basically union power is dangerous even if undertaken with sincerity. To paraphrase W.H. Hutt, coercive union tactics, “like all forms of warfare, can be used for good or noble purposes. Nevertheless, even when the objective is defensible, we are forced to regard all private use of coercive power...as an intolerable infringement of human freedom. We should condemn the Mafia even if it could be shown that the revenues of racketeering were being used to subsidize opera, cancer research, or civil rights movements.” Thus, coercive union tactics are indeed a form of private, or rather institutionalized, warfare. “Victory is, as in all warfare, to the strong, not necessarily to the righteous. Yet during the present century, apologists for the unions have adopted ‘might is right!’ as a moral principle.”^{23,24}

Union sympathizers or unionists themselves do not state the case in such blatantly Marxist or “Robin Hoodist” language. But the implications to each are there, as was depicted in the example from Freeman and Medoff. John Sweeney, the current AFL-CIO president who sought to change the face of the United States largest union twelve years ago,²⁵

²³Hutt, “Trade Unions,” p. 110.

²⁴It is important to point out here that it is the acme of hypocrisy for firms who benefit from subsidies, tariffs or other such favorable legislation to cry foul over union tactics. Yet, to counteract a firm’s use of private coercive power with union force makes about as much sense as counteracting a fire by dumping gasoline on it. The correct response is to repeal all private forms of coercive power—doubtless very difficult task. Indeed, union sympathizers should be neither apologizing nor surprised when union officials act in a corrupt manner. As Marcus Aurelius said 1500 years ago, “And what harm is done or what is there strange, if the man who has not been instructed does the acts of an uninstructed man? Consider whether you should not rather blame yourself, because you did not expect such a man to err in such a way.” (Aurelius, *Meditations*) In short, to give union officials such power and then to be surprised when it is misused is rather naïve; the fault rests just as much with he who bestows as he who receives.

²⁵Sweeney had come under fire from other leaders in the AFL-CIO: “In frequently heated discussions here in Las Vegas this week, AFL-CIO president John Sweeney won the first big showdown over how the labor federation should respond to its declining strength. But his opponents, led by Service Employees International Union [SEIU] president Andy Stern, have sufficient strength and determination to carry the fight through the AFL-CIO convention this summer in Chicago. The test came on dueling proposals about future federation budgets,

made his appeal in terms similar to the previous two mentalities. On management abuses of power:

It isn't only the impersonal forces like trade and technology—it is flesh-and-blood people in plush executive offices who make decisions that drive down our living standards and divide our society. For instance, there's Albert ("Chain Saw") Dunlap, the former chief executive officer of Scott Paper, who cut eleven thousand jobs in 1994—and

especially the balance of emphasis between politics and organizing and the size and role of the federation itself." (Moberg)

It should be noted that "in 2003, five unions came together to push for reform in the AFL-CIO: SEIU, the Union of Needletrades, Industrial and Textile Employees (UNITE) and Hotel Employees and Restaurant Employees Union (HERE) (later to merge to form UNITE HERE), the United Brotherhood of Carpenters (UBC) and the Laborers' International Union of North America (LIUNA) joined together informally as the New Unity Partnership (NUP). The NUP had no formal structure but pushed for coordinated, industry-based organizing campaigns and additional emphasis on organizing.

"The NUP was formally dissolved in 2005, but its member unions, joined now by the Teamsters Union and the United Food and Commercial Workers (UFCW), created a new coalition, Change to Win, which introduced a program for reform of the AFL-CIO.

"A few months later in 2005, on the eve of the AFL-CIO convention which would run from July 25-28, the two largest Change to Win affiliates, SEIU and the Teamsters, announced that they were leaving the AFL-CIO. Another Change to Win union, the United Food and Commercial Workers, disaffiliated later that week. UNITE HERE (the product of a 2004 merger between UNITE and HERE) also boycotted the 2005 AFL-CIO convention. On 14 September 2005, UNITE HERE disaffiliated from the AFL-CIO as well. Two additional unions, the Laborers and the United Farm Workers, attended the convention, without yet disaffiliating. The UFW would disaffiliate in January of 2006. Change to Win's seventh member, the United Brotherhood of Carpenters and Joiners of America, was not an AFL-CIO affiliate, having left the Federation in 2001.

"On September 27, 2005, Change to Win held its founding convention in St. Louis, Missouri. The informal coalition announced the official formation of a labor federation dedicated primarily to organizing. The new plan unveiled at that convention featured a scaled down model which lacked much of the internal bureaucracy and expansive program of the AFL-CIO and focused almost exclusively on organizing new members through cooperation between the federation's affiliates." http://en.wikipedia.org/wiki/Change_to_Win_Federation

According to the organization's website, Change to Win's mission is "to unite the 50 million workers in Change to Win affiliate industries whose jobs cannot be outsourced and who are vital to the global economy. We seek to secure the American Dream for them, and for all working people, including: (1) A paycheck that supports a family; (2) Universal health care; (3) A secure retirement; (4) The freedom to form a union to give workers a voice on the job." <http://www.changetowin.org/about-us/mission.html>

then received \$100 million in pay and stock profits and other perks when he merged the company with Kimberly Clark. The problem is that the “Chain Saw” Dunlaps have too much power and the rest of us have too little.²⁶

On working class power: “Our ultimate goal is a new social contract, by which workers will share not only in prosperity but in power.”²⁷ On profits hoarded by management:

The problem isn’t that Americans aren’t working well enough—their productivity has increased by 24 percent since 1979, a substantial increase, although not as great as in the years after World War II. The problem is that productivity gains haven’t found their way into the paychecks of ‘nonsupervisory or production employees’—a fancy phrase for workers who don’t tell other workers what to do.²⁸

Given that Sweeney was not only a top union official but also one that was on the campaign warpath at the time he wrote those words, one could dismiss the biting adversarial tone and rancor as political bluster—but the sentiment is still there; this is a class struggle, not merely one of individual rights.

Sympathizers and unionists alike make their strongest appeal on the basis of community as well as the more technical collective-voice view of unionism. Freeman and Medoff largely ignore or discount the “monopoly” view of unions in favor of Collective Voice/Institutional Response view.

Unions have some positive effects on productivity—reducing quit rates, inducing management to alter methods of production and adopt more efficient policies, and improving moral and cooperation among workers. . . . Unions collect information about the preferences of all workers, leading the firm to choose a better mix of employee compensation and a better set of personnel policies.²⁹ . . . Union rules limit the scope for arbitrary actions in the promotion, layoff, and recall of individuals.³⁰

Freeman and Medoff’s work includes many different points within this framework, while these seem to be those most germane to the present discussion. With respect to many of their other points, such as that

²⁶Sweeney, p. 5.

²⁷Ibid., p. 8.

²⁸Ibid., p. 33.

²⁹As alluded to in the personal footnote, my experience as well as union workers like me, is that unions do not take into account the wants of all workers, particularly those who are short-term/temporary or young.

³⁰Freeman-Medoff, p. 13.

unions raise productivity or that they promote wage equality, Reynolds offers a blistering critique: “Neither [Freeman and Medoff] nor other pro-union scholars ever cite clear, observable cases of union improvements in productivity; they cite only econometric studies.”³¹ The authors are asking readers to put their trust in that which is worse than “damned lies”: statistics. Indeed, they caution that:

Our efforts to prune our statistical results of potential biases do not, of course, guarantee that all our findings are correct: some certainly are, while others unfortunately may not be. The most we hope is that our overall assessment of unionism as an institution with important voice/response as well as monopoly wage effects is close to the mark.³²

In essence, the issue here is whether correlation implies causation: whether the data is proving the theory or merely coincidental with the theory. An analysis of their methods and results will not be undertaken here; suffice it to say that Reynolds’ rebuttal casts sharp doubt on the authors’ findings.

Their promotion for the Collective Voice/Institutional Response still raises some important questions. Can unions achieve some of these goals? Sweeney certainly seemed to think so:

A new movement of working people should also understand that we can no longer afford the luxury of pretending that productivity, quality, and competitiveness are not our business. They are our business, our jobs, and our paychecks. Too many workers . . . have suffered because of failed and foolish management policies. We need to win a share of power in decision making so that we can improve the products we make and services we deliver—and, often, save our bosses from themselves. I’m talking about a partnership of equals. Labor and management will always have adversarial roles, and that relationship is part of a healthy balance of power in our democracy, just like the relationship between the news media and public officials, or between prosecutors and defense attorneys.³³

Sweeney’s, as well as Freeman and Medoff’s, logic is problematic though. If workers have beneficial input, those companies that smugly ignore the valuable information will suffer the consequences—as will, by Sweeney’s own admission, the workers associated with them. The only way such ignorant bosses and their unfortunate employees would not suffer the consequences of bad managerial action is if they were

³¹Reynolds, “Critique,” p. 266.

³²Freeman-Medoff, p. 25.

³³Sweeney, p. 147.

insulated from competition who did take advantage of worker input. This obviously implies complete collusion (nearly impossible) or government privilege which returns the discussion to the aforementioned monopoly argument. If workers are suffering from poor managerial decisions, it follows that other competing workers are benefiting from other good managerial decisions, not to mention the fact that the consumer is receiving a better product due to this competition. In the absence of competition, why would the former suffer?

The unionist logic here suggests that unions can by the collective voice action make all managers “good.” The proposition is of a bizarre nature in that it implies that workers of different firms are not competing but managers are, and that all workers will win despite managerial differences and thus competitive advantages and disadvantages. The easier logic is that workers would be better served by running their own company. Yet this notion does not fit well with the fact that “labor and management will always have adversarial roles.” Is this true in a worker’s co-op? How can the success of the collective voice in the extreme union power sense *and* adversarial roles notion coexist? These views simultaneously imply that all sectors should be unionized, that they should be managed to some extent by workers, and that workers and management have an adversarial relationship—meaning that workers are at odds with themselves. Why not simply remove the relationship altogether by forming a union, building a war chest, and staging a hostile takeover of management? Would not the workers be best served by this alternative? This notion is never actually addressed by Sweeny (nor I believe, by Freeman and Medoff) perhaps because it skirts too close to the unpopular Marxist revolutionary ideal of workers taking the factors of production from the bourgeois. Either that or it would put the union leadership in the untenable position of being the managers whom they had so long railed against.

Excluding this sort of hostile takeover, there is a test to which unions can be put to in order to determine if the Collective Voice/Industrial Response view is justified: remove the coercive power of unions. A repeal of legislation is merely a return to court rulings before it was enacted and supported by preceding courts:

The basic idea is that every person, whether a union worker, a nonunion worker, an employer, a customer, or a supplier, has equal rights under the law. Each person has a right to make voluntary exchange offers to anyone else, but no person has a right to coerce another to accept his or her offers. Voluntary exchange requires mutual consent. Each person must be able to say “no” to an unacceptable offer from another and walk away without being molested. In the absence of an explicit agreement to the contrary, the employment relationship gives the employee a right to seek, in nonviolent ways, better

terms from the employer. An individual employee may, acting alone or in concert with other employees, withhold labor services in the face of unacceptable terms of employment offered by the employer. If this is what a strike is, then there is a right to strike. But no person has a right to prevent willing workers from working, willing customers from buying, and willing suppliers from delivering during a strike. Moreover, perfect strangers have no standing with the employer. The employer has a right to refuse to deal with them and to prevent them from trespassing against his property. Courts, according to the jurisprudence of common law, have a duty to enforce these universal rights.³⁴

In this case, unions could compete with other forms of labor. Their advantages would be weighed against the strength of competition. If unions would win out and become the norm, it is unlikely that anyone could object to it. Freeman and Medoff offer a sort of half-answer on this point. They claim to be for a weakening of monopoly power by favoring competition—but this competition does not arise against the union within the workforce it represents or could potentially represent. In fact, they suggest that such competition should be *weakened* by “permitting workers to choose union status, without undue management pressure on them.”³⁵ Instead, “as the principal weapon against monopoly power is competition, we favor continued governmental efforts to reduce industry (and therefore union) monopoly power through deregulation; we oppose efforts to reduce foreign competition for the purpose of bailing out particular sectors.”³⁶ While these are good suggestions, they still do not address the issue. Even if this would occur, the competition would be short-lasting because the unions could use their power to enlist the workforce of deregulated sectors and those of foreign competitors.³⁷ Thus, if unions were successful in complete unionization, they would still face no competition. The conclusions of Sweeney, Freeman and Medoff would go untested against the free market and remain largely assumed.

There have been examples in the United States of attempts to restrict union power or at least moderate it. The infamous Labor-Management Relations Act, more popularly known as the Taft-Hartley Act due its sponsorship by Senators Robert Taft and Fred Hartley, was passed shortly after the original two acts (Norris-LaGuardia and

³⁴Baird, “American Union Law,” p. 275.

³⁵Freeman-Medoff, p. 248.

³⁶Ibid., p. 249.

³⁷Assuming that the righteous union laws and tactics were exported fully, for to object to the enforcement of union laws abroad would seem to question their legitimacy in domestic markets.

Wagner) on June 23, 1947 over President Harry Truman's veto. "The intent of the LMRA is asserted to be to protect 'the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing' for collective bargaining purposes."³⁸ Moreover, the intent of the law was not so much to repeal the coercive power of unions but to ensure that the power was directed as the government wished in order "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."³⁹ Thus, the goal of the act is not to affirm individual liberty and freedom of association but to promote "public welfare" via modified (and of course expanded) government supervision of unions:

The act established control of labor disputes on a new basis by enlarging the National Labor Relations Board and providing that the union or the employer must, before terminating a collective-bargaining agreement, serve notice on the other party and on a government mediation service. The government was empowered to obtain an 80-day injunction against any strike that it deemed a peril to national health or safety. The act also prohibited jurisdictional strikes (dispute between two unions over which should act as the bargaining agent for the employees) and secondary boycotts (boycott against an already organized company doing business with another company that a union is trying to organize), declared that it did not extend protection to workers on wildcat strikes,⁴⁰ outlawed the closed shop, and permitted the union shop only on a vote of a majority of the employees. Most of the collective-bargaining provisions were retained, with the extra provision that a union before using the facilities of the National Labor Relations Board must file with the U.S. Dept. of Labor financial reports and affidavits that union officers are not Communists. The act also forbade unions to contribute to political campaigns.⁴¹

³⁸Baird, "American Union Law," p. 281.

³⁹Title 29 of the United States Code Annotated, Chapter 7, Subchapter 1 Section 141.

⁴⁰"A strike called in violation of an existing contract between labor and management." *The New Dictionary of Cultural Literacy*, 3th ed., edited by E.D. Hirsch, Jr., et al. Boston: Houghton Mifflin, 2002. <http://aol.bartleby.com/59/18/wildcatstrik.html>.

⁴¹"Taft-Hartley Labor Act." *The Columbia Encyclopedia*, 6th ed. New York: Columbia University Press, 2001-04. <http://www.bartleby.com/65/ta/TaftHart.html>.

The act was roundly criticized by unionists on the grounds that the secondary boycotts and the like were a right of workers but more so because of the new power of executive branch to break strikes. Even those critical of union privilege took umbrage with the executive fiat:

On October 4, 1971, President Nixon invoked the Taft-Hartley Act to obtain a court injunction forcing the suspension of a dock strike for eighty days; this was the ninth time the federal government had used the Act in a dock strike. Months earlier, the head of the New York City teachers' union went to jail for several days for defying a law prohibiting public employees from striking. It is no doubt convenient for a long-suffering public to be spared the disruptions of a strike. Yet the "solution" imposed was forced labor, pure and simple; the workers were coerced, against their will, into going back to work. There is no moral excuse, in a society claiming to be opposed to slavery and in a country which has outlawed involuntary servitude, for any legal or judicial action prohibiting strikes—or jailing union leaders who fail to comply.⁴²

Thus the Taft-Hartley Act in its wayward attempt to reign in union abuses illuminates the critical distinction between a privileged union, which enjoys the power of the state to require employees to join the union and to compel employers to deal with them, and free unions which exercise no such powers but which likewise cannot be forced back into work by the government when it is deemed a matter of public interest. Although the Taft-Hartley Act may have opened the door for some right-to-work laws at the state level, it failed doubly by reiterating various union powers and also increasing executive privilege over workers. Several of its arguments rest on the concept of an amorphous public good rather than individual rights, leading to further problems on an economic level. For instance, when the International Longshore Warehouse Union and West Coast port operators, President Bush began to employ the Taft-Hartley Act:

Hours after the breakdown in negotiations, President Bush took the first step toward invoking Taft-Hartley by appointing the required board of inquiry to report to him on the economic damage of the shutdown and the likelihood that the parties involved could settle the dispute on their own. The board reported back to the president the following day, October 8, stating that they had "no confidence that the parties [would] resolve the West Coast port dispute within a reasonable time." President Bush then requested that the Federal District Court in San Francisco issue a court order halting the lockout.

As justification for invoking the act, President Bush said that he was worried about the movement of military supplies through West

⁴²Rothbard, p. 83.

Coast ports in the event of war in Iraq or elsewhere. His aides, meanwhile, stressed the President's fear that a prolonged shutdown would undermine the nation's economic recovery (economists have estimated that the shutdown has already cost more than \$10 billion).⁴³

Indeed, privileged or not, all unions may be subject to a governmental determination not only of whether a work stoppage would be sufficiently detrimental to the parties involved, but to the greater "public" (in this case if it would "undermine the nation's economic recovery"). Not only would this be nearly impossible in a dispute between two individuals, as the relative costs and benefits could not be quantified monetarily and only known subjectively to each party, but the government is compounding the error by trying to decipher the relative costs and benefits to an indefinable general public. This facet of the Taft-Hartley Act is certainly one of the most arbitrarily enforced—and thus one of the most economically problematic. That is, even beside the point that workers should not be coerced back on the job, how can economic agents determine a course of action, such as a strike or other protest, if it is not known if they will be punished for it by the government based on the executive's arbitrary conclusion that the strike is sufficiently harmful or not? Such arbitrary laws confuse and distort economic activity to an even greater extent than those that privileged certain unions in the first place.

As the shortcomings of the Taft-Hartley Act's unfortunately unsuccessful and even inimical attempt to restrict the privilege of unions highlights, the best method for handling union privilege is not to create new executive powers or unfair labor practices, but to repeal the privileges of unions altogether. The underlying objection, and perhaps the basis of Taft-Hartley Act, is the notion that unions, although they may have started free and non-coercive, are predisposed to either violence or institutionalized violence in the form of state privilege to achieve their goals. Hutt concurs with this assessment, expanding the definition of coercive monopoly power to include even voluntary collusion:

Our thinking has gone awry if we fail to recognize that the threat of physical harm to person or property is not essential for monopolistic exploitation. The 'peaceful strike' can be as reprehensible as the 'peaceful boycott.' The threat to disrupt a complex system of social organization by collusive action can intimidate in the same sense that the threat of physical violence to persons or property can intimidate.⁴⁴

⁴³Steven Wagner, "How Did the Taft-Hartley Act Come About?" <http://hnn.us/articles/1036.html>.

⁴⁴Hutt, *Strike-Threat*, p. 53.

Thus, Hutt was against the strike threat whether it was undertaken by free or privileged unions—in his mind “private use of coercive power”. Morgan Reynolds makes a similar objection, insisting that the link between unions and violence is intractable due to economic incentives:

The association between unionism and violence is clearly accounted for by basic economics. In order to push the prices of their members’ services above the open market wage rates, labor unions must restrict (cut off) the supply of labor to struck enterprises. The only effective way this can be done is through threats and violence because many U.S. workers are willing to defy picket lines and accept wages and working conditions below those demanded by unionists.⁴⁵

Again, privileged unions have more or less institutionalized this violence into the power of the state in order to restrict a business from hiring other workers and force the business to continue dealing with union. However, although free unions may be tempted to prevent other workers from vying for their jobs through violence, this should be treated on a case by case basis, just as it would for an individual or any other group in price competition with another. The decision of any group, individual or company to withhold their supply of a certain good or service in order to either wait for or engender higher prices is not inextricably linked to violence simply on the grounds that violence might be most effective means to achieve this goal. Even if one accepts that violence against competing workers is the most effective way of driving up wage rates in conjunction with a strike, the withholding of labor and threatening or forcing others to do the same are distinct and separate actions.⁴⁶

Indeed, free labor organizations have existed prior to and even under the Wagner Act System. Although many sought to utilize violence, either state sanctioned or not, it is important to note that several refrained from such rapacious measures to achieve their goals. Moreover, there was also the important condition of competition between unions before the law outlawed such competition (although it has survived to some extent due to the limitations and prejudices of privileged unions). Before the Wagner Act solidified the cartelization of

⁴⁵Ibid.

⁴⁶For example, one might consider an individual of below average intellect but tremendous physical strength (the stereotypical “bully”) predisposed to using force against others in order to satisfy their wants. However, such a person may not necessarily do so; indeed they may instead choose to direct their energies toward entirely useful goals, such as becoming a bodyguard. Certainly one would not object to such a person’s existence outright, even if they could be considered “predisposed towards violence” as a means of achieving their goals.

labor by granting certain unions the sole power to bargain for all the workers, whether they voted or consented to enter the union, there existed a number of different worker organizations, such as the Knights of Labor, the International Workers of the World, and American Federation of Labor, which in some sense competed against one another, both in terms of membership but also ideologically.

The shortage of workers (thanks to booming war orders and a cut-off of new immigration) placed them into a sellers' market, prompting record strike levels for every year from 1915 to 1919. Union membership rose from 2.7 million in 1914 to more than 5 million just six years later; AFL unions alone gained a million members...Contrary to [Samuel] Gompers's [leader of the AFL] expectations, nearly all of the new and revived unions drew, to one degree or another, upon radical traditions.⁴⁷

One can note that are even early attempts by one union to use the power of the government to restrict that of others:

In hoping to neutralize traditional government hostility toward unionization in return for AFL support of [World War I], [Samuel] Gompers invited government repression of his radical opponents in the labor movement, most especially the Industrial Workers of the World. Resisting Latin American unionists' appeals for the U.S. government's release of IWW prisoners, he declared Wobblies to be 'enemy of unionism.'⁴⁸

Even in contemporary times, there are alternative labor organizations that exist outside of the Wagner Act system. Prime examples are so-called "worker centers", which can be defined as:

. . . community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers. The vast majority of them have grown up to serve predominantly or exclusively immigrant populations . . .

Worker centers are hybrids, combining elements of different types of organizations. Some features are suggestive of earlier U.S. social movements and civic institutions, including settlement houses, fraternal organizations, local civil rights organizations, and unions. Other features, like cooperatives and popular education classes, are

⁴⁷Buhle, p. 74; Buhle generally distinguishes between "business" unions and the more radical or ideologically socialist unions (as opposed to "free" and "privileged" unions). Despite these distinctions that arise from a decidedly socialist bias, it is important to note that there were still varied unions at the time competing for members.

⁴⁸Ibid., p. 77.

suggestive of the civic traditions of the home countries from which many of these immigrants came.⁴⁹

Worker centers actually bear some of the characteristics found in the labor organizations Buhle evoked in that they do not necessarily concentrate on a particular industry, but often rather on race and a generally low wage worker. Although worker centers do not necessarily compete directly with privileged unions (and may even cooperate and coordinate with them), they often provide the function to workers without utilizing the powers given to privileged labor unions:

Other centers have pioneered the creation of independent unions. This is most often the case among workers for whom a union does not already exist, such as cabbies, or where existing unions are reluctant to organize, such as in restaurants. The New York Taxi Workers Alliance is one worker center that has taken the form of an independent union. . . .

Immigrant worker centers attract those workers who are often the hardest to organize and for whom current unions by and large do not offer a viable option.⁵⁰

Thus worker centers not only offer an example of free labor organizations that exist even in the United States outside the Wagner Act system, it also displays the possible limitations of privileged unions to incorporate different (i.e., immigrant or certain industry's) workers.

Although it may be allowed that there exist some free labor organizations such as worker centers, one might contend that the current privilege enjoyed by many labor unions is unlikely to disappear (so unions must be attacked whole and entire). Contrary to the objection that such a repeal of law is unattainable, there is an example of union power being revoked:

In 1991, under the National Party, New Zealand deregulated the labor relations market with the Employment Contracts Act (ECA). The ECA eliminated almost all forms of compulsory unionism (Kasper, 1996). Today in New Zealand, individual workers are free, on an individual basis, to decide whether to represent themselves or to authorize an agent to represent them in bargaining for wages and salaries and other terms and conditions of employment. Authorized agents can be unions, individuals, or nonunion organizations. While employers must recognize agents chosen by individual workers as representatives, they do not have to bargain with them. That is, if an employer wants to bargain for the labor of an individual union member it must do so through the union. However, if it chooses not to bargain for the

⁴⁹Fine, pp. 3-4.

⁵⁰Ibid., pp. 7, 14.

labor of that individual it simply tells the union, “thanks, but no thanks.” Unions may represent only their voluntary members. There can be no forced membership or forced dues. Employers and workers are free to choose whether to enter individual or collective contracts. An employer may have individual contracts with some workers and collective contracts with others. All arrangements are made and carried out on the basis of mutual consent. Competition among alternative forms of labor representation is unrestricted and unregulated. New Zealand workers and employers are free to choose.⁵¹

Although he does not address it so directly, and it contradicts some of his other statements, Sweeney himself implies this type of unionism:⁵²

Restoring our independence will make us more effective than tethering ourselves to a political party. As we help workers organize themselves in their workplaces, as we fight to win union members better pay and benefits, and as we fight for such issues as raising the minimum wage and protecting workers’ health and safety, we will earn a new credibility with our members and with all working people. That credibility will make the information we offer more believable and our endorsements more valuable. Think about it: if you were buying a car, whose advice would you follow? A fast-talking salesman like Joe Isuzu? Or a respected source of information like *Consumer Reports*?⁵³

Consumer Reports is a source of information that consumers can choose to use. If one is buying a car, one does not *have* to use *Consumer Reports* in one’s bargaining. A union that emulates this entity would relinquish its private coercive power.

Sweeney’s strongest appeal, the one to community, can also be undertaken under free unionism (as demonstrated by worker centers):

The point is: to have any power in the workplace, a union has to find a way to bring together all workers. That means putting aside anything divisive or offensive and making appeals that are unifying. Once working people understand that the only way to protect their paychecks is to stand together, they’re likely to look past their prejudices to their shared goals.⁵⁴

This type of union cannot be built by the coercion of the majority. Unions should be allowed to compete against one another: those that fall prey to prejudice and to inefficiency will fail to those who do not. It will

⁵¹Baird, “Unions and Antitrust,” pp. 599-600.

⁵²In reference to the aforementioned case of New Zealand serving as a free market example, see the appendix for some commentaries on the situation and results in that country with respect to legislative changes concerning unionism.

⁵³Sweeney, pp. 107-8.

⁵⁴*Ibid.*, p. 153.

then be evident that a union is without bias (or at least has limited it to a sufficient extent), as its meddle has been tested against competitors.⁵⁵

⁵⁵The discussion of whether union tactics, particularly strikes, are effective or the best method for workers to use, has no definitive conclusion without the repeal of union privilege and a leveling of the playing field between non-privileged union workers and those that are, not to mention non-union workers. Indeed it is often argued, as was mentioned previously, that unions invariably slip into coercive means of achieving their goals by either directly utilizing violence or employing the institutionalized violence of the state. The counter-argument remains that even if it is allowed that even free unions are predisposed to force, they cannot be eliminated outright for a mere tendency.

Worker centers themselves have shown to produce results through both state power (in spite of their unprivileged status) and through voluntary, non-coercive measures. In one example, “working with a supportive City Councilor, Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) was able to use the leverage of the zoning process to compel Home Depot, in exchange for a building permit, to agree to set aside space and create an infrastructure for the opening of a city-financed day laborer center” (Fine, p. 6). Obviously, although the use of force was of the institutional variety found in zoning laws, this action is still clearly coercive and therefore illicit under the true free union framework.

A separate example is “the successful conclusion in March 2005 of the four-year national boycott of Taco Bell, organized by the Coalition of Immokalee Workers (CIW) in Florida to improve the wages and working conditions of tomato pickers. In a precedent-setting victory, Yum Brands (the largest restaurant company in the world and owner of Taco Bell) agreed to pay a penny-per-pound ‘pass through’ to its suppliers of tomatoes and to undertake joint efforts with CIW to improve working conditions in the Florida tomato fields” (Fine, p. 6). A voluntary boycott to attract attention and put pressure upon an employer is a perfectly acceptable method of achieving a labor goal.

It may be argued that such actions as the voluntary boycott (or strike) promote a Marxist or socialist conception of society and inhibit workers’ motivation to improve wages through increases in productivity. Two objections to this rebuttal are evident. First, although supporters of the free market would prefer to silence those who would propagate Marxist or socialist ideologies, most would strongly advise against forcibly preventing these propagations (as Voltaire wisely advised), whether it be in speech or action such as the voluntary boycott or strike. Secondly, the fairly extreme actions of boycott or strike cannot be overused by free unions without a public growing weary or other workers taking advantage of those who would remove labor without substantial productivity gains to back up the holdout. Indeed, free unions’ strikes would be most effective if they were also successful in increasing their workers’ productivity, thus making them more difficult to replace. Worker centers do assist the individual immigrant worker to expand his abilities by promoting education and in particular learning English.

Moreover, the restriction of workers to withhold their labor en masse calls into question any group from withholding their product in such a question.

The fact remains that the power given to unions under the law is not only unjust but counterproductive. Privileged union gains come not only at the expense of management and nonunion (or free union) workers but ultimately of consumers, as the products of a certain industry may suffer in quality or be driven up in price as wage costs and inefficiencies have a higher probability of being created by coercive strike threat or by featherbedding, namely since such unions by law face no direct competition, and thus much less consequence for shoddy work.⁵⁶ The unions in the exercise of their power violate the freedom of

Producers are no less prone to the temptation to use such a “strike” or even outright violence when it fails, as occurred during the Great Depression:

[In 1932] some radical farmers decided to call a “farmers’ strike” in an attempted price-support program of their own. Falling farm prices were to be combated by withholding farm produce. . . . But, by the fall of 1932, the movement had become a continuing mob. Centering in Sioux City, Iowa, the movement spread, and state units were formed in North and South Dakota, Minnesota, Montana, and there was agitation in Illinois, Wisconsin, Nebraska, and Kansas; but the units did not form a very cohesive front. The farmers soon shifted from attempts to persuade their fellows to outright physical violence. As is often, the case, when the strikers found that they were starving due to their own policies, while their non-striking colleagues were thriving, they attempted to force the hated “scabs” to lose their income as well. In August, in Sioux City, scene of the first farm strike, strikers blockaded roads, used guns to enforce their commands, stoned buildings, and forcibly stopped transportation. . . . All this agitation failed to raise prices; in fact, more goods flowed in from non-striking (largely non-Iowa) sources, and prices continued to fall rapidly. (Rothbard, *America’s Great Depression*, pp. 235-6)

To restrict or prohibit workers’ or producers’ ability to refuse to sell their labor or product, whether individually or collectively, is to usurp their ownership over the same. Not only is this objectionable morally but would also distort the entire framework of supply and demand (and therefore prices) via government intervention reminiscent, ironically, of socialism itself. Indeed a main tenet of socialism is central planning, something that is evident in the Taft-Hartley Act’s call for an executive determination of the supposed costs to the public (easily recognizable in the appeal to a test of “economic effects” to force workers back on the job). The appeal against even voluntary strikes elicits the socialist mantra of “public good” under the dubious guise of “market efficiency”.

⁵⁶Competition as is noted here is primarily in the form of other unions or non-union workers. As history has shown unionized work forces can be out competed by foreign work forces, or even non-unionized work forces hailing from a different area (as occurred between the Southern and Northern regions of the United States).

association, between the union and nonunion worker as well as the nonunion worker and management. This government privilege to unions to restrict competition, enshrined primarily in the Norris-LaGuardia and Wagner Acts, should be repealed. Likewise, the power conferred on government by the Taft-Hartley Act to break strikes and impel workers back on the job should be dismantled.

“Free” unions, such as worker centers, may indeed show their worth. Like Sweeney’s prophetic though unintended *Consumer Reports* analogy, “free” unions may assist workers in choosing a job and a wage. They could be integral in preventing fraud from occurring (especially in the case of immigrant workers) and facilitating a worker’s job search. But until unions, or more accurately the workers they claim to represent, regain the freedom to choose who represents them, the possible benefits of labor organization will remain undetermined in the absence of the crucial free market test.

APPENDIX

From *Unions and Union Membership in New Zealand: Annual Review for 2001* by May, Walsh, Harbridge and Thickett:

TABLE 1
TRADE UNIONS, MEMBERSHIP, AND UNION DENSITY 1985-2001
(SELECTED YEARS)

	Union Membership	Number of Unions	Potential Union Membership		Union Density	
			Total Employed Labor Force	Wage and Salary Earners	(1) / (3) percent	(1) / (4) percent
	(1)	(2)	(3)	(4)	(5)	(6)
Dec. 1985	683006	259	1569100	1287400	43.5	53.1
Dec. 1985	683006	259	1569100	1287400	43.5	53.1
Sept. 1989	684825	112	1457900	1164600	47.0	55.7
May 1991	603118	80	1426500	1166200	42.3	51.7
Dec. 1991	514325	66	1467500	1153200	35.1	44.6
Dec. 1992	428160	58	1492900	1165700	28.7	36.7
Dec. 1993	409112	67	1545400	1208900	26.5	33.8
Dec. 1994	375906	82	1629400	1284900	23.1	29.3
Dec. 1995	362200	82	1705200	1337800	21.2	27.1
Dec. 1996	338967	83	1744300	1389500	19.9	24.4

Source: Household Labour Force Survey, Table 3, Table 4.3 (unpublished) Industrial Relations Centre Survey.

(Notes: Total employed labour force includes self-employed, employers and unpaid family workers. Column 5 figures in italics are different to those previously reported due to a revision of Labour force figures in 1997 by Statistics New Zealand)

Introduction from *The New Zealand Journal of Industrial Relations*, Volume 28, Number 2:

This issue of the New Zealand Journal of Industrial Relations is largely devoted to a conference entitled Growth and Innovation through Good Faith Collective Bargaining held at Massey University, Palmerston North in May 2003. The intention of the conference was to explore the processes that employers and unions are employing to reach agreements in the new environment for collective bargaining under the Employment Relations Act 2000 (“the ERA”). . . .

For 90 years from 1894, the predominant system was one of compulsorily conciliated bargaining for blanket-coverage awards, backed by the availability of arbitration if needed. Some awards were limited to local industry labour markets, but many of them were regional or national in scope. Conciliated bargaining for award renewals was the order of the day, but given the broad coverage of so many documents, opportunities for involvement in bargaining were limited. Awards were negotiated by necessarily limited numbers of representatives of employers and employees and their respective organisations. To most employers and employees, the bargaining process was pretty remote. Fixed wage relativities and the tendency towards common wage movement across industry meant that much award bargaining was confined to just a few days, with the outcome often fairly predictable.

There were exceptions, when a more demanding style of bargaining took centre stage in award negotiations. There were a limited number of industries in which second-tier negotiations for above-award rates produced some vigorous and localised negotiations at times. And there were some industries and workplaces in which labour relations were notoriously difficult and the bargaining hard-nosed and uncompromising year after year. Nonetheless, the predominant pattern of bargaining for many years was the pretty predictable process of “the annual award round” in which the relative few negotiated documents on behalf of the relative many in a conciliated setting, with contingent arbitration in the background.

Amidst the reforms of the 1980s, substantially more—and more decentralised—bargaining was intended by the Labour government’s 1984 and 1987 legislative initiatives but, in the bigger scheme of things, the impact in terms of changing the nature and processes of collective bargaining was minimal. The State Sector Act of 1988 did more to stimulate “enterprise” based collective bargaining and to change the nature of collective bargaining in this country, but its immediate impact was limited to the public sector.

So, from the 1890s to the 1980s there was plenty of collective bargaining occurring. Much of it was fairly patterned and predictable award negotiations, but there were pockets and periods of more robust negotiations with less predictable outcomes. Across this period, there were many experienced and skilled negotiators, representing employers and unions, who crossed the industrial relations stage. The system also required a cadre of talented conciliators and mediators, accomplished at guiding the parties towards agreements, and putting out brush fires in the process.

The Employment Contracts Act of 1991 (“the ECA”) promoted individualism in employment relationships at the expense of collectivism, causing union membership and the coverage of collectively negotiated documents to decline dramatically during the decade of the 1990s. And what unionised collective bargaining remained was quickly decentralised in many cases. Particularly where unions had been strong going into the decade, pockets of decentralised, membership-involved,

power-dependent collective bargaining was sustained, and sometimes flourished during the ECA era.

But principally, the decade of the 1990s dramatically shrunk and reshaped unionised collective bargaining in New Zealand. In the process, a whole generation of skilled negotiators was lost, as unions in particular shed experienced staff in the wake of falling membership and bargaining activity. And as the decade progressed, many of the mediators experienced in collective bargaining also left the scene or turned their attention to other aspects of the employment relations field. And, not incidentally, some industrial relations scholars moved offshore, while others abandoned labour relations for a more generalist and individualist human resources management focus.

The ERA reversed the legislative philosophy that had dominated the 1990s, giving encouragement to union membership and promoting collective bargaining as a positive basis for employment relationships. An obligation to bargain in good faith was incorporated to give further substance to bargaining in the new environment. The Employment Relations Authority was given the role of regulating bargaining behaviour in the first instance. And the new Mediation Service was encouraged to be involved, both reactively and proactively, in assisting the parties in collective bargaining. An employment relations education fund was established to assist parties in developing relevant skills and knowledge, including collective bargaining skills.

Three years on, while there has been some anecdotal evidence and speculation, there has been little documented research and writing on collective bargaining under the ERA. There are interesting and potentially complex legal issues - principally good faith bargaining - on which there has been some writing for and by both scholars and practitioners, but perhaps surprisingly little litigation activity.

From *Workers' News* July 2000, Volume 1 Number 7
(<http://www.amrc.org.hk/Arch/3611.htm>):

Reversing almost a decade of declining membership, some trade unions are now reporting substantial increases. After the notorious Employment Contracts Act became law in 1991, union membership rates fell from 46 to 18 percent of the workforce. The National Distribution Union reports a ten percent membership increase in recent months...The Service and Food Workers Union has also gained substantially more members recently, especially cleaners, security guards and aged care workers. Construction, manufacturing, transport, nursing and public services all reported membership increases.

There is also a political movement for the repeal of the Employment Contracts Act. A description of their goals on this topic can be found at <http://www.alliance.org.nz/info.php3? Type=Position Paper&ID=159>.

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