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Cooperation, Conflict, or Coercion: Using Empirical Evidence to Assess Labor-Management Cooperation

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COOPERATION, CONFLICT, OR COERCION: USING EMPIRICAL EVIDENCE TO ASSESS LABOR-MANAGEMENT COOPERATION

Ellen J. Dannin*

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INTRODUCTION

Since the 1980s there has been strong interest in labor-management cooperation. That interest was reflected even in government attention, for example, through projects by the U.S. Department of Labor's Bureau of Labor-Management Cooperation. Under the leadership of Undersecretary Stephen Schlossberg, the Bureau's "Laws Project" examined the impact of labor law on labor-management cooperation.¹ The Dunlop Commission issued a report strongly in favor of labor-management cooperation,² and National Labor Relations Board (NLRB) Chair William B. Gould has spoken favorably of it.³ More recently, the government issued a report on state and local initiatives in this area.⁴

Currently, the concept of labor-management cooperation is receiving strong support from some scholars, politicians, and employer groups as a way to improve U.S. competitiveness. That support is exemplified by the introduction of the Teamwork for Employees and Management (TEAM) Act in Congress to facilitate the development of labor-management cooperation by amending § 8(a)(2) of the National Labor Relations Act (NLRA).⁵

1. The author was a member of the Laws Project in 1987 and worked on one of its published reports concerning the interaction of the duty of fair representation and labor-management cooperation. See BUREAU OF LABOR—MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, *Labor-Management and the Duty of Fair Representation*, in U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, SECOND INTERIM REPORT 39 (1987).

2. See COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 2-4 (1994); see, e.g., COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT (1994); Arthur J. Martin, *Current Critical Issues in Labor and Employment Law: Company Sponsored Employee Involvement: A Union Perspective*, 40 ST. LOUIS L.J. 119, 129-30 (1996) (describing the history of the Dunlop Commission).

3. See William B. Gould, *Labor Policy by and beyond the NLRB: Globalization, Corporate Reorganization, and the American Workforce*, in BUREAU OF NATIONAL AFFAIRS, INC. *Remarks by NLRB Chairman William B. Gould to the Commonwealth Club of California*, 152 DAILY LAB. REP. (BNA), Aug. 4, 1997, at E-1.

4. See WORKING TOGETHER FOR PUBLIC SERVICE: REPORT OF THE U.S. SECRETARY OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION (1996).

5. See Teamwork for Employees and Management (TEAM) Act, S.295, 105th Cong. (1997); As TEAM ACT Moves through Congress, *Employers Pursue Employee Involvement*, EMPL. REL. WKLY. (BNA), Mar. 17, 1997, at 255; NAM Offers Agenda for Helping Workers That Stresses Worker Involvement of TEAM, LAB. REL. WK., Mar. 5, 1997, at 229. The TEAM Act was approved in March 1997 by the Senate Labor and Human Resources Committee. President Clinton vetoed a virtually identical bill in 1996 and threatened that he would veto its successor if it was sent to the White House. See *Steelworkers: House Democrats Criticize GOP Study of U.S. Labor Policies*, DAILY LAB. REP. (BNA), July 16, 1997, at D11; Michael H. LeRoy, "Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromotion, 73 NOTRE DAME L.

The TEAM Act and the impact of labor-management cooperation are hotly debated issues.⁶ As with most proposed legislation, it is impossible to know how the TEAM Act would function if it were to be enacted. No social science experiment can be run to gauge its operation and predict its likely effect. There are simply no social laboratories complete with control groups and replicability. Even if there were, the best of such experiments could not capture the complex ways in which law interacts with society.

In this arena comparative law is not based on a superficial reading of statutes or cases, but, rather on an in-depth examination of society's laws and values. As a result, it is possible to use the experience of a comparable country as if it were a laboratory in which the experiment has been run. In this case, New Zealand's six year experience under the Employment Contracts Act 1991 (ECA) is particularly useful. The ECA has created the conditions under which labor-management cooperation has been used as a replacement for collective bargaining. Thus, analyzing the ECA can be used as a means of gaining a clearer understanding of the likely ways in which the TEAM Act would function were it to be enacted.

I. ARGUMENTS CONCERNING LABOR-MANAGEMENT COOPERATION

Proponents of labor-management cooperation make several interrelated arguments concerning the use of cooperation as a replacement for the NLRA. First, these proponents contend that the form and function of unions must change so that unions will engage in cooperative efforts rather than take adversarial positions. Second, we must alter the purposes of labor law from supporting a narrow focus on increasing wages to promoting win-win bargaining and employer productivity and competitiveness. Third, employers must be given the opportunity to affect or choose the form of unionization that will best serve the needs of the enterprise. Finally, since employees would prefer labor-management cooperation to adversarial unions, labor-management cooperation would reverse the decline of unionization. Each of these claims is hotly contested. Unfortunately, the argument on both sides is infused with passion but has so far suffered from an inability to rely on empirical evidence.

This article will first sketch the arguments on each of these points made in the United States and compare them to arguments made in sup-

REV. 31, 79-82 (1997) (providing the history of 8(a)(2) and recent efforts to amend it); *see also* PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 283-95 (1990).

6. *See* discussion *infra* Part I.A.

port of the enactment of New Zealand's ECA. It will then examine the empirical evidence available from New Zealand's experience, which provides a rich understanding of how the changes to its labor law from one based in a system of collective bargaining and industrial relations to one based on freedom of contract have operated, and how the system of labor-management cooperation, which has grown up in the context of the new law, has functioned.

A. *Changing the Form and Function of Unions*

Some argue that U.S. unions are mired in an adversarial, rigid system.⁷ Proponents of this view argue that unions make no positive contribution to the economy because they press for increased wages and thus lower firm profits.⁸ To ameliorate this situation requires using "a greater measure of freedom of contract [that] would open up opportunities for the development of different models of unionism and labor-management relations," creating "value-added" unionism—that is, "organizations that give employees greater voice in articulating their concerns and that negotiate and administer collective goods like grievance procedures, but without undermining firm profits or managerial flexibility."⁹ Increasing union density is, indeed, positively associated with promoting decreased inequality of wages.¹⁰

By seeking to create links among workers across the boundaries of individual employers, the multi-employer unions found in the United States promote adversarial behavior that does not focus on promoting employer productivity. Unions try to channel worker "discontent into support for an organization external to the firm that will press for industry-wide wages and rules that narrowly confine management authority. Though workers organize as employees of a firm, unions are

7. See Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 185 (1996).

8. See Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 830 (1996); see also CHARLES HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 7-27 (1988).

9. Estreicher, *supra* note 8, at 829. See generally Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); see also Gail Herriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167 (1993); Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, DAILY LAB. REP. (BNA), June 5, 1995, at E-10.

10. See generally, Martin Asher & Robert De Fina, *The Impact of Changing Union Density on Earnings Inequality: Evidence from the Private and Public Sectors*, 18 J. LAB. RES. 425 (1997); Javed Ashraf, *The Effect of Unions on Professors' Salaries: The Evidence over Twenty Years*, 18 J. LAB. RES. 439 (1997).

principally multiemployer organizations.”¹¹ To combat this negative approach to workplace governance, “[l]abor laws should narrow, rather than widen, the divergence of perspective between the union and the firm.”¹²

To address this problem, unions could take a range of forms, the best of which would be as consultants to employers. Union leaders would be financed by employers to perform this task.¹³ The ideal union would be an enterprise union representing employees of only one employer instead of employees of multiple employers. Multi-employer unions would then be only service providers offering employees access to lawyers, actuaries, placement advisers, and other professional services.¹⁴ These two new forms of unions would compete for members with local unions, which would be mere “administrative units of traditional, adversarial organizations pursuing industry wage and job control policies.”¹⁵

Promoting labor-management cooperation is not a new concept. Similar views were expressed by employers during debates for the NLRA.¹⁶ Indeed, the question of control and the origins of conflict within the work relationship have long been debated by industrial relations scholars.¹⁷ Although it can be seen as a negative that U.S. unions are institutions which workers seek out when they are unhappy; others would argue that such a safety valve is necessary.¹⁸ The NLRA expressly wanted unions were to be a vehicle by which workers could effectively express and remedy their discontent, which Congress found was imperiling the U.S. economy.¹⁹ The NLRA’s “Findings and Policies” state that the NLRA was enacted to channel employee discontent in order to prevent unredressed discontents from injuring commerce.²⁰

11. Estreicher, *supra* note 8, at 830.

12. Estreicher, *supra* note 9, at E10, E14.

13. See Estreicher, *supra* note 8, at 833–34.

14. See *id.*; see also Janice Bellace, *Labor Law Reform for the Post-Industrial Workplace*, 45 LAB. L. J. 461, 462–63 (1994).

15. Estreicher, *supra* note 8, at 834.

16. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1460 (1993).

17. See generally, STEPHEN M. HILLS, *EMPLOYMENT RELATIONS AND THE SOCIAL SCIENCES* 3–4 (1995).

18. In *Rivethead*, Ben Hamper tells how he and another General Motors line worker fantasized about making “a violent bluecollar docudrama called *No Need for the Grievance Procedure*. It would be a collection of short pieces that chronicled the systematic executions of our least favorite shoplords.” BEN HAMPER, *RIVETHEAD: TALES FROM THE ASSEMBLY LINE* 125 (1991).

19. See JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 35–43 (1983).

20. See NLRA § 1; 29 U.S.C.A. § 151 (1973).

Unions should be expected to push for increased wages given that the NLRA was enacted to achieve precisely this end. The NLRA drafters believed that unions needed to be strong enough to press for higher wages and thus put an end to the underconsumption and disinflation which had led to the Depression.²¹ The NLRA states that inequality of bargaining power "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."²²

Collective bargaining need not be viewed as adversarial simply because the relationship exists to mediate conflict. Indeed, collective bargaining agreements have been referred to as the original "quality of work life" (QWL) documents.²³ They are essentially systems of self-governance under a private rule of law.²⁴ As such, collective bargaining has provided the means to empower workers and thus represents an all too rare opportunity for workers to learn the skills of participatory democracy.²⁵ The NLRA itself supports cooperation of a kind that can exist only between equals by embodying the understanding that employers organized in the corporate form cannot meaningfully cooperate with their *individual* employees.²⁶

21. See ATLESON, *supra* note 19, at 41-42; See generally, CHARLES GREGORY & HAROLD KATZ, *LABOR AND THE LAW* 223-30 (3d ed. 1979).

22. NLRA § 1; 29 U.S.C.A. § 151 (1973).

23. See Labor-Management Cooperation and the Duty of Fair Representation, U.S. Labor Law and the Future of Labor-Management Cooperation 39, 43-44 (2d Interim Rep. 1987); see also Charles Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 624-25 (1990).

24. See *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 580 (1960); see also Thomas Kohler, *Civic Virtue a Work: Unions as Seedbeds of the Civic Virtue*, 36 B.C. L. REV. 279, 298 (1995).

25. See Elaine Bernard, *Democracy in the U.S.: Why Unions Matter* (1995) (unpublished manuscript) (on file with author). Thomas Kohler observes:

Unions are autonomous bodies. They stand independently of the state and the organizations that employ their members. They come into being as a result of employee self-organization, and their health and continuing existence depends upon the ability of the members to maintain solidarity. Winner-take-all attitudes don't produce enduring relationships or democracies. Unions can provide a forum where people can learn to prevail on a point without triumphalism, to lose an argument without resentment, and most importantly of all, to practice the art of reasonable and responsible compromise.

Kohler, *supra* note 24, at 300; see also James Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J. L. REFORM 47, 65-66 (1989).

26. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 795-96 (1994). See *infra* text, at nn. 326-328.

Not only can unions engage in labor-management cooperation, but many unions, which might be described as adversarial, have actively embraced labor-management cooperation during recent decades.²⁷ Studies have shown that independent unions offer something of value not only to employees but also to employers. Labor-management cooperation programs tend to be more successful in firms, in which employees are represented by unions.²⁸ It cannot be assumed that unions are necessarily and irrationally adversarial or that it is unions which create adversarial relationships.

Charles Morris observes that it is a myth "that an adversarial relationship between unions and management is inherent in the NLRA," although it often appears to be "conventional wisdom . . . that cooperative labor relations and employee participation programs are unnatural to the NLRA. It is too simplistic to label the NLRA system 'adversarial' and leave it at that."²⁹ It seems illogical to conclude that unions are the source of an adversarial dynamic about which we should be concerned when there is strong evidence that an important source of conflict comes from U.S. employers. In recent years, U.S. employers have increased their opposition to unions, as part of their ongoing efforts to assert control over work processes³⁰ as evidenced by the rising merit factor in NLRB cases³¹ and documented hostility to unionization.³² Among the

27. See James Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 495-96 (1994); Thomas Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B. C. L. REV. 499, 510-12 (1986). See also JOSEPH FUNCINI & SUZY FUNCINI, *WORKING FOR THE JAPANESE: INSIDE MAZDA'S AMERICAN AUTO PLANT* (1990); *Labor-Management Cooperation: Members of 24 Union Locals Approve Partnership Pact With Kaiser*, DAILY LAB. REP. (BNA), June 4, 1997, at D8.

28. See Maryellen R. Kelley & Bennett Harrison, *Unions, Technology and Labor-Management Cooperation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 247 (Lawrence Mishel & Paula B. Voos eds., 1992).

29. Charles Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. 517, 526 (1994). See also Kohler, *supra* note 27, at 513-16.

30. For a discussion of these efforts and the impact they have had on the economy, see, for example, SAMUEL BOWLES ET AL., *AFTER THE WASTELAND: A DEMOCRATIC ECONOMICS OF THE YEAR 2000* (1990). In particular, the authors observe that a "corporate counteroffensive against labor began aggressively in the mid-1970's." *Id.* at 124.

31. See WILLIAM COOKE, *UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS* 49 (1985); Atleson *supra* note 27, at 477-84. Board filings and findings of unfair labor practices are highly inaccurate as to the absolute degree of employer opposition because truly effective opposition may mean that no charges are ever filed as to illegal activity and Board processes may mean that meritorious charges do not result in final Board decisions.

Many European employers have taken a very different view of their relationships with unions and refer to them as social partners. See Kohler, *supra* note 24, at 287.

32. See Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75 (Sheldon Friedman et al., eds. 1994); Kate Bronfenbrenner &

most extreme tactics to oppose unionization is the threat to close a plant or the actual closing of a plant. A recent study found that, in a sample of NLRB election cases filed in units of over fifty for 1993-1995: (1) employers threatened to close the plant in at least fifty percent of cases; (2) in an additional eighteen percent of cases, the employer threatened to close the plant after the union won an election; and (3) in twelve percent of cases in which the union won the election, the employer actually closed the plant.³³ When the study examined only industries in which credible threats to move could be made, there were threats to close in sixty-two percent of cases.³⁴ Indeed, to focus on only one part of the equation is to ignore history. The system which now exists evolved as a result of the interactions of all parties—unions, non-union and union employees, employers, and the government's branches.

Indeed, some of the differing views when discussing labor-management cooperation are the result of its being such a loose concept. Although it is commonly thought to refer to one sort of work practice, labor-management cooperation is in fact a general term that comprises a range of ways work can be organized and includes many different motivations. Labor-management cooperation can include rotating jobs, enlarging or enriching job content to reverse Taylorist deskilling, increasing worker responsibility and self-management, allowing workers to participate more directly in decision-making on issues ranging from work assignments to quality control to personnel decisions and grievance handling. Labor-management cooperation can take place through committees, teams, quality circles, employee involvement and problem

Tom Juravich, *The Impact of Employer Opposition of Union Certification Win Rates: A Private/Public Sector Comparison* (Feb. 1995) (working paper no. 113, Economic Policy Institute) (on file with the author); Richard Hurd & Joseph Uehlein, *Patterned Responses to Organizing: Case Studies of the Union Busting Convention*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 32, at 61; *see generally*, DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 61-86 (1995).

33. *See, e.g.*, Kate Bronfenbrenner, *Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers to Organize*, Report to the Labor Secretariat of the North American Commission for Labor Cooperation, Sept. 30, 1996.

34. *See id.* Threats included verbal threats as well as:

attaching shipping labels to equipment throughout the plant with a Mexican address, to posting maps of North America with an arrow pointing from the current plant site to Mexico, to a letter directly stating that the company will have to shut down if the union wins the election. . . . The most blatant example of this involved ITT Automotive in Michigan, where the company parked thirteen flat-bed tractor-trailers loaded with shrink-wrapped production equipment in front of the plant for the duration of the campaign with large hot-pink signs posted on the side which read 'Mexico Transfer Job.'

Id. at 11.

solving.³⁵ One goal of labor-management cooperation programs is the promotion of employee job satisfaction that will in turn lead to greater worker commitment to the job in order to achieve management goals of higher productivity and lower employee resistance to change.³⁶ Thus, it is impossible to know exactly what is meant by any labor-management cooperation program when the term is used without explaining the details of its operation.

Opponents of labor-management cooperation do not see it as an institution to increase worker empowerment and workplace democracy, but focus on labor-management cooperation's use in the United States as a "style or theory of management."³⁷ As such, proposals to increase the use of labor-management cooperation are seen as plans to increase management power and reduce true quality of working life by permitting employers to "manage by stress."³⁸ It is worthy of note that the same programs taught by QWL consultants are also used in seminars training employers how to deunionize or to remain union-free.³⁹ Opponents of

35. See DONALD WELLS, *EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT* 1-2 (1987); Kohler, *supra* note 27, at 500-10; Martin, *supra* note 2, at 119.

36. See Susan Schwochau et al., *Employee Participation and Assessments of Support for Organizational Policy Changes*, 18 J. LAB. RES. 379, 380-85 (1997). It has been pointed out that the way, in which benefits arising from teams have been studied, presents special concerns. First, these studies have tended to focus on economic outcomes, assuming that there must be a link between positive economic results and worker satisfaction. Second, some studies have focused only on team benefits and have thus failed to consider or learn whether there might not be psychological or other problems associated with teams. See Hannah Knudsen & Leon Grunberg, *The Promise and Reality of Teamwork at a Large American Company* 6 (1997) (unpublished manuscript) (on file with author).

37. Kohler, *supra* note 27, at 500-03 (describing various theories and applications as well as the history of labor-management cooperation schemes during the twentieth century in the U.S.).

38. MIKE PARKER, *INSIDE THE CIRCLE: A UNION GUIDE TO QWL* (1985); General Motors once used a person dressed as a mascot as an attempt to improve quality. See HAMPER, *supra* note 18, at 112-15 (1991).

39. See Wells, *supra* note 35, at 5-6; see also PARKER, *supra* note 38. In 1981, GM circulated a memo among its executives encouraging them to use QWL programs to subvert the union's collective bargaining demands. See Wells, *supra* note 35, at 106; see also GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY* (1988).

A recent study of NLRB elections during 1994 found such programs in thirty-two percent of elections, a dramatic increase from eight years earlier, when a similar study found them in only seven percent of election campaigns. Furthermore, the new study found that the existence of LMC programs significantly decreases the union win rate. The employer's anti-union campaign also tended to be more aggressive where LMC programs existed, and there tended to be more unfair labor practices committed. Furthermore, the LMC programs were dominated, rather than merely assisted, by the employer. Jim Rundle, *Winning Hearts and Minds: Union Organizing in the Era of Employee Involvement Programs*, in *ORGANIZING TO WIN* 213 (Kate Bronfenbrenner et al., 1998); see also Bronfenbrenner, *supra* note 32; Bronfenbrenner & Juravich, *supra* note 32.

labor-management cooperation may be concerned about advocating such a step because unions have both historically and recently spear-headed efforts to improve workers' lives and promote democracy.⁴⁰

Beyond seeing unions as mere actors in the marketplace, some would argue that unions promote justice, equality, and democracy.⁴¹ Solidarity among workers without regard to where they are employed is fundamental to the cause of working people and to labor law. Solidarity across employers allows workers to know and care about what is happening elsewhere and then to make common cause with one another.⁴² Thus, weakening solidarity by strengthening attachment and identification with only one employer means limiting union strength and, to some degree, transforming unions into altogether different entities. Indeed, the NLRA supports cross-employer solidarity by defining "employee" to include any employee, not limited to the employees of a particular employer.⁴³ This definition grows out of pre-NLRA experience with judicial interpretations which limited worker power by narrowly defining worker interests.⁴⁴

Charles Gregory, for example, asked why the use of concerted action by workers to use their freedom to contract by exerting their collective economic power was a crime at common law; he answered:

Since individual refusals of wage earners to work under conditions not acceptable to them had no discernible effect on the national economy, the vice was combination and concerted action. Hence judges found it possible to maintain the principle of freedom of contract—at least for individuals—and at the same time to declare unlawful the united efforts of workers to change the conditions under which they worked.⁴⁵

40. See Kohler, *supra* note 24, at 287–89.

41. See, e.g., PARKER, *supra* note 38; see also LABOR RESEARCH REVIEW, CONFRONTING GLOBAL POWER: UNION STRATEGIES FOR THE WORLD ECONOMY (1995) [hereinafter LRR].

42. See, e.g., PARKER, *supra* note 38; see also LRR, *supra* note 41.

43. See NLRA § 2(3); 29 U.S.C.A. § 152(3) (1978).

44. For a history of judicial decisions that have limited worker solidarity, see GREGORY & KATZ, *supra* note 21, at 222. A sympathy strike or refusal to handle "hot cargo" offers workers an opportunity to strengthen themselves by making common cause in addition to demonstrating their solidarity across the boundaries of one employer. Judges have often failed to see the self-interest involved and thus their enjoining such strikes is asking workers to place more value on self-interest rather than on altruism. See *id.* at 106–11, 122–31.

45. *Id.* at 19.

Collective bargaining's majoritarian bias and commitment to democratic and egalitarian values thus necessitate some sacrifice of individual freedom.⁴⁶

One important question is whether any of this history is still relevant and should continue to shape our labor law. Proponents of labor-management cooperation would argue that the new global marketplace and the need to be internationally competitive mean the NLRA and the traditional form of unions are destructive to the U.S. economy.⁴⁷ It may be that a law can age in such a way that its original purposes are no longer useful and are even destructive.⁴⁸ Whether tendencies toward global marketplaces have indeed altered employer-employee relations to such a degree that a new industrial relations paradigm is needed is a difficult question. At any rate, pleading for unions that will promote or at least not harm company profits—rather than furthering worker interests—is an odd concern at a time when we have been experiencing both record corporate profits and wages so severely depressed that some workers qualify for food stamps.⁴⁹ Choosing the generation of profit as the measure of a good labor law is also odd, given the state of society today. Despite the increasing emphasis on economic issues, "goods cannot be traded indefinitely in disregard of the fate of the people who make them."⁵⁰ Ultimately commerce must be concerned with the well-being of people and society.⁵¹

46. See HARRY WELLINGTON, *LABOR AND THE LEGAL PROCESS* 129, 189-98 (1968); See also Zimarowski, *supra* note 25, at 54-55.

47. See Heckscher, *supra* note 8, at 7-8, 53-81; See Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159 (1996); but see Gould, *supra* note 3, at D24. Representative William Goodling (R-Pa), chairman of the House Education and the Workforce Committee, said:

'It blows my mind that anybody could ever veto the TEAM Act,' . . . pointing to the ever-growing global economy as an impetus for changing the National Labor Relations Act. 'With the international competition as great as it is,' Goodling said, 'we can't keep going down the same path of confrontation, rather than cooperation, between labor and management.'

Pamela M. Prah & Court Gifford, *GOP Workplace Proposals Awaiting Completion When Congress Returns*, August 27, 1997, 166 DAILY LAB. REP. (BNA), at D16.

48. See James J. Brudney, *A Famous Victory: Collective Bargaining and the Statutory Aging Process*, 74 N.C. L. REV. 939 (1996).

49. See HOLLY SKLAR, *CHAOS OR COMMUNITY? SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS* (1995); see also Gould, *supra* note 3, at D24.

50. Alain Supiot, *Perspectives on Work: Introduction*, 135 INT'L LAB. REV. 603, 603 (1996).

51. See Supiot *supra* note 50, at 603. Alain Supiot, Professor of Law and Social Policy at the University of Nantes, observes that the experiences of many workers who face joblessness and uselessness or overwork create something like a social death that threatens the very foundations of human existence and reproduction (particularly lack of money or time to bring up children). See *id.* This is bound to lead to violence because people cannot be recon-

The ECA's advocates, primarily New Zealand employer groups, such as the New Zealand Employers Federation (NZEF) and New Zealand Business Roundtable (NZBR), made arguments that tracked those in support of a system based on labor-management cooperation as labor law.⁵² The NZBR and NZEF also claimed that unions create conflict in the workplace and thus impede productivity, and that workers and employers were united in wanting to make the employer as profitable as possible.⁵³ These employer groups argued that once the old, conflict-ridden system was eliminated, labor-management cooperation would naturally come into existence since the highest priority for workers was the same as for employers: the viability of the enterprise.⁵⁴ The NZBR submission on the ECA argued that the existing system had ritualized and institutionalized the supposed conflict that existed between employers and workers.⁵⁵

Labor-management cooperation has also figured prominently in the New Zealand employers associations' campaign for labor law reform.⁵⁶ The NZEF claimed that the ECA would foster companies in which "each employee is committed to a set of operational and personal objectives, through participation in the planning process."⁵⁷ Workers would be self-managing, individually fulfilled, problem solving team-workers, who would work through "[s]taff associations, [which] where they exist are strong and loyal"⁵⁸ and facilitate the sensitive and rapid defusing of controversy to obtain mutually satisfactory results. Management provides information freely and regularly and shares profit with the workers, "after capital retention and dividend decisions have been made."⁵⁹ The NZEF contended that cooperation, equality and fairness are the natural state for the workplace when there is no third party interference. The NZEF's handbook on employee involvement programs

ciled to social death indefinitely. Whether religious, criminal, or nationalist, violence will in turn pose a threat to business and to the very survival of the market economy. The age of simplistic arguments for labor deregulation (e.g. dismantle labour law and all will be best in the best of all possible worlds) is drawing to a close and will have been short-lived.

52. See, e.g., Anne Knowles, *Four Months Down the Track: Is the Employment Contracts Act Working?*, EXAMINER (N.Z.), Sept. 5, 1991, at 19; REPORT FROM THE ELECTRICITY CORPORATION OF NEW ZEALAND TO THE LABOUR SELECT COMMITTEE OF NEW ZEALAND ON SUBMISSIONS ON THE EMPLOYMENT CONTRACTS BILL 10 (1991) (on file with author).

53. See *id.*

54. See *id.*

55. See NEW ZEALAND BUSINESS ROUNDTABLE (NZBR), SUBMISSION TO THE LABOUR SELECT COMMITTEE ON THE EMPLOYMENT CONTRACTS BILL 1 (1991).

56. See, e.g., PENELOPE BROOK, FREEDOM AT WORK 17 (1990).

57. NEW ZEALAND EMPLOYERS FEDERATION (NZEF), THE BENEFITS OF BARGAINING REFORM 3 (1990).

58. See *id.*

59. See *id.*

states that "the effect of consultation should be to achieve the co-operation of employees in . . . the implementation of management decisions."⁶⁰ Conspicuously missing from this handbook statement is any discussion of employees' having influence over workplace decisions and any mention of bargaining.

The NZEF and NZBR contend that unions are inherently adversarial and decry law that is "falsely 'based on the premise of an inherent ongoing conflict of interest between employers and workers,' which [is] a 'shibboleth and source of confusion.'"⁶¹ The NZEF and NZBR argued that New Zealand industrial relations legislation needed to be cleansed of the idea that employer and employee interests conflicted. The NZEF and NZBR's mutual goal was productivity; thus the interests of workers and unions would be served by a closer identification with the employer.⁶² The NZEF and NZBR argued that employees' main concern is that their employer makes a profit so it can continue to provide them with jobs. This means, these employment associations contend, that employee and employer goals are so consistent that anything that interferes with these common goals must be removed.⁶³

The NZEF and NZBR also claimed that conflict is a symptom of pathology, of something gone awry in the natural state of employment relations, which is an association of mutual gains, and argued that cooperation was the natural state of the workplace. Thus, conflict must mean that some outside force, usually unions, has blinded the employer and its employees to the unity of their natural interests.⁶⁴ Anne Knowles, NZEF Labour Market Manager, wrote: "[I]t is the equally firmly held view of proponents of the [ECA] . . . that divisions that have been created in the workplace by outside constraints imposed by current

60. NZEF, *EMPLOYEE INVOLVEMENT IN THE NEW ZEALAND WORKPLACE: AN INTRODUCTION AND GUIDE TO WORKER PARTICIPATION* 35 (1977).

61. Ellen J. Dannin, *Labor Law Reform in New Zealand*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 1, 30 (1992) (references omitted). This view has been developed by the organizational behaviorist school. It incorporated a focus on discovering techniques which would secure "employee acceptance and cooperation in securing management's goals," viewed conflict as pathological, and management's goals as paramount. Kohler, *supra* note 27, at 516-17; see also GRENIER *supra* note 39, at xiv. Grenier found that the worker-participation program he studied actually increased conflict between management and the workers and among workers as part of a strategy to divide and conquer. *Id.* at xix.

62. See NZBR CRITIQUE OF THE LABOUR RELATIONS ACT 2, NZBR SUBMISSION TO THE LABOUR SELECT COMMITTEE: THE LABOUR RELATIONS BILL 10 (1987) [hereinafter LRA CRITIQUE].

63. See Anne Knowles, *Employment Contracts Bill: What's in it For the Workers?* EXAMINER (NZ), Apr. 24, 1991, at 7; see also Peter Shirtcliffe, Chairperson of Telecom NZ, Ltd., Address to the NZEF Convention 4-5 (May 13, 1992).

64. See Ellen Dannin, *Solidarity Forever? Unions and Bargaining Representation Under New Zealand's Employment Contracts Act*, 18 LOY. INT'L & COMP. L.J. 1, 4-7 (1995).

legislation will be removed, allowing the employer and employees at an enterprise to have full and open communication.”⁶⁵ Electricity Corporation supported the enactment of the ECA because it believed that a system, which gave the unions exclusive bargaining rights, led them to advocate goals that bear no relationship to the real needs of employees and employers.⁶⁶

It was argued that the reforms proposed for New Zealand would naturally improve both working conditions and the country's economy, because they would promote a focus on business needs. Peter Shirtcliffe, NZBR member and Chairperson of Telecom NZ, said: “Improved customer satisfaction—giving people more of the goods and services they need in better quality, at prices they can afford—is *the* central objective of deregulation: the force driving opportunity, innovation, business growth, economic expansion, higher employment, higher wages, and better social harmony for the future.”⁶⁷ Unions would exist in a system controlled by economic outcomes: “The bottom-line test of the performance of any employment relations system is a simple one : [sic] is it achieving high levels of employment and high levels of productivity growth?”⁶⁸

New Zealand employer groups also advocated the importance of enterprise bargaining in their campaign to replace the existing multi-employer bargaining system.⁶⁹ The New Zealand employer groups advocated enterprise unionism as a means to improve performance by moderating worker wage demands:

Union representatives argued against the formation of enterprise unions . . . on the grounds that “sweetheart” unions would develop and disruptive inter-union rivalry would occur. The self-interested and empty nature of these claims is illustrated by the following observations on the harmonious and highly productive Japanese industrial relations system from a member of the United States Council of Economic Advisers:

‘Why do Japanese unions allow a degree of flexibility that would be an anathema to American unions? The reason: they are organised companywide rather than industrywide. Because national unions in Japan rarely control locals’ policies, a single

65. Knowles, *supra* note 63, at 7.

66. See Electricity Corporation, *supra* note 54, at 5.

67. Shirtcliffe, *supra* note 63, at 4–5.

68. NZBR, REVIEW OF THE OPERATION OF THE LABOUR RELATIONS ACT IN THE 1988/89 WAGE ROUND 15 (1989).

69. See Dannin, *supra* note 61, at 20–24.

industry contains several different "enterprise unions" as they are called, and these unions compete with one another. Workers will moderate wage demands rather than jeopardise their firm's market share.'⁷⁰

New Zealand employer associations also argued that unions should be transformed by focusing on providing services to prospective members and competing with one another on that basis.⁷¹ These employer associations contended: "Thorough reform of the system, including breaking down barriers to competition, will transform unions in much the same way that the deregulation of product markets has transformed business in New Zealand and made it more productive and responsive to consumers."⁷² Unions were to exist in a system controlled by economic outcomes:

Trade unions reflect the need to have associations in many circumstances, not least to minimise the costs of negotiating and enforcing agreements. They can also provide valued services to members. What is at issue is the form of many unions, which is often divorced from the common interests of a workplace, and the lack of effectiveness stemming from protected positions. Unionization should not be forced on groups in the economy where such arrangements are not relevant. But in an environment where unions were free to adapt their structures and compete for the provision of services, their vitality, responsiveness and democratic accountability to members could only be enhanced.⁷³

Thus, not only did New Zealand groups which advocated changes in their labor law promote a system of labor-management cooperation, many of their arguments and analyses bore a strong resemblance to those now being advanced in support of basing U.S. labor law on labor-management cooperation.

B. Allowing Employers to Choose the Form of Unionization

Among those who promote labor-management cooperation are those who also advocate giving an employer the power to choose the union that will represent its employees in order to promote the use of labor-

70. LRA CRITIQUE, *supra* note 62, at 9–10.

71. See Dannin, *supra* note 61, at 12–17.

72. Ronald Trotter, *New Zealand Labour Market Reform: Class Struggle or Productivity Struggle?*, in NZBR, LABOUR MARKETS AND EMPLOYMENT: NZBR STATEMENTS ON LABOUR RELATIONS 10 (1988).

73. See Trotter, *supra* note 72, at 9.

management cooperation.⁷⁴ Achieving this requires altering NLRA § 8(a)(2),⁷⁵ which proscribes employer assistance to or domination of a labor organization, which Republican Congressional representatives⁷⁶ and employer organizations, such as the Labor Policy Association, have long advocated.⁷⁷ One argument made for permitting this is to:

create incentives for unions to alter their 'product'—to emphasize the contributions they can make in communicating employee preferences, promoting employee commitment and trust, and negotiating what the economists call 'collective goods' (terms, like a grievance procedure, that are desired by the workers as a group but are not efficiently provided to individuals).⁷⁸

These proposals harken back to conditions before the NLRA was enacted. Employers were then free to recognize any union and could impose upon employees a "representative" not chosen by the employees.⁷⁹ The NLRA rejected this and gave employees freedom to choose their own representative by majority vote—that is, by a process commonly felt to be a legitimate one for making collective decisions in the United States. In doing so, the NLRA orders employers not to resist unionism and vests the decision as to representation solely with employees.⁸⁰ Thirty years ago, Harry Wellington observed that even flawed unions do more to protect workers' economic interests and political democracy than do no unions, but only as long as "the union is not a tool of the state or the employer."⁸¹ The NLRA is founded upon this principle.

74. Estreicher, *supra* note 8, at 834–41.

75. See, Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 22–27 (1993).

76. See TEAM Act, *supra* note 5. On February 10, 1997, Senate Republicans introduced the Teamwork for Employees and Managers Act of 1997 (TEAM). The bill would amend the NLRA to allow labor-management teams currently prohibited by NLRA § 8(a)(2)).

77. See, *As TEAM Act Moves Through Congress, Employers Pursue Employee Involvement*, *supra* note 5, at 255; see, e.g., *NAM Offers Agenda for Helping Workers That Stresses Worker Involvement of TEAM*, *supra* note 5, at 229; Estreicher, *supra* note 75, at 22 n.66.

In a detailed study of NLRB cases from 1972 to 1993, James Rundle found little evidence that supported the claims employers advanced in support of their need to repeal § 8(a)(2). James R. Rundle, *The Debate over the Ban on Employer-Dominated Labor Organizations: What Is the Evidence?*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 32, at 161.

78. Estreicher, *supra* note 9, at E-10.

79. GREGORY & KATZ, *supra* note 21, at 227.

80. See *id.* at 224.

81. Wellington, *supra* note 46, at 187 (quoting SEYMOUR LIPSET, *POLITICAL MAN* 430 n.10 (1963)). One measure of the viability of such a system could be based on current experience with employer-established grievance procedures in nonunion settings. If they are simply a rubber stamp of managerial decisions, this suggests little employee bargaining

New Zealand employer associations also argued that an employer must have final control over the form and number of employment contracts in its workplace.⁸² Employer control might not seem offensive to those who believe that workers and employer interests are one, although such control seems to place little faith in the workers' ability to demonstrate the unity of these interests. The ECA permits employers to recognize and deal with unions that no employee has selected as a representative.⁸³

C. Employees Prefer Labor-Management Cooperation

Some argue that U.S. employees are not joining unions because the analysts prefer less adversarial forms of representation.⁸⁴ Thus, these employees would argue, the reason unions have declined is that they are adversarial and for this reason cannot attract new members. A labor relations system based in labor-management cooperation would increase union density. Recently, a Freeman-Rogers poll found that workers prefer to elicit management cooperation by being represented by an organization jointly run by employees and management and fully financed by management.⁸⁵

This polling data, while intriguing, is not, however, a sufficient basis for deciding how to construct a labor relations system. Basically, the employee responses reflect little more than a snapshot of worker reactions. They cannot fairly be taken as demonstrating what worker views

power and little interest on the part of management in paying attention to employee interests. In Joseph Gentile's experience with Northrup, its management appeals committee overturned or modified sixty percent of the grievance decisions that came before it. This, however, cannot be regarded as representative of all such programs since Northrup's program is not widely used and provided many special checks to ensure fairness. See Joseph Gentile, *The Structure and Working of Employer-Promulgated Grievance Procedures*, in *LABOR ARBITRATION UNDER FIRE* 136, 147-53 (James Stern & Joyce Najita eds., 1997).

82. See Parl. Deb. (Hansard) 1425 (1991).

83. See Dannin, *supra* note 64, at 44-46.

84. See Heckscher, *supra* note 8, at 53, 62-71.

85. See RICHARD FREEMAN & JOEL ROGERS, *THE WORKER REPRESENTATION AND PARTICIPATION SURVEY: A NATIONAL SURVEY OF AMERICAN EMPLOYEES* (1994). Rogers himself promotes what he calls a "high-road alternative" which includes promoting:

nearly continuous innovation and productivity growth among firms and the substitution of quality-based competitive strategies for price-based ones. High road restructuring is associated with better industrial relations, higher levels of worker involvement, a more democratic workplace, higher productivity and pay, vastly reduced environmental damage, and greater firm commitment to the health and stability of surrounding human communities—all happy outcomes for workers and American society in general, all immensely preferable to the low road alternative of sweated workers, economic insecurity, rising inequality, and degraded natural environments.

Wade Rathke & Joel Rogers, *A Strategy for Labor*, *DISSENT*, Fall 1996, at 78, 79.

are for all times under all conditions. Different responses would be likely if workers were asked the same questions at a time when they were actually choosing to unionize or if they were subjected to the sort of stresses that motivate workers who to attempt to organize.⁸⁶ Indeed, the results cannot be read without considering evidence of the current high level of expressed employer hostility to unionization.⁸⁷ It seems likely that this employer hostility would squelch the possibility of making any accurate measurement of employees' desires as to unionization.

Furthermore, studies suggest that the decision to unionize is subject to change based on workers' level of familiarity with unions and perception of unions as effective in attaining workers' goals.⁸⁸ In addition, other polls show that unorganized workers' desire to unionize far exceeds their rate of unionization, suggesting that other factors than employee desire play a role in the outcome.⁸⁹

Thus, views captured in an opinion poll may reflect no more than transitory preferences founded in uncertainty about economic conditions in a time of union decline. Without some reason to believe that the Freeman-Rogers poll has tapped into stable, fundamental values, this poll is a thin reed upon which to propose fundamental labor law reform.

II. NEW ZEALAND'S EXPERIENCE WITH A LABOR-MANAGEMENT COOPERATION REGIME

A. *Are the United States and New Zealand Comparable?*

The discussion to this point demonstrates that arguments currently being advanced for U.S. labor law reform strongly resemble those made in support of the ECA. That similarity, however, may not mean that New Zealand's experience under the ECA can shed light on how such a system would operate in the United States. To the degree that there is a close fit between the United States and New Zealand on relevant points we can say with confidence that New Zealand's experience is suffi-

86. See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 393 n.28 (1983) (listing inappropriate uses of polling data).

87. See Bronfenbrenner, *supra* note 34; Bronfenbrenner, *supra* note 32, at 75; Bronfenbrenner & Juravich, *supra* note 32.

88. See Thomas Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 283-84 (1995); Hoyt Wheeler & John McClendon, *The Individual Desire to Unionize*, in THE STATE OF THE UNIONS 47, 62-63 (George Strauss, et al., eds., 1991).

89. See Ronald Seeber, *Trade Union Growth and Decline: The Movement and the Individual*, in THE STATE OF THE UNIONS, *supra* note 88, at 93, 99; see also Atleson, *supra* note 27, at 477, 486-88.

ciently comparable to permit generalization to the United States and that the results are applicable to the United States.

There are strong similarities between the two countries on many relevant factors. Both are developed, industrialized countries and have a strong mix of industrial, service, and agricultural sectors. Both countries have had a long history of legalized collective bargaining, and, although they are not identical, both systems of collective bargaining share certain basic principles and modes of operation. Both countries are the heirs of the common law system and thus apply similar bodies of law and concepts, including common law employment law concepts. Furthermore, both share common histories and cultures as former colonies of Britain with indigenous peoples, and immigration has since led to mixed cultures and communities. Finally, both are democracies with educated, literate populations.⁹⁰ These factors are important in affecting the way people are likely to work and interact with one another and with the law.

Pre-ECA New Zealand unions strongly resembled certain aspects of U.S. unions. Paul Weiler suggests that while it is possible to view U.S. unionization as an activity of employees, U.S. unions are more often perceived as an entity external to employees, as "a large, bureaucratic organization whose full-term officials periodically negotiate a long-term contract behind closed doors with the employer, and then represent a fairly small number of employees who are aggrieved by the way management administers the contract during its lifetime."⁹¹ Weiler also describes unions that have paid little attention to the felt needs of those they represent.⁹² As a result, rather than being a collective of employees, U.S. unions may often be seen as professional organizations similar to an employer's personnel department.⁹³ This was certainly true of those New Zealand unions which had little direct involvement in the lives of workers as the unions' most important role shrank to negotiating contract terms and prosecuting personal grievances when those terms were violated.⁹⁴

90. See generally JOHN DEEKS ET AL., *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND* (2d ed. 1994); ALAN GEARE, *INDUSTRIAL RELATIONS: A GENERAL INTRODUCTION AND THE NEW ZEALAND SYSTEM* (3d ed. 1995); see generally, ELLEN J. DANNIN, *WORKING FREE: THE ORIGINS AND IMPACT OF NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT* (1997). I also make these generalizations as one who has lived for extended periods in both countries.

91. WEILER, *supra* note 5, at 11-12.

92. See *id.*

93. See *id.*

94. For a more detailed description of unions in this period, see generally, Ellen J. Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 14 *BERKELEY J. EMP. & LAB. L.* 1, 1-87 (1995),

Furthermore, beginning in the 1980s New Zealand has undergone a major reorientation in its perception of unemployment and individual and social responsibility that resembles that which occurred in the United States under President Ronald Reagan as part of "Reaganomics." In New Zealand these changes have come about as a consequence of and coincident with policies of Finance Minister Roger Douglas which have come to be known as "Rogernomics." In fact, the name "Rogernomics" was consciously modeled on "Reaganomics."⁹⁵ As in the United States,⁹⁶ the changes which grew out of the materialism experienced during the prosperous first years under "Rogernomics" contributed to this shift in public views. In the past, most New Zealanders would have supported a philosophy that said full employment was an important component of a functional democracy because full employment removes servility and balances power. Through the two generations that grew up after the Great Depression, the New Zealand government made full employment its goal and spent large amounts of money to create employment or works schemes.⁹⁷ In the 1990s, however, unemployment was displaced as the government's top economic priority. Rather, the rights of consumers and investors to maximum freedom of action became the paramount interest.⁹⁸

Furthermore, the legal environment during the ECA's existence strongly resembles that in the United States today. The ECA's partner legislation, the Economic and Social Initiative, made major cuts in most areas of social welfare benefits.⁹⁹ These cuts were designed to force people to accept work under any conditions offered. It did this, first, by limiting those entitled to receive welfare benefits.¹⁰⁰ Second, the legislation lowered wages payable to large segments of the unemployed

95. See Colin James, *Overview*, in *ROGERNOMICS: RESHAPING NEW ZEALAND'S ECONOMY* 1, 3 (Simon Walker ed., 1989).

96. The U.S. has experienced high official unemployment which has also kept wages from rising and has resulted in wage declines from twenty to forty percent. The real unemployment rate is much higher; at least one-third of the workforce is looking for more work than it has. Furthermore, the past two decades has seen a delinking of productivity gains and wage increases. See Lester Thurow, *The Crusade That's Killing Prosperity*, in *TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULT ON DEMOCRACY* 48, 50-51 (Robert Kuttner ed., 1996); Lawrence Mishel, *Rising Tides, Sinking Wages* in *TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULT ON DEMOCRACY* at 81, 81-84.; KORTEN, *supra* note 32, at 19, 22, 37-50.

97. See DAVID THOMSON, *SELFISH GENERATIONS? THE AGING OF NEW ZEALAND'S WELFARE STATE* 69-70 (1991).

98. See JANE KELSEY, *ROLLING BACK THE STATE: PRIVATISATION OF POWER IN AOTEAROA/NEW ZEALAND* 78-79, 83 (1994); see generally, THOMSON, *supra* note 97.

99. See Finance Bill § 15(3); see also Patricia Herbert, *Stripping Away Workers' Protection*, *THE DOMINION* (N.Z.), Feb. 20, 1991, at 14.

100. See *id.*

workforce. This included a youth subminimum wage which could be paid to age twenty.¹⁰¹ Third, welfare benefits were lowered so drastically that few could survive on them.¹⁰²

This program reflected a new view, one at odds with New Zealand's socialist past, that poverty is a sign of a weak character, that the well off have no responsibility to the poor, and that such requirements, in a time when the opportunity to work is limited, are not inhumane or unrealistic.¹⁰³

There are, of course, differences between the two countries. The United States is larger geographically, economically, and demographically than is New Zealand. U.S. unions are larger and more numerous than their New Zealand union counterparts, although overall union organization tends to match, reflecting the similar breakdowns of jobs and industries. The United States is not physically isolated from other countries as is New Zealand. Pre-ECA New Zealand had a much higher union density¹⁰⁴ than did the United States; an industrial relations system more supportive of unions than is the United States; and a society that had a long tradition of being more friendly to socialized answers to problems.

Although all these differences might be important in another context, there is nothing about any of these factors that means the New

101. See Finance Bill § 34, Schedule (1990); see also Colin James, *Stay Tuned In—There's a Lot More Drama*, NAT'L BUS. REV., Dec. 21, 1990 at 10.

102. See Herbert, *supra* note 100, at 14. Of this package, New Zealand economist Brian Easton comments:

Thus the substantial reductions in unemployment benefits—some of the cuts were over twenty percent—plus harsher entitlement conditions, were intended to reinforce the changes in industrial law, by keeping unskilled wage rates lower, and—it was hoped—so generating extra jobs. Unfortunately the fiscal impact of the package, involving substantial reductions in social welfare spending, collapsed a fragile economy into its sharpest post-war contraction, so the harsher welfare measures and the changes in the industrial relations law, compounded the social pressures of an economic downturn.

Brian Easton, Economist, Letter to Ellen J. Dannin 1–2 (Mar. 27, 1994) (on file with author).

103. See EDMUND BYRNE, *WORK, INC: A PHILOSOPHICAL INQUIRY* 65 (1990).

104. Estimates vary; however, it is clear that New Zealand had high actual and comparative union density. Various studies show it with forty-two percent membership in 1988. See Richard Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 16 (Bruce Kaufman & Morris Kleiner, eds. 1993). 1985 New Zealand Department of Labour estimates show union density at sixty-five percent on the eve of the ECA in May 1991. See Raymond Harbridge & Kevin Hince, *Organising Workers: The Effects of the Act on Union Membership and Organisation*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* 224, 226, 228 (Raymond Harbridge, ed. 1993); see also Nigel Hawthorn, *Unions in Crisis: Deregulation and Reform of the New Zealand Union Movement*, in *ORGANIZED LABOR IN THE ASIA-PACIFIC REGION: A COMPARATIVE STUDY OF TRADE UNIONISM IN NINE COUNTRIES* 282, 286–87 (Stephen Frenkel, ed. 1993).

Zealand experience cannot fairly be generalized to the United States. If anything, New Zealand's smaller scope and relative isolation is an advantage because it facilitates the tracing of events and causation. Furthermore, as will be discussed, the events that have occurred under the ECA actually have greater significance for the United States precisely because New Zealand had been so much more supportive of unions.

In sum, it is fair to generalize from the ECA experience to the likely operation of the current program of reforms associated with labor-management cooperation.

B. *The Employment Contracts Act (ECA) in the Laboratory*

The ECA created a flexible scheme for bargaining within the ideological framework of at-will contracting. The ECA was intended to change the way workplace conditions were set and to move bargaining from New Zealand's century-old system based on multi-employer bargaining, which set terms on an occupational basis across employers, to bargaining on an enterprise or single-employer basis.¹⁰⁵ Examining how the ECA has played out over its six years of existence provides intriguing evidence as to how similar reforms would operate in the United States. The balance of this article assesses the ECA's operations in terms of the role unions are playing in promoting an employer's enterprise: whether New Zealand unions have come to focus more on improving employer productivity; whether union density has increased; whether employers and employees have preferred cooperative or value-added unions over traditional adversarial unions; and whether the reforms have had a positive impact upon productivity and society.

Indeed, within its first year, fundamental changes were already taking place. The most basic of these changes was a shift from multi-employer agreements to enterprise agreements. As early as 1992 and certainly by 1993, that is, within two years, there had been a dramatic move away from the previously dominant multi-employer agreements (awards)¹⁰⁶ to enterprise agreements—either based on collective employment contracts (CECs), individual employment contracts (IECs), or no formal contract. Indeed, within two years, multi-employer agreements had declined from fifty-nine percent of all agreements to only six percent.

105. See generally Dannin, *supra* note 94 for an exploration of the ECA's genesis and drafting. Its impact is explored at length in Dannin, *supra* note 90.

106. Awards are described in more detail. See *infra* text, at nn. 189–205.

CHANGES IN EMPLOYMENT CONTRACT STRUCTURES: 1991-1993¹⁰⁷

<i>Type of Coverage</i>	<i>1991</i>	<i>1992</i>	<i>1993</i>
Award/Multiemployer CEC*	59%	9%	6%
Single Enterprise CEC	13%	35%	35%
IECs ♦	10%	36%	37%
Combination IEC & CEC	0%	5%	8%
No Formal Contracts	18%	16%	14%

* Collective Employment Contracts

♦ Includes contracts negotiated individually, informal contracts—those not actually negotiated—and those which the law recognized as contracts, such as contracts based on the terms of expired awards of agreements.

The changes have continued as the contract form continues to devolve toward IECs as the dominant form. By 1996, forty-five percent of employers surveyed had IECs as the predominant contract form.¹⁰⁸

There were also early claims that the ECA has made bargaining less adversarial. Gavin Fitzgerald of the Manufacturers Industrial Relations Service Ltd., for example, wrote that by 1992, that is within one year, he had already “*formulated 1447 contracts under the new Act.*”¹⁰⁹ He said that the process had taken an average of three months and had resulted in an atmosphere of trust and commonality of interest because the philosophy of the ECA was that “*employer and employees must get their heads together, removed from the influence of third parties, and agree jointly how best to make the enterprise prosper to the benefit of both investors and employees.*”¹¹⁰

The first six years of the ECA has been a dramatic period of union restructuring through splits, amalgamations, and dissolutions. Most of these events are brought about as workers shift their support and their authorizations to represent from one union to another. This change of representation is easily done, since the law imposes no restrictions of freedom of choice and freedom of association.¹¹¹ In May 1991, five per-

107. See Richard Whatman et al., *Labour Market Adjustment under the Employment Contracts Act*, 19 N.Z. J. IND REL. 53, 56 (1994).

108. See John Savage, *What Do We Know about the Economic Impacts of the ECA?* N.Z. Institute of Economic Research (Inc.), May 15, 1996, at 14.

109. Gavin Fitzgerald, *Does the Medicine Work?*, MANUFACTURER, Aug. 1992, at 8 (emphasis added).

110. See *id.*

111. See BRIAN EASTON, *THE COMMERCIALISATION OF NEW ZEALAND* 127–31 (1997); see generally, Interview with Graeme Clarke, General Secretary Manufacturing and Con-

cent of New Zealand unions had fewer than one thousand members.¹¹² By December 1995, forty-six percent of unions had one thousand or fewer members.¹¹³ Thus, one effect of such a regime has been more and smaller unions.

Those union splits, which often reflect ideological and strategic differences, have resulted in two umbrella organizations, each of which effectively embodies one of the two union models: the cooperative or value-added unionism and traditional or adversarial unionism.¹¹⁴ The value-added model is found within the New Zealand Council of Trade Unions (CTU). At the time of the ECA's enactment, the CTU was the sole umbrella organization. The CTU was formed in 1987 when the Federation of Labor (the private sector umbrella organization), the state sector unions, and some previously unaffiliated unions combined.¹¹⁵ In 1991, sixty-five percent of all New Zealand unions representing eighty-seven percent of all union members were affiliated with the CTU.¹¹⁶

The second umbrella organization, the Trade Union Federation (TUF), was formed May 1, 1993, largely from groups disaffected with the CTU's focus.¹¹⁷ The name was chosen for its acronym because its membership wanted the organization to be tough.¹¹⁸ The TUF conforms to a model of traditional or adversarial unionism. According to its then general secretary, Maxine Gay:

Since its formation the TUF has acted both as a trade union centre in its own right and also as a ginger group inside the trade union movement as a whole. The TUF represents 13 unions with a total of 30,000 members, about one-tenth the size of

struction Workers Union, in Wellington (July 28, 1997) [hereinafter Clarke Interview]; Interview with Maxine Gay & Graeme Clark, in Wellington, New Zealand (June 17, 1996) [hereinafter Gay & Clark Interview]. For a description of the mechanisms of these splits, see Dannin, *supra* note 90; Dannin, *supra* note 64, at 22-33, 54-60.

112. See Aaron Crawford, et al., *Unions and Union Membership in New Zealand: Annual Review for 1995*, 21 N.Z. J. INDUS. REL. 188, 190 (1996).

113. See *id.*

114. For the details of how these two umbrella organizations have behaved are set out below, see *infra* text, at nn. 111-32. To a large extent this split reflected a rift between the New Zealand Communist Party and the Socialist Unity Party. The CPNZ has long regarded the SUP-affiliated Council of Trade Unions (CTU) as an advocate of "class collaborationist unionism." Chris Trotter, *Mysterious Ways*, METRO, Feb. 1994, at 130.

115. See Owen Harvey, *The Unions and the Government: The Rise and Fall of the Compact*, in *CONTROLLING INTERESTS: BUSINESS, THE STATE AND SOCIETY IN NEW ZEALAND* 59, 64 (John Deeks & Nick Perry eds., 1992).

116. See Raymond Harbridge & Kevin Hince, *Unions and Union Membership in New Zealand 1985-1992*, 18 N.Z. J. INDUS. REL. 352, 358 (1993).

117. See Herbert Roth, *Chronicle*, 18 N.Z. J. INDUS. REL. 264, 267; See also Sarah Boyd, *Unionism Finds New Ways in Fight to Survive*, EVENING POST (N.Z.), Sept. 8, 1993, at 7; *Unions to Form New Federation*, PRESS (N.Z.), Dec. 12, 1992, at 1.

118. See Gay & Clark Interview, *supra* note 111.

the larger centre [the CTU]. In the short time of its existence the TUF has been able to play a significant role in pulling the trade union movement as a whole to a more left/ activist orientation or, where it has not achieved this, forcefully pointing out that there is another trade union view to the dominant one.¹¹⁹

The way these two union movements and one key affiliate union within each of them have performed provides valuable insights into many aspects of proposals for labor-management cooperation in the United States. Although New Zealand is a small country in terms of population, its union movement is as complex as in any country. Certainly not all unions that have retained their CTU membership conform to all its aims. Within the CTU the affiliate union which has best embodied its model of unionism is its largest affiliated union, the New Zealand Engineering, Printing & Manufacturing Union (Engineers).¹²⁰ Within the TUF its main affiliate, the Manufacturing and Construction Workers Union (MCWU) is an exemplar of the TUF's underlying philosophy.¹²¹

The ECA has exacerbated the pre-existing inter-union conflict because the ECA has allowed unions a wide ambit to define themselves, to take new forms and to become more aggressive in pursuing their own visions. The Engineers view the MCWU as radical, confrontational, and unrealistic; while the MCWU sees the Engineers as a business union—not a real union—and as willing to do deals with employers at the expense of workers.¹²² At times, the MCWU and Engineers have worked together, for example, in negotiations at Honda, Mitsubishi, and other

119. Maxine Gay, Speech Notes: Search Foundation Seminar: Brisbane (May 19, 1996) (on file with author).

120. The Engineers has historically been made up of automobile workers and metal trades workers. It has been the largest private sector union in New Zealand during most of the ECA era with about 40,000 members, depending on industry performance and amalgamations. It has expanded its ambit through outright mergers with other unions or by soliciting individual workers so that it now represents far more classifications than before the ECA. See RAYMOND HARBRIDGE & KEVIN HINCE, *A SOURCEBOOK OF NEW ZEALAND TRADE UNIONS AND EMPLOYEE ORGANISATIONS* 36 (1994). On April 1, 1996, the Engineers merged with the Printing, Packaging and Media Union to cover fourteen industries and grew to 60,000 members. See *Birth of a Super Union*, METAL, June 1996 at 1.

121. The Manufacturing and Construction Workers Union (MCWU) represents workers in diverse industries and locations as a consequence of its having gone through a series of amalgamations between 1987 and 1991.

122. For a detailed description of their relations, see Dannin, *supra* note 94, at 27–33, 36–38.

sites where both have members.¹²³ However, most of the time these groups have opposed one another in tactics, ideals, and actions.

The ways in which the CTU, TUF, Engineers, and MCWU have interacted on key issues provides insights as to how a labor-management regime would function in the United States.

1. Union Focus on Productivity Issues

One key argument advanced for labor-management cooperation is that it would improve productivity by defusing an adversarial atmosphere and encouraging a focus on the employer's bottomline. This issue has been important within New Zealand, and the different union organizations have taken opposing positions on it.

a. The CTU—Engineers Views

The CTU and Engineers Union have tried to use the increased scope of bargaining under the ECA to put new issues on the table. The Engineers believe that unions exist mainly to negotiate better wages and terms of employment.¹²⁴ However, much of its literature, as well as that of the CTU, suggests that its main focus has been on improving management practices in order to promote productivity and, as a result, improve wages and other working conditions.¹²⁵

The Engineers says it has altered its bargaining strategy to fit the goals of progressive employers by pursuing contracts that focus on an industry or an enterprise, providing career paths by rewarding skill development, and promoting workplace reform and cooperation "to jointly manage the process of change."¹²⁶ The Engineers see being simply a bargaining agent as a narrow role; as the Engineers also prefer to participate in decisions on training at the industry and workplace level.¹²⁷

The CTU echoes this. Its prescription for "a fairer industrial relations system" includes:

123. See, e.g., *Works Committee Abandoned*, M & C WORKERS NEWS, Dec. 1995, at 5; *Growing Unity Stems Employer*, M & C WORKERS NEWS, Sept. 1995, at 4; Clarke Interview, *supra* note 111.

124. See OWEN HARVEY, *TOWARDS A UNION STRATEGY FOR THE 1990'S* 13 (1988).

125. Not so far under the surface of its proposals was the judgment that employers, if left to themselves, could not properly manage their own workplaces and would trade off long-term social needs for short-term gains. Haworth, *supra* note 104, at 282, 297.

126. MARTIN PERRY, ET AL., *REFORM AT WORK: WORKPLACE CHANGE AND THE NEW INDUSTRIAL ORDER* 56 (1995).

127. See Rosalie Webster, "Give Us Dignity," *POLITICAL REVIEW*, Sept./Oct. 1993, at 15; see also PETER ENDERWICK, *INDUSTRIAL POLICY IN NEW ZEALAND: A REVIEW OF THE ISSUES: A REPORT PREPARED FOR THE NEW ZEALAND ENGINEERING UNION AND THE NEW ZEALAND PRINTING AND RELATED TRADES UNION* (1993).

- Protection for the vulnerable, the out of work and the work seekers,
- Improved rights and bargaining processes,
- A wider scope of bargaining so that effective collective agreements can be negotiated with more than one enterprise,
- The establishment of industry development organisations through which all interest groups—the government, and workers and their unions as well as the companies—can negotiate,
- Involvement in broader economic and social policies for workers and unions,
- Emphasising economic growth with equity, developed in a participatory way, and
- A national code of basic rights and protections.¹²⁸

Both the CTU and Engineers see failing to participate in macro-economic decisionmaking as consigning “unions to a reactive role in an environment outside their influence.”¹²⁹ CTU president, Ken Douglas, urges unions to take on a role to ensure a “quality economy with a role for unions within it.”¹³⁰ He believes: “It was because the old industrial order did not deliver the quality economy that it could be knocked over without fear for its economic consequences.”¹³¹ Douglas argues that the

128. See NEW ZEALAND COUNCIL OF TRADE UNIONS (CTU), *A QUALITY FUTURE: WORKING TOGETHER FOR GROWTH IN NEW ZEALAND* 14 (1992) [hereinafter *QUALITY FUTURE*]. This corresponds to some degree to the program advanced by Wade Rathke and Joel Rogers. Rathke & Rogers, *supra* note 85, at 79–80. They argue that unions should help capital by providing “a trained and motivated labor force, capable of sustaining the requirements of continuous innovation”; “redesigned labor-market institutions providing clear labor-market signals to incumbent workers and new entrants”; minimum working standards with the elimination of government subsidies to “low-loading firms”; promotion of labor-management cooperation and flexibility to capture employees’ full productive potential; rapid diffusion of technology and “high-performance forms of work organization.” *Id.*

129. HARVEY, *supra* note 124, at 20.

130. Ken Douglas, *The Political Economy of the Employment Contracts Act*, 13 *RACE GENDER CLASS* 10, 11 (1992).

131. *Id.*, at 12. Of course, it can be argued that the old industrial order did deliver a quality economy, but the loss of Britain as a customer once it joined the European Economic Community was what harmed unions.

It can also be argued, as Douglas does, that one role unions need to play is that of helping capitalism by solving problems individual firms are unable to resolve.

Unions use their reach in the economy, their political power in the state, and the interests of their members to force capital to do something good for itself. . . . [C]apitalism . . . left to its own squabbling devices is ever more ruinous to our health. In response to increased competitive pressures, most U.S. firms have responded with ‘low-road’ competitive strategies geared more to price reduction than quality improvement—strategies that have led to falling wages and rising inequality.

new unionism must be based on what unions support, rather than what they oppose:

We can oppose the introduction of a new technology. That is protesting against it. Or we can negotiate the work design and skills recognition that goes with it to gain the benefits of enhanced job security. That is mobilising around change. . . . What I am trying to convey is the need to get away from the mindset that sees union action as sufficient in the carrying of banners. The key question is what happens next. What we can get the government or the boss to do, not what we can stop them from doing.¹³²

The key to making a "contribution as a union movement to the goal of a fully employed, high skilled, high wage economy" in the CTU's view is unions playing a role in training, technological change, and industrial policy.¹³³ The CTU advocates that unions have an industry focus, meaning that unions should view:

things from an industry outlook. At the macro level this means being concerned about and planning for the development and betterment of that industry. It means using one's resources at a Governmental and increasingly international level. It means commitment of resources (plans and staff) with employers organisations, industry organisations, training organisations and having a view on the monetary and fiscal policies that may effect that industry.¹³⁴

The CTU says that industry bargaining would be "more a consequence of attitude and approach than of structure, evolutionary both in coverage and in its depth, an aspect of the wider development path of the industry."¹³⁵ Industry bargaining would focus on research and development expenditures and allocation of funds; joint ventures between industry and government on technological development; assessment of industry infrastructure supply needs; market development assistance programmes; coordination of marketing; trade access negotiations; skills needs assessment and labour supply projections; the establishment

Rathke & Rogers, *supra* note 85, at 79.

132. Jonathan Milne, *Has Ken Douglas Gone Soft?*, PSA J., Nov. 1991, at 4.

133. See *QUALITY FUTURE*, *supra* note 128, at 18.

134. CTU, *WELL-RESOURCED, EFFICIENT, INDUSTRY FOCUSED UNIONS: A NEW ZEALAND COUNCIL OF TRADE UNIONS VIEW ON THE ISSUES UNIONS NEED TO CONSIDER TO COPE WITH THE DEMANDS OF TODAY'S ECONOMIC, SOCIAL AND POLITICAL ENVIRONMENTS*, 7 (1995) [hereinafter *WELL-RESOURCED EFFICIENT, INDUSTRY FOCUSED UNIONS*].

135. *QUALITY FUTURE*, *supra* note 128, at 19.

of quality standards and quality control procedures; establishing and monitoring health and hygiene regulations and industry codes for occupational health and safety; and assistance with workplace reform, team work initiatives, and gainsharing payments systems.¹³⁶

b. The TUF-MCWU View

Implicit in the CTU-Engineers' position is an assumption that a union cannot be a vigorous representative of employee interests or negotiate important issues of the day, such as how technology is to be introduced, if it maintains a focus separate from that of the employer. The TUF and MCWU would argue, however, that this assumption creates a false dichotomy. Their view that traditional unionism can and has successfully accommodated negotiations on such subjects has empirical support.¹³⁷ Although it is commonly believed that job-control unionism makes it impossible to introduce new technology, systematic studies since 1926 show that "willing acceptance is the most common American union response to technological change. . . . [I]n most cases, unions welcome technological modernization; sometimes encouraging it, most often accepting it, infrequently opposing it, but usually seeking to protect their members."¹³⁸ This is precisely the stance taken by the TUF and MCWU.

In 1996, the MCWU formally resolved that it would maintain a point of view independent of employers and political parties.¹³⁹ At the same time, it established a Solidarity Fund to be used to strengthen solidarity inside and outside the union, to assist in recruiting and organizing new members, and to support members involved in long-term disputes.¹⁴⁰ The MCWU affirmed that organizing is a priority and pledged

136. See *id.*, at 20; NEW ZEALAND ENGINEERING UNION, INC., WORKPLACE AUSTRALIA: THE NEW ZEALAND LINK (1991); *Preview Demonstration Project*, WORKREFORM: THE NEWSLETTER FOR WORKPLACE NEW ZEALAND, Sept. 1992, at 1; Patricia Herbert, *Ripples of Change for the Workplace*, THE DOMINION (N.Z.), Nov. 3, 1992, at 6. The Public Service Association (PSA) is also interested in having an industrial strategy which would include "the delivery of effective and efficient public services." *Industrial Strategy: Taking A Broader View*, PSA J., Feb. 1992, at 8.

The Communist Party, a group with which the MCWU was aligned, opposed Workplace New Zealand, a key forum for promoting expanded bargaining, as "Fordism taken to its logical conclusion of total control by the employer." Graeme Clarke, *Reform Secures Employer Control*, LABOUR NOTES, Sept. 1992, at 8; see also *Workplace New Zealand: Designing the Future*, METAL, Oct. 1992, at 5.

137. Jeffrey Keefe, *Do Unions Hinder Technological Change?*, in Mishel & Voos, *supra* note 28, at 109, 123-24.

138. See *id.*

139. See *Growth to Be Promoted*, M & C WORKERS NEWS, June 1996, at 6, 7.

140. See *Fund Established*, M & C WORKERS NEWS, June 1996, at 6.

to use funds from any new members to fund organizing.¹⁴¹ Most fundamentally, the MCWU believes that a union's job is "to run into the employer's vaults and take out as much money for the workers as possible."¹⁴² The MCWU opposed the idea that workers were resources or commodities to be managed or bought and sold.¹⁴³

This does not mean that the MCWU refuses to promote training or discuss wider workplace issues but does mean that the MCWU does so by its focus on the worker. Thus, the MCWU is not opposed to promoting training to enhance an industry or provide the skills a specific employer needs. However, the MCWU demands that training develop a worker's full skills in a trade.¹⁴⁴ Indeed, the MCWU's response to its 1996 negotiations at Mitsubishi provides an interesting insight into how the MCWU has implemented these principles. The union had demanded a four percent wage increase, while the company offered only 2.5 percent:

Prior to the negotiations starting the delegates decided that we should try and achieve a wage increase of 4%. Union members at Honda had fought to get an increase of 3.8% last year and other motor assembly plants were due to negotiate soon.

The delegates agreed with the advocate, Graeme Clark, that if we accepted less during the term of our contract than applied elsewhere, not only would it undercut negotiations at other plants, but it would mean that Mitsubishi would become the lowest paid plant. This would encourage the other companies to demand low wage rises to meet a low cost Mitsubishi challenge.

The delegates also recognised that the company hadn't done very well in the last year. The company had been overstocked and the interest bill paid had knocked any chance of them making a profit. Everyone was appreciative that the overstocking had not led to redundancies, as had frequently occurred in years gone by. The company had carried the cost and so had earned some consideration.

141. See *Organizing Priority*, M & C WORKERS NEWS, June 1996, at 6.

142. Clarke Interview, *supra* note 111. This view is echoed by the UAW's New Directions Movement. Its leaders believe that society's greatest challenge is changing the capitalist system's line from profits to people. See STEVEN DANDANEAU, A TOWN ABANDONED: FLINT, MICHIGAN, CONFRONTS DEINDUSTRIALIZATION 27 (1996).

143. See *Our Principles Are Not for Sale*, M & C WORKERS NEWS, Dec. 1995, at 1.

144. See *Training Levy Opposed*, M & C WORKERS NEWS, Sept. 1995, at 9.

It was decided to suggest to the company that both their objective of a low cost wage round and our objective of rates of 4% could be met by phasing in the wage increase. The company accepted this proposal.¹⁴⁵

c. Employer Response to the CTU-Engineers' Strategy

Professor Estreicher, a longtime proponent of labor-management cooperation, believes that employers will come to regard value-added unions as partners and, in turn, will lead workers to join these unions.¹⁴⁶ The experience in New Zealand has not been positive on this measure.¹⁴⁷

As the excerpts above demonstrate the ideas advanced by the CTU and Engineers Union, all of which are designed to improve workplace productivity and thus to ensure stable jobs for their members, make these employment groups the very model of a value-added union. Furthermore, the views of the MCWU and TUF are those of a traditional union. These differences, however, did not arise with the advent of the ECA. The Engineers and CTU began espousing these ideas beginning as early as 1987.¹⁴⁸ In other words, there has been nothing about the change to a law based on a freedom of contract model that prompted the Engineers or CTU to adopt a focus on workplace reform. Thus, it is doubtful that a change from a traditional collective bargaining law to a law fostering labor-management cooperation is necessary to persuade unions to act in cooperative, nonadversarial ways.

It cannot, however, be said that law was irrelevant to this change on the part of the Engineers. The Engineers began its shift, in part, due to the enactment of the Labour Relations Act (LRA) in 1987.¹⁴⁹ That law was based on a traditional model of unionism, but the LRA expanded

145. *Phased in Wage Rise Agreed*, M & C WORKERS NEWS, Mar. 1996, at 4; *see also Contract Reforms Delayed*, M & C WORKERS NEWS, Sept. 1995, at 5. The Mitsubishi contract also contained a provision limiting work an employee can be asked to perform, whereas the Honda contract had none. The MCWU argued that this explained why Honda had nine times the rate Mitsubishi did for occupational overuse syndrome—that is, repetitive strain injury—and back injuries. *See Speed Up Increases Injuries*, M & C WORKERS NEWS, Dec. 1995, at 3.

146. In his analysis, Estreicher has asked what role employer opposition may play in the decline of unions. He rejects as explanations the example set by the Reagan administration, the ability to replace strikers permanently, increasing levels of anti-unionism, and the desire to economize on labor costs. Rather, Estreicher attributes the decline of unions to “an unleashing of competitive forces in the markets for American products and services,” which have exacerbated the underlying strains in the system. *See Estreicher, supra* note 75, at 9–10.

147. The impact on worker choice will be discussed below. *See infra* text, at nn. 311–16.

148. *See Dannin, supra* note 94, at 27–33, 38–39.

149. *See* NEW ZEALAND AMALGAMATED ENGINEERING AND RELATED TRADES INDUSTRIAL UNION OF WORKERS, STRATEGIES FOR CHANGE: REPRESENTING WORKERS IN A NEW ENVIRONMENT 3 (1987).

the range of issues as to which unions and employers could negotiate. Before 1987, unions were limited to bargaining only on economic issues.¹⁵⁰ After 1987, the Engineers began to focus negotiations on nontraditional issues of increasing workplace productivity, worker incentives, redesigning skills, and training.¹⁵¹ In 1987, its Auckland branch negotiated a labor-management cooperation agreement (known as *The Nissan Way* agreement) with Nissan Manufacturing.¹⁵²

This shift in focus is worthy of note because it came into being under the LRA, despite its being a labor law regime based on a traditional model. Although it increased the scope of bargaining, the LRA did not permit the sort of wide open, unstructured bargaining which has led to the destructive gamesmanship possible under the ECA.¹⁵³ If anything, however, other factors such as the state of the economy and industry, as well as union leadership, were the key factors in affecting the divergent approaches these unions took.

If the CTU and Engineers were already focused on labor-management cooperation before the change in law, how have employers responded? Have they embraced the value-added unions? For the most part, although the Engineers have tried to expand its role to be more employer-oriented and to have a cooperative relationship, few employers have been eager to enter into such a partnership:

The result has been an unusual situation in which the Engineers have implored management to restructure their work organization and bargaining structures in line with the demands of a high-technology, high value-added economy. Clouding employers' responses to these initiatives have been a combination of factors: skepticism about the motives of the unions, uncertainty about the ability of the unions to deliver on productivity, and an unwillingness to recognise unions as partners in the restructuring process.¹⁵⁴

Rather than taking up the Engineers and CTU's offers of partnership in increasing worker skill levels and promoting workplace reform, man-

150. *See id.*

151. *See* STEVE O'NEILL, LABOUR MARKET DEREGULATION: THE NEW ZEALAND EXPERIENCE 11 (Parliamentary Research Service) (1993) (on file with author).

152. *See* DEEKS ET AL., *supra* note 90, at 352-54.

153. The LRA did introduce the possibility of negotiating either on a multi-employer or enterprise basis. There is some evidence that this was leading to a stalemated situation in many agreements. One can get a sense of the difficulties this caused by the number of unions that entered the ECA era with expired agreements and by the number of situations in which employers were able to use the ability to force agreements to change the form of bargaining. *See* Dannin, *supra* note 94, at 61-74.

154. Haworth, *supra* note 104, at 297.

agement has often preferred to deal with its problems by simply cutting pay or working conditions.¹⁵⁵ In this respect, the New Zealand experience has resembled the U.S. experience where many employers have responded to increased competition by "taking a 'low-road' human resource strategy, one aimed above all at reducing current labor costs. . . . [Indeed,] the fundamental problem in the 1980s was that most employers did *not* follow a high-tech, high-skills path."¹⁵⁶

The Engineers' experience in this respect has not been unique. Other unions which have tried to bargain about training and skills have also found a lack of interest on the part of employers.¹⁵⁷ The New Zealand Nurses Association made proposals, which requested training, workplace design and reform, and improving employer-employee communication; but, the area on which health boards' proposals focused was lowering pay.¹⁵⁸ Management rejected union proposals on the grounds that "issues relating to consultation with employees are outside this document."¹⁵⁹ Leaked board minutes of a medium-sized Auckland manufacturer revealed that the directors decided to use the ECA to reduce workers' employment conditions because doing so would lead to savings of hundreds of thousands of dollars and greater profits. These directors did not consider using the ECA's flexible bargaining to expand, reinvest or engage in productivity-based bargaining.¹⁶⁰

Thus, even though the range of bargaining topics in New Zealand is essentially unlimited, it is employers that have proved unwilling to focus on anything outside the traditional narrow range of issues. For the most part, what employers are unwilling to discuss remains off the table, because employers have been given so much power by the ECA that

155. See Peter Harris, *The Limits of Cheap Labour*, MANUFACTURER, Aug. 1992, at 10. The Engineers has also had some notable successes in promoting training through multi-employer bargaining. See generally, Dannin, *supra* note 90.

156. David Howell, *The Skills Myth*, in TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULT ON DEMOCRACY, *supra* note 96, at 90. "The tyranny of the financial markets' short-term outlook is a critical impediment. Rather than reward firms for the improved worker-management relations that a high-performance workplace requires, Wall Street investors put a premium on ruthless labor policies that they take as signals of management's dedication to efficiency." Jeff Faux, *Is the American Economic Model the Answer?*, in TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULT ON DEMOCRACY, *supra* note 96, at 128, 133.

157. See Mark Gosche, *The Impact of Enterprise Bargaining on New Zealand Workers*, in ENTERPRISE BARGAINING: EXPERIENCES FROM NEW ZEALAND WORKPLACES 36, 39, 40-41 (ACIRRT ed., 1993).

158. See Nicola Legat, *Bargain Bin Industrial Relations*, METRO, Sept. 1995, at 104, 107.

159. Sarah Oxenbridge, *Health Sector Collective Bargaining and the Employment Contracts Act: A Case Study of Nurses*, 19 N.Z. J. INDUS. REL. 17, 26 (1994).

160. See Michael Pearson & Rachell Rose, *Sign or Resign: Who Wins With Contracts?*, MANAGEMENT, June 1992, at 57.

they control the bargaining agenda.¹⁶¹ As a result, many, though not all, New Zealand employers have used their power to prevent discussion on workplace reform, training, and increasing productivity.¹⁶² A 1996 study comparing employer attitudes in Australia, New Zealand, and Canada found that New Zealand employers ranked lowest in willingness to include unions in strategic management decisions; New Zealand employers ranked 1.94 on a 1-5 scale in willingness to include unions in strategic management decisions. Australian employers ranked 2.14 and Canadians 2.75.¹⁶³ At the time, the survey was done, some Australian states were moving towards or had enacted an ECA type law.¹⁶⁴ Canada, however, has laws resembling the NLRA model. Thus, Estreicher is not correct in his prediction that value-added unions will prove attractive to employers because unions have tried to become partners in strategic decisions about the workplace; yet New Zealand employers have no interest in including them.

The U.S. should think carefully before enacting legislative reform of this nature, for the results have been destructive. Employers' attitudes and their ability to enforce pay reductions as a way to deal with workplace problems has meant that New Zealand skill levels have been

161. There are a number of ways in which this has come about. One is that the high rates of unemployment in the early days of the ECA tipped the power in favor of employers. In addition, unions and employers became convinced that the ECA would destroy unions and, in some ways, acted to make that a reality. See Dannin, *supra* note 94, at 87-138. Furthermore, the ECA makes employers more powerful by treating employers and employees as equals when they are not. See generally Dannin, *supra* note 64. Finally, important decisions by the Employment Court exacerbated the difficulties unions had in organizing and in bargaining. See Dannin, *supra* note 90.

162. A recent book notes that: "While some New Zealand managers are enamoured with the anti-union, downsizing approach of some American companies, others are building new partnerships for competing in the marketplace, providing higher-quality services and products and giving new meaning to work." Edward Cohen-Rosenthal, *Foreword* to Perry, *supra* note 126, at x, xi. No doubt some employers are doing this, but not enough are, and the ECA helps them avoid this tactic.

Making the situation worse, has been the leadership provided by the NZBR and its views about training. In 1994, Roger Kerr stated that too much emphasis was being put on training, that there were still a large number of unskilled jobs in the economy that did not require training and warned that too much training for jobs available would only lead to "credentials creep." Roger Kerr, *Ten Myths About Training*, in *THE NEXT DECADE OF CHANGE* 161-63 (NZBR, ed., 1994). He suggested that the statistics on training were failing to pick up many "important training experiences, particularly in small firms, such as co-workers 'sitting next to Nelly' and keeping their eyes and ears open." Finally, he argued that appropriate levels of training and skills were only likely to be achieved when markets are open to competition. *Id.*

163. See CLIVE GILSON & TERRY WAGAR, *EMPLOYEE INVOLVEMENT AND HUMAN RESOURCE MANAGEMENT IN AUSTRALIAN, NEW ZEALAND AND CANADIAN ORGANISATIONS: A RESEARCH REPORT* 12 (1996).

164. See *id.*

declining rapidly in critical areas.¹⁶⁵ A 1995 survey found serious shortages in skills were affecting most businesses.¹⁶⁶ Forty-five percent of Auckland region employers reported skill shortages were affecting their businesses.¹⁶⁷ Thirty percent of enterprises had serious or very serious skill shortages.¹⁶⁸ Most affected were manufacturing, financial services, construction, transportation, and communication, and larger employers.¹⁶⁹ As the ECA was enacted, the retail industry was characterized by intense competition and structural instability which reshaped the organization of work, and reducing pay and the quality of work for most shop assistants. Many retail employers have gone into "survival mode" and their emphasis is almost solely on the return on investments. Thus training is being neglected throughout most of the industry. This compares to related industries, such as the motor parts industry where there is a strong emphasis on training. Emphasis in the retail sector is on newer technologies and centralized purchasing and marketing. There is no place in most managers' thinking for training, job enrichment or worker motivation.¹⁷⁰

Accompanying this reduction in job skills and exacerbating the problems New Zealand workers have experienced has been the deskilling of managerial jobs.¹⁷¹

Even worse, ECA bargaining is creating agreements that are progressively more destructive to productivity and training. In 1993, fifty-one percent of enterprises employing forty-eight percent of workers had failed to take on training, quality improvement, or other workplace reforms, compared to forty-one percent of enterprises and thirty-three percent of employees the year before.¹⁷² In 1993, only twenty-four per-

165. Employers reduced labor costs through lowering numbers of staff and changing payrates but not through increasing training. Janet Hector et al., *Industrial Relations Bargaining in the Retail Non-Food Sector: 1991-1992*, 18 N.Z. J. INDUS. REL. 326, 339-40. The U.S. is currently suffering from a skills problem that the National Association of Manufacturers (NAM) says threatens its global competitiveness. NAM has called on employers, unions and policymakers to address the problem. 'Skills Gap' Threatens U.S. Competitiveness, 156 LAB. RES. REV. 399 (1997).

166. See Erling Rasmussen, et al., *Where Are We and How Did We Get There? Skills Shortages & Industry Training in New Zealand*, in PROCEEDINGS OF THE 1996 AIRAANZ CONFERENCE—PERTH 463, 467 (1996).

167. See *id.*

168. See *id.* at 468.

169. See *id.* at 467; see also Erling Rasmussen, *Chronicle*, 20 N.Z. J. INDUS. REL. 336, 342 (1995).

170. See Peter Brosnan, *Labour Market Flexibility and the Quality of Work: A Case Study of the Retail Industry*, 16 N.Z. J. INDUS. REL. 13, 29 (1991).

171. See Brosnan, *supra* note 170, at 29-30.

172. See Whatman, *supra* note 107, at, 70; Rebecca Macfie, *Employers Set Industrial Agenda*, NAT'L BUS. REV., Nov. 15, 1991, at 19; see also Rasmussen, et al., *supra* note 167, at 464. The subject of training is further discussed below. See *infra* text, at nn. 250-51.

cent of enterprises employing twenty-five percent of employees had increased training.¹⁷³ In only forty-four of 1,053 contracts studied was there any linkage of improved productivity with pay.¹⁷⁴

Engineers industrial officer Rosalie Webster described the reaction of Australian visitors to these conditions: "Australian companies who come here seeking examples of advanced workplace change and skill development are usually dumbfounded to find that industrial relations here has been dominated by the narrow issues of wage costs, contract bargaining and associated disputes since the Act came into force in 1991."¹⁷⁵ An Australian employer association, the Metal Trades Industry Association (MTIA), concluded that New Zealand employers under the ECA were paying less attention to training, quality, and service than to changing working hours and pay.¹⁷⁶ The MTIA found a dramatic decline in apprenticeships and a shortage in skills.¹⁷⁷

The evidence from this experience is that having unions focused on an employer's productivity is insufficient to improve bargaining or productivity. Rather, the New Zealand experience shows that having weak unions in the midst of a weak economy has actually reduced bargaining on productivity improvement and has thus proven disastrous for the long term health of New Zealand society and the quality of working life for most workers. Indeed in certain cases, expanding the scope of bargaining created additional grounds for a stalemate or weakened unions by forcing them to make concessions on fundamental issues.¹⁷⁸ As has been the case with New Zealand, U.S. unions are still in a long period of decline, and they also face strong opposition from employers.¹⁷⁹ This opposition often comes in the form of explicit or implicit threats to move

173. See *id.*

174. See Raymond Harbridge, *New Zealand's Collective Employment Contracts: Update November 1992*, 18 N.Z. J. INDUS. REL. 113, 121. During the last couple years, since the passage of the Industry Training Act 1992, training levels may be increasing through the creation of industry training agreements. See Rasmussen, et al., *supra* note 167, at 465-66.

175. Webster, *supra* note 127, at 13.

176. R. Boland, *Changes to Industrial Relations Laws and Practices in New Zealand and Their Implications* 21 (unpublished manuscript) (July 1992), cited in O'NEILL, *supra* note 151, at 19.

177. See *id.*

178. The dispute involving Designpower and the Public Service Association is a good example of how powerless a union can be under these circumstances. The parties' maneuvering in that case was too complex to describe fully here. Suffice it to say that the parties tried to use bargaining over preliminaries as a way to advance their cause. The law, however, gave the employer so much stronger a position in such a situation that the union was forced to concede in the end. For a full description of the case, see Dannin, *supra* note 83, at 57-60. For a list of issues that may force union concessions, see *id.* at 14.

179. See GARY N. CHAISON, *UNION MERGERS IN HARD TIMES: THE VIEW FROM FIVE COUNTRIES* 22-24 (1996); see also Gould, *supra* note 3, at D24 (decrying policies which might lead to a race to the bottom).

jobs.¹⁸⁰ Indeed, despite changes in the AFL-CIO's leadership and increased support for organizing, U.S. unions are still in a vulnerable state.

2. Labor-Management Cooperation

As discussed earlier, New Zealand employers have been strong supporters of labor-management cooperation techniques. On this issue, as with the question of what role unions should play in promoting employer interests, the CTU-Engineers promoted such programs, while the TUF-MCWU was generally suspicious of them.

a. CTU—Engineers

The CTU and Engineers have promoted labor-management cooperation mostly in the forms known as participatory management,¹⁸¹ job redesign, job rotation, job enlargement, teamwork, and a "whole job approach" as a way to break down barriers in work organization, and gender and minority equality.¹⁸² The CTU argued that unions should be in partnership with employers in order to develop strategies that would help employers overcome worker resistance to change. The CTU explained that using the methods it advocated would avoid disputes over skill content and job demarcation and would allow improvements to be implemented more quickly.¹⁸³

The Engineers' views on labor-management cooperation have been strongly affected by its positive bargaining relationship with Fisher & Paykel, one of New Zealand's largest appliance manufacturers and, by 1991, the only whitewear manufacturer left in the country. In 1981, the Engineers represented eighty percent of Fisher & Paykel's workforce, and Fisher & Paykel was one of New Zealand's most internationally competitive companies.¹⁸⁴ When asked to assess their accomplishments during the economically difficult pre-ECA years of the mid-1980s, both the Engineers and Fisher & Paykel concluded that "the whole process would have been totally unsuccessful without the involvement of the unions concerned."¹⁸⁵

Indeed, Fisher & Paykel's approach to the negotiation process contrasts sharply with many New Zealand employers. From 1985 to 1989,

180. See Bronfenbrenner, *supra* note 34, at 9–10.

181. See Harris, *supra* note 155, at 10.

182. TRADE UNION EDUCATION AUTHORITY, THE COMPACT AND CURRENT UNION ISSUES 4–6 (1990).

183. See QUALITY FUTURE, *supra* note 128, at 21.

184. See Patricia Herbert, *Burying the Hatchet*, AUCKLAND STAR, Aug. 4, 1991, at D3, D4; David Barber, *Throwing off the Cloth Cap*, NAT'L BUS. REV., Sept. 13, 1991, at 30.

185. Brian Wooller, *Dairy Workers Visit New "Consultative" Workplace*, FOOD & TEXTILE WORKER, Apr. 1992, at 9.

69,000 jobs were eliminated in the appliance industry creating a large pool of unemployed. Rather than using this glut in the labor market and the recent enactment of the ECA as an opportunity to drive wages down, Fisher & Paykel negotiated an agreement in July 1991, with its fourteen unions that moved to a consultative approach and guaranteed that Fisher & Paykel would share relevant and even sensitive data with the unions.¹⁸⁶ Fisher & Paykel unions have thus jointly made decisions on sick leave and discipline, a role many in the union have found uncomfortable.¹⁸⁷

The Engineers has tried to tie traditional union issues to workplace reform, training, and cooperation. As Rosalie Webster of the Engineers explained:

The idea is to dispense with across-the-board increases linked to cost of living and to wage justice between groups of workers. Instead the approach is to make pay increases a management tool.

Under the proposed new pay systems, pay is linked to attitud[e] and conduct and/or profit and/or whether a worker gets on with the supervisor. The new systems are intended to link pay to the performance of an individual and to break the link between pay and skill and the link between pay and collective/union organization.¹⁸⁸

Thus, much of the Engineers and CTU's position on labor-management cooperation is closely tied to their views with regard to improving employer performance.

It is not, however, the case that a change in law promoted this approach. Again, the Engineers were involved in labor-management cooperation and workplace reform long before the ECA was enacted. Once the ECA was enacted, they continued, as before, to advocate it as a useful way to become a co-partner in the workplace.¹⁸⁹ During my visit to New Zealand in July 1997, the Engineers indicated that they were beginning to rethink their positions on workplace reform and cooperation because they had not produced results they regarded as positive. If a change in this longstanding position takes place, it will be a dramatic repudiation of the value of labor-management cooperation by one of its staunchest supporters.

186. See Herbert, *supra* note 184, at D3.

187. See *id.*; see also Herbert Roth, *Chronicle*, 16 N.Z. J. INDUS. REL. 317, 318 (1991).

188. Webster, *supra* note 127, at 14. The Dairy Industry Memorandum of Understanding, to which the Engineers were a party, demonstrates this philosophy. See Perry, *supra* note 126, at 104-05.

189. In the U.S., employers are establishing teams even without the enactment of the TEAM Act. See LeRoy, *supra* note 5, at 80-81.

b. TUF—MCWU

The TUF and MCWU's support for traditional unionism has translated into a jaundiced view of both job redesign and labor-management cooperation.¹⁹⁰ Indeed, the MCWU has been particularly critical of the Engineers and the system of quality management, in which the Engineers engages at Fisher & Paykel. The MCWU's position is captured by a story in the June 1996 MCWU newspaper about Peter Lusk, a temporary worker at Fisher & Paykel.¹⁹¹ Lusk tells how his teammates pushed him to speed up his pace by heckling and embarrassing him whenever he failed to keep up.¹⁹² When he spoke with his union delegate (steward) about the fast pace of production, the delegate refused to support him, because they had put "things like strikes and conflicts behind us."¹⁹³ Lusk described attending a company team-building event during which Rex Jones, the Engineers general secretary, praised the company.¹⁹⁴ Company head, Gary Paykel, then warned the workers about stiff competition from Thailand and told them that the company was opening new plants in the United States and Australia.¹⁹⁵ During his tenure, the union agreed to a twenty cent per hour pay cut for new hires. In the end, the union participated in the decision not to give Lusk a permanent job.¹⁹⁶

There are a number of ways to look at this experience. On the one hand, Lusk may be a slow, uncooperative worker, and the story may be sour grapes motivated by his termination. However, incidents, such as teammates' heckling a new worker, the unwillingness of the union even to consider taking the side of workers when it might impair production, and the pitting of workers against one another in the name of competition, raise important issues about the nature of work in such a system. The no-buffer, no-error target of lean production can demand extremes

190. This view exists within the U.S.. Paula Voos, for example, argued that employee involvement programs are only a new variant of the older phenomenon of productivity bargaining and not evidence of a fundamental transformation. See Paula Voos, *Introduction*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 1, 2 (Paula Voos ed., 1994).

191. See Peter Lusk, *Team Work Nightmare*, M & C WORKERS NEWS, June 1996, at 10.

192. See *id.* A similar situation occurred at a Mazda plant near Flat Rock, Michigan. Workers who were injured trying to keep up with the pace of work were often ridiculed and harassed by Mazda managers. The unit leaders encouraged their teams to yell insults at workers on restriction. They told the team members that their work would be easier if it weren't for people on medical restrictions. Workers who went to the medical department were treated coldly and with suspicion. See FUNCINI & FUNCINI, *supra* note 27, at 182-83.

193. Lusk, *supra* note 191, at 10.

194. See *id.*

195. See *id.*

196. See *id.*

in discipline and pressure to achieve its results. It can also entail oppressive forms of surveillance, control and intense workflow.¹⁹⁷ Team members who can vote on whether a new worker is retained or not translates into a system in which, in effect, the key issue is whether the other team members like you.¹⁹⁸ The story of Peter Lusk dramatizes and personalizes the reasons for the MCWU's opposition to labor-management cooperation.

It would be a caricature, however, to label the MCWU's position on how to deal with employers as that of the recalcitrant, destructive traditional union. Along with its opposition to labor-management cooperation, one must reconcile different behavior that does not support pigeonholing the MCWU's relations with employers as either strictly adversarial or cooperative. The MCWU's position simply does not fit into either the category of oppositional, antagonistic unionism or of cooperation, in the sense these are commonly discussed. The MCWU contract with Mitsubishi reflects this complexity. The contract declares that employer and worker interests differ in important respects. Despite this, the contract says, each party agrees to promote the other's interests:

The parties to this contract recognise the employer's objective of retaining and promoting a profitable business by providing its customers with high quality vehicles at competitive prices, and recognise the employees' objective of retaining jobs and reasonable living standards and working conditions. It is acknowledged that the industry operates in a highly competitive environment which is influenced by government policies on tariffs. Without sub-ordinating either party to the objectives of the other, the parties agree to cooperate in achieving their objectives.

The parties agree that:

- employees will be provided with the opportunity to influence decisions that affect them in the work place.
- quality will be put first.
- within the parameters of this contract a well trained and flexible work force will be maintained.
- the importance and contribution of all to the success of the company is recognized.
- they will treat each other with respect and dignity.
- they will act at all times in a safe, fair and honest manner.

197. See Perry, *supra* note 126, at 51–52; FUNCINI & FUNCINI, *supra* note 27, at 136–37 (teams created self-regulating attendance system and encouraged workers to pressure one another to maintain rapid work pace so everyone minds everyone else's business).

198. See GRENIER, *supra* note 39, at 17, 29.

- they will promote employee and employer behavior that is consistent with accepted standards of conduct.
- they will develop communication channels and systems that will keep all employees informed of things that affect them in the work place.
- they will resolve problems in a non-adversarial manner where possible based on consensus.¹⁹⁹

This preamble to an employment contract demonstrates the inadequacy of a simplistic adversarial paradigm versus a cooperative paradigm. On the one hand, the contract's willingness to give credence to the employer's needs and to support them sounds cooperative. On the other hand, the preamble leaves no doubt that workers also have important interests that differ from the employer's and that are worthy of respect. Ignoring the workers' interests or trying to subsume them under the needs of the firm is unlikely to succeed for long. Thus, this agreement attempts to find a way to accommodate what are authentic, enduring, and conflicting interests not by denying that one group has any specific interests but by acknowledging the reality that areas of conflicting interests exist and must be addressed.

This agreement does not stand in isolation. It should be recalled that the MCWU was described as approaching negotiations by asking not only what it ultimately wanted and how accepting anything less would affect the solidarity it was trying to achieve among workers across employers, but also whether the company could afford to pay this amount and whether the employer had engaged in good faith actions which deserved to be rewarded by the union.²⁰⁰ Basing a relationship upon a realistic appraisal of the parties' interests and a mature appraisal of their current situations seems more likely to lead to results satisfactory to all parties than would ignoring them or subsuming one's interests.

The MCWU cooperates because it genuinely wants to do so and not because it feels compelled to do so. In any case, if a traditional adversarial union can cooperate or, even better, take a more realistic approach to cooperation, this route raises the question whether any change to the U.S. system is necessary for those who support real cooperation as opposed to cooperation in name only. Certainly, similar agreements have come into existence in the current U.S. system, and the evidence is that labor-management cooperation functions better and tends to be a more

199. Mitsubishi Motors New Zealand Ltd—Todd Park Employees Collective Employment Contract cl.1.1 (1996–1997). This contract embodies the concept that unions “are not married to a system of narrow job classifications or adversarial shopfloor labor relations; they are willing to cooperate and to participate.” Voos, *supra* note 190, at 1, 17.

200. See *supra* text, at nn. 131–32.

permanent feature when a union is involved in its establishment than when a union is not involved.²⁰¹

The bottom line is that there is no evidence that the ECA had any impact in prompting either union to cooperate or not. In fact, the evidence seems to point to other issues as more important in prompting unions to engage in labor-management cooperation.

c. How Labor-Management Cooperation Is Used under the ECA

Focusing on union efforts with regard to labor-management cooperation tells little about how it actually manifests itself in New Zealand. It is true that labor-management cooperation has come into increasing use in New Zealand under the ECA and is now used at a rate far exceeding that of its neighbor, Australia.²⁰² The form most commonly used in New Zealand has not, however, been the basis for building union strength or membership. Rather, New Zealand employers have been devising ways to use labor-management cooperation without unions and succeeding.²⁰³

The government itself has endorsed this particular style of labor-management cooperation. For example, in a speech given eighteen months after the ECA was enacted, Minister of Labour Bill Birch praised the ECA for letting employers change hours, pay, shifts, and other workplace terms. He advocated, however, that, in the future, employers should not simply eliminate worker's terms but should establish a rationale that would gain employee support. This, he argued, could be done by "the soft and hard conversion processes. The latter tends to occur when a company has to change its work practices rapidly and often radically. . . . The soft conversion describes a more gradual change to work practice which focuses on the need to maintain the trust and confidence of staff."²⁰⁴ The key to achieving this, Birch said, was employers' using labor-management cooperation techniques.²⁰⁵

201. See COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 36-37 (1994) [hereinafter DUNLOP COMMISSION REPORT].

202. See CLIVE GILSON & TERRY WAGAR, EMPLOYEE INVOLVEMENT AND HUMAN RESOURCE MANAGEMENT IN AUSTRALIAN, NEW ZEALAND, AND CANADIAN ORGANISATIONS (1996); Alastair Duncan, *Champagne and Staff Reports: The Wonderful World of "Win/Win,"* LABOUR NOTES, Aug. 1995, at 5.

203. This should not be surprising, for there is evidence that labor-management cooperation is used in the U.S. as a method of union avoidance. See RICHARD HURD, ASSAULT ON WORKERS' RIGHTS 43-51 (1994).

204. Bill Birch, Address to the Employers' Federation's New Zealand Business and Industry Advisory Council's Labour Market Group (Sept. 1, 1992) (on file with author); cf. GREINER, *supra* note 39, at 10.

205. See *id.*

Indeed, to the extent that any training has taken place in the ECA era, such training has largely been part of an effort to institute labor-management cooperation and not to impart skills. Thus, one must be cautious as to what is meant by training in New Zealand because training may not necessarily focus on skills other than those designed to improve worker loyalty and attitudes towards their employers. For example, the Canterbury Manufacturers Association said that, in its opinion, worker training included basic worker attitudes rather than skills.²⁰⁶ Most NZEF discussions concerning "best practice" methods for workplace improvement focus on improving worker attitudes.²⁰⁷

The major employer groups, the NZBR and NZEF, essentially deny that more is needed than worker attitude adjustment to improve productivity. In 1993, NZBR spokesperson Roger Kerr told an Australian audience that the improved productivity due to ECA incentives and flexibility "are the stuff from which future folklore is going to be made" and that employers and employees were working together, with trust and cooperation.²⁰⁸ Even if one accepts Kerr's figures, the workers' payoff for cooperation and trust seems meager. Kerr told his audience that it was a buyers' market for labor, with wage increases of up to eight percent amidst productivity increases of seventeen percent.²⁰⁹

Unfortunately, these figures were not accurate. Six years after the ECA's enactment neither wages nor productivity has shown improvement.²¹⁰ From 1990 to 1997, total productivity growth was but five percent—an annual growth rate of less than one percent per year, far below the figure suggested by Kerr of 8.5 percent per year.²¹¹ Kerr is correct, however, in the import of his statement. Workers wages show that workers have not participated in whatever productivity gains were made.²¹² In February 1996, Prime Minister Jim Bolger, the leader of the party which had enacted the ECA, admitted that there has been only 0.1 percent annual average real wage growth from March 1990 to March

206. *Skills Survey Identifies Gap*, MANUFACTURER (N.Z.), Oct. 1994, at 7.

207. NZEF, HUMAN RESOURCES: AN INTRODUCTION TO BEST PRACTICE (1992).

208. ROGER KERR, THE CHALLENGE OF THE '90'S: LABOUR REFORM IN AUSTRALASIA, SPEECH TO THE AUSTRALASIAN INSTITUTE OF COMPANY DIRECTORS WESTERN AUSTRALIA DIVISION, in PERTH 4-5, 10-11, 15 (1993).

209. *See id.*

210. Kerr's error may have arisen from the peculiar way in which the NZBR and NZEF tend to measure productivity. Rather than use the standard economists' definition of a ratio of effort to product, they measure labor cost. Worse, they often derive this information by opinion polling; that is, they ask employers their opinions rather than making any actual measurements. *See Dannin, supra* note 90, at Chapter 10.

211. *See* Brian Easton, *The Economic Impact of the Employment Contracts Act*, 28 CAL. W. INT'L L. 209, 214 (1997).

212. *See id.* at 221. *See supra* text, at nn. 294-99; *see also* Roger Kerr, *Ten Myths About Training*, in THE NEXT DECADE OF CHANGE 161 (NZBR, ed., 1994).

1995.²¹³ Again, this is far below Kerr's claim of four percent annual wage growth.

It is important to keep New Zealand's use of labor-management cooperation in mind when considering whether the U.S. system should be made more accommodating to it. Most of the U.S. public has a vague understanding of labor-management cooperation which equates it with worker empowerment, a more worker-friendly job and higher productivity. A key reason labor-management cooperation has not operated that way in New Zealand is that unions have been weak and unable to act as full partners who bring something valuable to the relationship. This issue will be discussed more fully below.²¹⁴

d. Assessing New Zealand Labor-Management Cooperation

Critics of teams see them as an effective and deceptive way to promote management's ends, such as increased work pace or improved performance, at the worker's expense. These critics point to peer pressure from other team members as likely to arise, especially if the team members face greater workloads or lowered remuneration should one member not produce at an acceptable level. This pressure can make teams more stressful for team members than direct supervision.²¹⁵ Indeed, Lusk's experience with labor-management cooperation has been repeated in the United States, for example, at Mazda's Flat Rock, Michigan plant. Workers there felt patronized and manipulated at team meetings. They complained that management believed that if it said teamwork and consensus often enough it could co-opt the workers even while giving them no involvement in the decision-making process.²¹⁶ They felt that the supposedly "cooperative" Mazda bossed them as much as would "traditional" General Motors (GM) but Mazda used the term "consensus" to disguise its domination of the workers.²¹⁷

In fact Mazda unit leaders had even more unchecked power than was the case at traditional automobile factories because there were no formal guidelines or written standards, which, in turn, encouraged cronyism, favoritism, and spying among workers.²¹⁸ In addition, the United Auto Workers (UAW) at Mazda was seen as playing a role similar to that of Rex Jones at the Fisher & Paykel meeting—that is, of being concerned about management priorities over workers' needs. One Mazda

213. Rasmussen, *supra* note 169, at 109, 116.

214. *See infra* text, at nn. 245–48.

215. *See* Knudsen & Grunberg, *supra* note 36, at 2.

216. *See* FUNCINI & FUNCINI, *supra* note 27, at 138.

217. *Id.* at 138–39.

218. *See Id.* at 139–43.

worker commented: " 'Sometimes it seems that the union wants to make itself more attractive to management than to its own members . . . ' "219

The generalized views of labor-management cooperation as a win-win method of securing greater productivity and higher worker contentment are anything but certain. A recent U.S. study concludes: "In reality, beneficial results [from participation programs] are not guaranteed and may be dependent on developing participation programs that provide employees meaningful voice."²²⁰ If this conclusion is correct, the form of labor-management cooperation commonly used in New Zealand is unlikely to lead to greater productivity in the United States, for unions and worker empowerment are not part of the program.

The New Zealand experience with labor-management cooperation suggests that it would not be a system congenial to increasing U.S. unionization. Except in instances, such as the Fisher & Paykel example, there is no evidence that the form of labor-management cooperation advocated and in use by most employers and the government is one that involves unions. Rather, labor-management cooperation is often expressly designed to exclude unions. As a result, persistent efforts by the CTU and the Engineers have not been sufficient to change the opinions of the most powerful employer groups in New Zealand.²²¹ There is no evidence to suggest that this result would be otherwise in the United States.

3. New Forms of Organization

U.S. proponents of labor-management cooperation suggest that it will improve union performance by allowing new forms of representation, with a preference for unions limited to a single enterprise, as opposed to multi-employer unions. In addition, Estreicher, for example, favors unions that would offer a variety of services to attract members. Both these changes have taken place in New Zealand under the ECA. New Zealand has moved from almost an exclusively multi-employer system to an enterprise system, and unions have begun trying to entice workers to become members by offering an array of nontraditional services.

219. *Id.* at 159, 169-71.

220. See Schwochau, et al., *supra* note 36, at 397; see also DUNLOP COMM'N REPORT, *supra* note 201, at 36-37.

221. How support for labor-management cooperation has affected employee support for the CTU/Engineers position as opposed to the TUF/MCWU will be discussed below. See *infra* text, at nn. 303-18.

a. Forms of Organization and Bargaining Under the ECA

From the time collective bargaining was legalized in New Zealand, in 1894, under the Industrial Conciliation and Arbitration Act (IC&A Act) through its last iteration under the LRA, registered unions could have essentially one form. Each union's registration gave it representation rights over specific job classifications or an industry across all workplaces within the union's geographical jurisdiction. Thus, the terms of all clerical workers working for all employers within a designated region were covered by the clerical workers agreement or award for that area. An award was the document that set forth the workers' terms. At one time the term accurately reflected the fact that they were created through a process of interest arbitration. More recently award terms were arrived at through negotiation. Negotiations in this system bore a strong resemblance to multi-employer bargaining in the United States. Awards could be national or regional in scope.²²² Within their jurisdiction, they automatically covered employers or workers performing covered work, even if the employer was not in existence at the time the award was created.²²³

This award system played a vital role in the unionization of some industries. New Zealand is still a sparsely settled country with many small worksites. Travel is difficult through much of the country with even vital links in some places being dependent on one-lane gravel roads.²²⁴ Thus, negotiations on a workplace by workplace basis would often be impossible. Awards ensured at least a minimum common standard and protections for a substantial portion of employees doing the same job, thus constraining the bidding down of wages, decreasing employer wage competition, and resolving a large number of disputes in one set of negotiations.²²⁵

222. See LRA 1987 §§ 132-34.

223. See *id.* § 160. This was referred to as the "blanket coverage" right of registered unions.

224. On the west coast of the South Island some one-lane bridges carry not only car traffic but rail as well. The west coast is a temperate rain forest which receives as much as fifteen meters (roughly forty feet) of rain a year, so while crossing these bridges amidst a downpour a traveler may notice that the river is but inches from flooding the bridge. The New Zealand Alps rise immediately to the east, so east-west traffic on the South Island is limited to a very few places. In other words, once the traveler is en route on the west coast, the options are essentially to backtrack or continue forward. Travel there can be breathtaking for more reasons than just the dramatic scenery, which exceeds the beauty of California's Route 1. California does not have two glaciers which reach from the Alps to the ocean on its west coast.

225. See I MINISTER OF LABOUR, INDUSTRIAL RELATIONS: A FRAMEWORK FOR REVIEW (1985).

Awards under the LRA from 1987 to May 14, 1991, were negotiated following notice to the Chief Mediator, who then designated a mediator to facilitate negotiations.²²⁶ The mediator then arranged for up to ten representatives of each side to meet as a conciliation council.²²⁷ Any agreement these representatives reached was then registered as an award.²²⁸ If the parties were unable to agree, the dispute was referred to the Arbitration Commission which could, but only if the parties agreed, decide the dispute and make the award. Otherwise, the Commission only had the authority to act in the role of a mediator.²²⁹

These features were eliminated by the enactment of the ECA in 1991. Under the ECA New Zealand has indeed fostered the emergence of new forms of organization. Indeed, this has been a dramatic change and one that was intended and eagerly anticipated by the ECA's proponents. Just as the ECA was enacted, the NZEF produced a video that stated: "For the first time, it'll be easy for employers to negotiate agreements to take particular needs of their own businesses or enterprises into account. Now that's a fundamental change that many employers and employees have been after for a long time."²³⁰

According to the NZEF, by 1995 this prediction had come true:

In fact many employees, both individually and collectively, are now choosing to be represented by a range of nonunion people or organisations. This includes lawyers, accountants, private consultants, a parent, a friend or a workmate.

The essential feature, however is that to gain the right to represent and to keep it, the representative is being required to understand the needs and aspirations of the individual or group being represented. To understand the needs and aspirations of the employer concerned and to become a constructive part of that enterprise focused partnership.

That is pretty new and radical stuff for most traditional unions and as those figures show, they have lost out in the transition.²³¹

It is certainly true that the ECA has permitted a nearly limitless range of bargaining forms. With no oversight, limits or guidelines, the form in which bargaining takes place is constrained only by the imagi-

226. See LRA 1987 § 139. The functions of the mediators are set out at §§ 251-58.

227. See *id.* at § 139.

228. See *id.* at § 146.

229. See *id.* at § 147.

230. NZEF, Working Together: Employment in the 90s (Unpublished transcript of a videotape on file with author) (1991).

231. *The "New" Unions*, NEWSLETTER (NZEF), 1995, at 15.

nation and daring of those involved. There are two basic forms of contracts—collective or individual.²³² The form, however, reveals nothing of the process used to achieve the agreement. Employees may become signatories to a collective employment contract (CEC) one-by-one, with no collective negotiation or collective action of any kind. Conversely, an individual employment contract (IEC) may be the product of collective negotiations in the sense that it has terms identical to every other IEC in the workplace, that it has emerged from actual collective negotiations, or that it has come about by operation of law at the expiration of a CEC,²³³ thus perpetuating terms negotiated collectively.

This flexibility is possible because of the law's minimalist provisions. An IEC is simply "an employment contract that is binding on only one employer and one employee."²³⁴ A CEC is collective only in the most technical of senses. It is "an employment contract that is binding on one or more employers and 2 or more employees."²³⁵ In other words, the addition of one employee to an IEC would change it into a CEC. Although it has minimal numerical requirements, a CEC can be a powerful document. ECA § 19(2) provides that when there is a CEC, no IEC can be negotiated that provides terms inconsistent with "the applicable collective employment contract."²³⁶ Since a CEC comes into existence with just two signatory employees, such a document can establish the terms for all the employer's other employees. This system has resulted in a complex array of agreements.²³⁷

Added to this complexity of the resulting form of agreement are the ways in which representation occurs. Unions may or may not be involved in the negotiations, and this involvement may happen whether or not a worker has authorized the union to be the worker's representative. In a 1995 survey, for example, 60.8 percent of employees said they had represented themselves in negotiating their most current contract, 34.8 percent had used a union representative, and 8.8 percent were represented by a fellow employee.²³⁸

232. See ECA §§ 19–20.

233. See *id.* § 19(4).

234. *Id.* § 2.

235. *Id.*

236. *Id.*

237. The details of how this system has worked have been explored by the author. See, e.g., Ellen J. Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917 (1996); Ellen J. Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455 (1996).

238. See Rasmussen, et al., *supra* note 167, at 456. The study's author urges caution in accepting these figures because the study suffered from a number of methodological shortcomings.

Although the NZEF and NZBR's statements are accurate when they say that there have been new forms of bargaining, including more direct negotiations, the description in these statements of how bargaining has been taking place in New Zealand and why unions have played the roles they have does not reveal the full picture. The reality of ECA-bargaining can only be pieced together from a full understanding of the law and how it has been used. The ECA evenhandedly allows either an employee or employer to designate another as a representative to negotiate an employment contract.²³⁹ Representation is a limited concept. First, representation is presumed to play no role during the life of the agreement, although there is no prohibition against it. Furthermore, although an employer is required to recognize an employee's authorized representative,²⁴⁰ recognition has little practical meaning. An employer is not obligated to negotiate with a worker's representative even if the employer does recognize it. Authorization is also a technically complex issue because determining the sufficiency of a union's authorization is left to the employer.²⁴¹ Membership in a union will not give the union authority to represent an employee, unless the employee has also expressly given the union that specific authorization.

Furthermore, the courts have even allowed employers to undermine their employees' representative. In the most extreme cases this has included permitting the use of threats, terminations, and other forms of coercion to undermine a representative and to force an employee to withdraw an authorization to represent.²⁴² There are also less oppressive ways to achieve the same end. Employers can simply ignore a representative. If the employer, however, wants to bargain with someone, the ECA does not forbid employers from bargaining with an entity which is not an employee's chosen representative. This has led some employers to establish company unions or simply chose their workers' representative.²⁴³ Employers have taken unilateral control to determine who, if anyone, would bargain for their workers, because the law permitted it and because the environment did not constrain them.²⁴⁴ This result could

239. See ECA §§ 9-12.

240. See *id.* § 12(2).

241. See *id.*

242. See Dannin, *supra* note 237; see also Dannin, *supra* note 64; Dannin, *supra* note 94, at 172-175.

243. See REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE ON THE INQUIRY INTO THE EFFECTS OF THE EMPLOYMENT CONTRACTS ACT ON THE NEW ZEALAND LABOUR MARKET 6-8 (1993).

244. See *Reports of the Committee on Freedom of Associations*, 77 International Labour Organization (ILO) Official Bulletin 1, 228 (series B, no. 1, 1994) (considering case No.1698 ¶ 726).

also emerge from allowing U.S. employers to select employee representatives.

b. Assessing Bargaining and Representation under the ECA

How have these changed forms and the employer's power to choose the employees' representative affected negotiations? The fact that so many workers say they have represented themselves in negotiations might seem to suggest that New Zealand's freedom of contract regime confirms Richard Epstein's claim that individual employees can bargain concerning their own terms of employment. The question, of course, is what it means to have bargained. Does this include merely setting employment terms or must there must be some evidence of give and take or at least some input from all parties? In other words, how satisfactorily has bargaining been carried on under this flexible regime?

One thing we know is that the ECA form of enterprise and individualized bargaining has led to less bargaining in some cases because negotiations on smaller scales are very expensive. One way this problem has been resolved has been to move from the tradition of negotiating contracts on an annual basis, with the trend to greater than one year to two year contracts apparent by 1993.²⁴⁵ Smaller employers have been most likely not to renegotiate contracts. By 1993, eighty-four percent of employees of employers employing more than one hundred had contracts negotiated under the ECA; whereas, for those employing between four and nine employees, only thirty-seven percent had contracts negotiated under the ECA.²⁴⁶

Less bargaining has taken place in other respects as well. The fact that many contracts had no wage rates at all²⁴⁷ suggests that the employer-employee dialogue has not concerned wages.²⁴⁸ When the Labour

245. See Whatman, *supra* note 107, at 57-58, 61-62. This study showed that for 1993, in fifty-eight percent of enterprises no new contract was negotiated in the last year. *Id.* at 58. This is a slightly different approach to the subject than looking at the express term in the contract and may indicate an intent to drift into longer term contracts in the low inflation period of the 1990s.

246. See *id.*

247. See Raymond Harbridge & Anthony Honeybone, *Employment Contracts: Bargaining Trends and Collective Bargaining Patterns: A Review of the 1994/95 Year in EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1994/95* 5, 11 (Raymond Harbridge & Peter Kiely, eds. 1995); Raymond Harbridge & Julia Lane, *The Effect of a Minimum Youth Wage in New Zealand*, 18 N.Z. J. INDUS. REL. 275, 278 (1993).

248. A survey of students found that they had no input into their working conditions. See Debbie Peterson, *Secondary School Students in Paid Work*, in *LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994* 189, 193 (Philip S. Morrison, ed., 1994). While this can be dismissed as merely a problem of the young working at unskilled jobs, it may suggest a more fundamental problem. The ECA is designed to rely upon individuals to bargain their own terms and represent their own interests. If the first work experiences do not provide this

Select Committee Minority (LSCM) issued its report assessing the ECA in 1993, the LSCM found no real negotiation was occurring. In most cases ECA bargaining involved employers insisting and workers acceding.²⁴⁹ The Majority, which is the same party that had enacted the ECA, also agreed that the ECA was having a troubling impact on workplace relations.

[E]vidence received has also shown that some employers are using the removal of compulsory unionism as a way to tell employees less than before about their rights. Witnesses said that, especially in companies where the employer has actively encouraged staff to resign from a union, employers often impose contracts without negotiations. Sometimes these contracts contain scant information about employment conditions. Many witnesses, particularly from service and retail industries, said employers do not communicate with them about their contracts and frequently intimidate employees into signing contracts with the message that they will be dismissed if they do not.²⁵⁰

The Majority report also noted:

A much repeated statement by employees was that the Act has given too much power to employers. Employees feel powerless to negotiate suitable conditions if employers refused to take account of their wishes. . . .

Another factor much commented upon by employees is the lack of a good faith bargaining provision in the Act. This related to the feelings of powerlessness which employees feel, to in some way ensure an employer enters into meaningful negotiations.²⁵¹

There has been virtually no data collected on ECA bargaining other than for larger employers. Service Worker Union organizer Judy Shepard contended that small employers—the group least likely to have reported its outcomes to the ongoing Raymond Harbridge survey and completely absent by law from the government studies—“do not draw

opportunity, when will students ever learn the necessary skills? Furthermore, to the extent that students are exploitable they provide a large group of workers who can undercut the wages of others.

249. SEE REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE ON THE INQUIRY INTO THE EFFECTS OF THE EMPLOYMENT CONTRACTS ACT ON THE NEW ZEALAND LABOUR MARKET 3, 5 (1993).

250. REPORT OF THE LABOUR COMMITTEE ON THE INQUIRY INTO THE EFFECTS OF THE EMPLOYMENT CONTRACTS ACT 1991 ON THE NEW ZEALAND MARKET 20 (1993).

251. See *id.* at 17.

up contracts with workers. They just tell workers 'these are the conditions' and they can take it or leave it.'²⁵²

When one looks more deeply into what is meant when an individual New Zealand employee claims to have represented him or herself in bargaining, it appears that relatively little meaningful bargaining occurs. Another study of ECA bargaining patterns reveals that when unions were not involved fifty-six percent of initial proposals were developed by management without consulting employees, while forty-four percent consulted only with some affected employees. It concluded that there was little movement from management's initial proposal. Only six percent of negotiations for new individual contracts reported that making significant modification management's initial position. A majority (sixty-two percent) reported making minor modifications, and generally these applied to a small percentage of employees. One-third of firms with new individual contracts said that all employees accepted initial proposed contract terms without modification.²⁵³

Only negotiations which involved unions showed evidence of thought, preparation, and actual give and take.²⁵⁴ Samuel Estreicher argues that employers would tend to prefer dealing with value-added unions as opposed to traditional adversarial unions.²⁵⁵ However, in New Zealand management bargainers tended to view negotiations that involved traditional unions and actual bargaining far more positively than those without.²⁵⁶ For the most part, however, the dominant form of bargaining appears to be employer fiat.²⁵⁷

252. Georgina Bailey, *Three-Way Trap Catches Workers*, EVENING POST (N.Z.), Oct. 27, 1992, at 5.

253. See Ian McAndrew, *From Regulation to Deregulation in New Zealand Labour Relations: New Models of Bargaining Under the Employment Contracts Act 1991* 8 (Jan. 5, 1993) (unpublished paper prepared for the 45th Annual meeting of the Industrial Relations Research Association); cf. Julius Getman & Thomas Kohler, *The Common Law, Labor Law, and Realty: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1422 (1983).

254. See Ian McAndrew & Virginia Phillips, *Bargaining Behaviour in New Zealand's Deregulated Labour Market*, in CURRENT RESEARCH IN INDUSTRIAL RELATIONS: PROCEEDINGS OF THE 9TH AIRAANZ CONFERENCE 276, 278 (Larry Sonder ed., 1995); See also McAndrew, *supra* note 253, at 8.

255. See generally, Estreicher, *supra* note 8.

256. See McAndrew & Phillips, *supra* note 254, at 282-83. The study examined dynamics such as belief in the other team's honesty and friendliness, trust in the legitimacy and far-sightedness of the other team's positions, and perceived emotional difficulty of the negotiations.

257. See LeRoy, *supra* note 5, at 41, 78 (finding that employers in the U.S. tend to dominate the teams they establish).

c. Union Services

As discussed earlier, some have argued that U.S. unions need to offer additional services as a way to attract members. New Zealand unions have indeed responded to the ECA's regime by reinventing themselves. The ECA both provides incentives to unions to do this in order to recruit members and also makes this easier because the process of authorizing representation and union membership means that there can be no free riders. In other words, the only way an employee can have access to an attractive service is by becoming a union member.

Unions in New Zealand have marketed themselves aggressively by trying to appeal to a wide range of perceived member needs.²⁵⁸ Union magazines and pamphlets are filled with what are essentially advertisements touting the extra benefits of joining. The Engineers offered free Sky TV subscriptions²⁵⁹ and special rates for wine purchases.²⁶⁰

Sometimes trying to explain how these services have been integrated into traditional unionism has proved difficult. Peter Conway of the National Distribution Union (NDU) described the new union campaigns for members:

In response to these changes, unions have generally developed a broader range of services such as law centres, medical centres, superannuation schemes, insurance schemes, funeral expenses benefits, travel discounts - even "smart" cards. But fundamentally the union "message" has not changed. It is still about solidarity, collective organisation, and independent representation. The new services are additional aspects. They do, however, emphasise that the union is not just a workplace organisation but is a provider of collective security.²⁶¹

The Public Service Association (PSA), the union which represents most government workers, announced:

We're always going to have to assert member rights and this will sometimes lead to a showdown, but there's more to the union than industrial battles. We can buy a wide range of benefits simply because we stick together, and I mean things like health

258. Unions in the United States have also responded to their declining density by offering an array of services, including credit cards, financial services, legal advice, and insurance. See Gary Chaison & Joseph Rose, *The Macrodeterminants of Union Growth and Decline in THE STATE OF THE UNIONS*, *supra* note 89, at 3, 38.

259. See Sarah Boyd, *Unions Attack Free Sky Offer*, DOMINION (N.Z.), Dec. 13, 1993, at 1.

260. See Insert, in METAL, June 1996.

261. Peter Conway, *Stayin' Alive*, POLITICAL REVIEW, July 1993, at 8.

services, welfare benefits, loans, discounts, and so on. It's important that it makes good, economic sense to belong to the union.²⁶²

Getting into the business of offering consumer goods and services has proved not only to be a distraction from their central focus, but in some cases it has also put unions into uncomfortable situations. Among the services unions have offered have been those patronizing companies while they were engaging in serious antiunion activities, such as Air New Zealand.²⁶³ The PSA offered an array of benefits, including health and superannuation (retirement) plans. Although these might seem uncontroversial, they actually created difficult contradictions. On the one hand, the PSA promised to oversee its health plan to ensure that it provided good service. On the other hand, the health plan was a potential source of revenues, whose surpluses would be returned to the union.²⁶⁴ The PSA offered superannuation to assist those who were suffering from recent government cutbacks,²⁶⁵ but, of course, the government was also the PSA's major bargaining partner, and the way in which the PSA bargained affected the number who might qualify for benefits.

Not all unions, however, saw a focus on consumer services as a way to attract new members. The Service Workers Union, for example, said that the greatest benefit of membership was helping members achieve traditional union goals: a fair wage to provide a reasonable standard of living; good working conditions such as holidays, meal breaks, and paid sick leave; fair treatment; solidarity with co-workers; access to a trained union organiser; a fair contract; access to support, including legal support, when needed; and training.²⁶⁶ The same pamphlet, however, also lists extra services on its reverse side, including medical care at union health centres, health insurance, legal advice, retirement plans, life insurance, discount shopping, and low interest loans, as benefits of membership.²⁶⁷

The MCWU opposed offering goods and nontraditional union services as a method of attracting new members and argued that unions needed to reassert basic principles rather than consumer goods:

Unions are often "sold" to prospective members on the basis that they are

262. *Thorp Heralds Major Changes for PSA*, PSA J., Oct. 1991, at 1.

263. *See Guide to Union Welfare Services*, PSA J. SUPP., Oct. 1991.

264. *See, eg., PSA Health Plan*, PSA J. SUPP., Oct. 1991.

265. *See, eg., Retirement Income Planning*, PSA J. SUPP., Oct. 1991.

266. SERVICE WORKERS UNIONS, *JOINING THE SERVICE WORKERS UNION: WHAT'S IN IT FOR YOU?* (on file with author).

267. *See id.*

- an “insurance” if you get unjustifiably sacked
- an enforcer of your employment contract
- a provider of services, from discount shopping to cheap health care, to life insurance.

While unions may do all of these things, they are not the basis of unionism.

Unions were established to stop competition between workers for jobs. In times of high unemployment such competition results in workers offering to work at lower wages and worse conditions in order to secure a job. Eventually, competition between workers tends to lower wages and conditions for all workers.²⁶⁸

The TUF agreed that unions should not be “industrial insurance companies” and should have members rather than clients.²⁶⁹ However, the TUF offered members a credit card with associated discounts as a perquisite of membership²⁷⁰ as did the Engineers.²⁷¹

Even worse than these ethical and practical dilemmas for New Zealand unions is the fact that the choice of no representative is also available and can be offered to workers by employers on compelling terms—coercive or attractive—that will make the workers choose it.²⁷²

The PSA saw the ECA as putting it in competition with employers for the hearts and minds of it saying, “We have to sell the union as never before.”²⁷³ At the same time, the union has tried to make itself an appealing partner to employers:

We’ve also been nudged more firmly to understand business practices so that we can talk on equal terms with employers. We can make a positive contribution to the way enterprises are run and of course we also have to know about their finances so that

268. *Basic Principles Reasserted*, M & C WORKERS NEWS, Dec. 1993, at 6. However, even before the ECA was enacted, the MCWU had taken a position that it would offer those things its members wanted. In one case this involved low-interest short term loans to help its members escape the predations of loan sharks. These had a major impact on making it attractive to nonmembers who wondered why their unions were not offering them similar services. See Dannin, *supra* note 94, at 36–38.

269. See Maxine Gay, *Directions for Unions*, M & C WORKERS NEWS, Dec. 1993, at 7.

270. See *Discount Card*, M & C WORKERS NEWS, Dec. 1995, at 9.

271. See Boyd, *supra* note 259.

272. Employers can freely use an array of inducements and disincentives to persuade employees not to join or be represented by a union. See generally Dannin, *supra* note 237.

273. *Thorp Heralds Major Changes for PSA*, *supra* note 262, at 1.

we can negotiate in full knowledge of the employer's circumstances.²⁷⁴

Whether any of this made unions more attractive to members was unclear. The disappointing results of the PSA's efforts to find and provide what workers wanted illustrate the problems unions have making themselves attractive to employees. It polled its members and other workers in an effort to attract more members by improving its services. However, the feedback it received must have been difficult to implement. Members gave it good marks for communication but scolded it for being bureaucratic, slow to act, invisible, out of touch, and "weak and ineffective; a soft touch for the employers."²⁷⁵ This might suggest that the PSA could satisfy those polled by being more aggressive in dealing with employers. However, the advice on how militant members wanted the PSA to be was mixed: "Members wanted their union to be democratic, dynamic and fearless in representing its members and professional and responsible in its dealings with employers. When forced to a choice, many insisted that a union should take a balanced approach."²⁷⁶ Some said they would only remain a member if the union was responsible and nonmilitant.²⁷⁷

Thus, although New Zealand unions have tried to compete for members by increasing the services they offer, this has also had negative repercussions. It is also unclear that any of these extras have attracted members in the ECA atmosphere.

d. Multi-Employer Versus Enterprise Unions

In the United States those who advocate labor-management cooperation associate it with promoting enterprise-based organizations. Although in most respects the Engineers and the CTU are the very model of value-added unions, on this issue they have advocated using the ECA's freedom of association to promote larger, industry unions²⁷⁸ as the only means to ensure unionism's survival. On the other hand, the TUF/MCWU have supported enterprise unionism.

Although on this issue the two groups appear to have reversed the roles we would expect to see within the New Zealand context and potentially within the U.S. context, this makes sense when examined more closely. A key part of the Engineers' strategy has been promoting train-

274. *Id.*

275. *What People Had to Say*, PSA J, Nov. 1992, at 2.

276. *Id.* at 3.

277. *Id.* at 2.

278. See WELL-RESOURCED, EFFICIENT, INDUSTRY FOCUSED UNIONS *supra* note 134, at 2.

ing.²⁷⁹ Industry training can only effectively be done across employers, particularly in the lower-skilled, lower-paid industries. Under the award system virtually all negotiation was done on an industry basis, and training was just one more industry issue to be taken up. Procedures are very different in a system based in the enterprise. Workers who expect to be paid low wages cannot afford to pay for their own training and, indeed, may see no point in making an investment whose costs the workers are unlikely to recover in the short term either in increased wages or a better job. The individual employer which might wish to train its workers will refrain from doing so out of fear that its newly-trained workers will be able to demand higher pay or credibly threaten to leave for higher pay. The employer which hires such a worker but does not pay for training will benefit and will be able to pay higher wages because it does not incur training costs. This provides a further disincentive to other employers in the industry to train.²⁸⁰

Thus, if each actor makes rational choices in a system without industry training, no one will train, and the industry as a whole will suffer.²⁸¹ Unions may be the only institutions capable of fostering certain sorts of industry-specific training.²⁸² In addition, in a period in which a philosophy of individualism is dominant, government is likely to feel that training is not its role. Thus, even necessary training may go undone in a society with a low level of unionism, low pay, and highly competitive employers.

There are additional reasons, however, as to why the preference for enterprise or multi-employer unionism is not as much of a reversal of roles. Even though their bargaining structure is based on multi-employer contracting, the Engineers' contract willingly accommodates the needs of individual employers. In fact, its bargaining strategy is based in the enterprise and expressly permits enterprises to vary multi-employer agreements.²⁸³ As a result, the Engineers actually incorporate a high degree of enterprise bargaining and attention to individual employer's desires.

279. See David Barber, *Throwing off the Cloth Cap*, NAT'L BUS. REV., Sept. 13, 1991, at 30.

280. See Jeff Faux, *Is the American Economic Model the Answer?*, in TICKING TIME BOMBS: THE NEW CONSERVATIVE ASSAULT ON DEMOCRACY, *supra* note 96, at 128, 133-34.

281. See Hamid Azari-Rad, Anne Yeagle & Peter Philips, *The Effects of the Repeal of Utah's Prevailing Wage Law on the Labor Market in Construction*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 32, at 207.

282. See Joel Rogers, *Reforming U.S. Labor Relations*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 32, at 15, 25.

283. See Perry, *supra* note 116, at 62.

One of those employer desires has actually been to have a system of multi-employer terms.²⁸⁴ Thus, by advocating multi-employer unionism, the Engineers has actually been promoting a form of unionism desired by many employers. Multi-employer bargaining is low cost, maintains industry standards, and creates a level playing field so employers can compete on factors other than wage cutting. In fact, employers can find it so desirable to take wages out of competition that some New Zealand employer associations have written their own unionless model industry standardized multi-employer agreements with the parties limited to employers and employee. Forty-nine percent of employees in the hospitality industry are covered by multi-employer contracts negotiated without a union.²⁸⁵ Some dairy industry employers also took the initiative to create a multi-employer agreement, which they then hoped to sell to the other employers.²⁸⁶

Multi-employer bargaining has been popular with U.S. employers as well.²⁸⁷ In 1980, 33.6 percent of nonmanufacturing contracts were multi-employer and 13.9 percent were multi-plant.²⁸⁸ When manufacturing and nonmanufacturing are combined, 40.4 percent are multi-employer.²⁸⁹ The United States provides strong evidence that employers have agreed that their interests are best met through bargaining at some level other than single enterprise bargaining. The NLRB only certifies unions at the enterprise level or smaller because the NLRA states that the Board is to decide whether the appropriate bargaining unit is "the employer unit, craft unit, plant unit, or subdivision thereof."²⁹⁰ Larger bargaining units came about only because employer and union each agreed that aggregated structures were of more benefit to them.

284. In fact, not only have New Zealand employers themselves demonstrated that they like to keep their terms of employment relatively close to competitors, the NZEF has responded to this desire by maintaining a bank of contracts that allow this to happen. See *Employment Contracts Database*, EMPLOYER, Apr. 1992, at 4.

285. See Harbridge & Honeybone, *supra* note 245, at 9.

286. See *New Zealand Dairy Workers Inc. v. Hautapu Whey Transport Ltd.*, [1994] 2 ERNZ 549, 555.

287. For example, twenty percent of employers surveyed in late 1997 planned to mirror industry patterns. The prediction by the analysts was that patterns would actually be higher once the parties entered into talks. This was a typical year in terms of these plans. See *BNA Special Report: 1998 Employer Bargaining Objectives*, LAB. REL. WKLY. (BNA), Dec. 10, 1997, at 4. This tendency of employers to want to take working conditions out of competition is of longstanding in the U.S.. In the mid-nineteenth century, planters developed an extensive labor code which bound them to pay uniform wages and terms and conditions of employment, so they would not compete with each other for workers. See Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 491, 493-94 (1989).

288. See RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* 39 (1984).

289. See *id.*

290. NLRA § 9(b); 29 U.S.C. § 159(b).

These are rational choices. Multi-employer bargaining may compensate for small employers' power and expertise deficiency and lower bargaining costs. Multi-employer bargaining recognizes that most employers negotiate with an eye on their competition. Also, multi-employer bargaining ensures that competitors will make the same deal and will simultaneously be hit with a strike or lockout, which precludes rivals from taking each other's market share. When technological or economic changes occur, multi-employer bargaining can more successfully resolve ensuing problems.²⁹¹

Despite the clear advantages of multi-employer bargaining, the MCWU and TUF have espoused small unions, including organization at the enterprise level. The MCWU advocated having one hundred percent union membership in each workplace, having a single representative of the workers in negotiations with employers, and "getting all workers in the same industry organized into unions that are independent of the employer, democratic and which stand for co-operation with other industry unions in the workers interests."²⁹² The MCWU wanted unions to organize in decentralized sections so that each could determine its own affairs, while retaining the ability to call upon the entire body for support.²⁹³ In other words, each workplace might have its own union, but that union would be closely affiliated with a larger multi-employer organisation.

TUF/MCWU support for decentralization is not, however, coupled with an ideology of "win-win" bargaining. While representation might be within an enterprise, a union could only achieve its prime objective, to stop wage competition among workers, if the union acts as the single seller of labor. This was the case because the union's collective power gives the union more bargaining power than an individual worker possesses. A union's collective bargaining power is at its maximum strength when all workers in an industry are in the same union. At a minimum, where more than one union exists within an industry, those unions must have the same goals and methods. When, however, some workers are not in a union, are in a union that tries to appease the employer, or are in unions which do not cooperate, a union's power to protect wages and working conditions is reduced.²⁹⁴ In other words, the MCWU and TUF

291. See, e.g., P. WILLMAN, TECHNOLOGICAL CHANGE, COLLECTIVE BARGAINING, AND INDUSTRIAL EFFICIENCY 138 (1986).

292. *Basic Principles Reasserted*, M & C WORKERS NEWS, Dec. 1993, at 6. In the United States, the New Democratic Movement, a radical caucus within the UAW, advocated policies which they saw as being in society's best interests even though they might cost jobs. See DANDANEAU, *supra* note 142, at 22-23.

293. See *Growth to be Promoted*, M & C WORKERS NEWS, June 1996, at 6.

294. See *Basic Principles Reasserted*, M & C WORKERS NEWS, Dec. 1993, at 6.

advocated having many small unions but having them organized so they can work together across employers when needed, thus functioning effectively as one unionized force.

The CTU and Engineers have been promoting even larger unions. On June 9, 1992, the CTU told its affiliates that unions could only provide better representation if they were arranged in appropriate structures.²⁹⁵ This meant amalgamating and redefining their membership bases around an industry or sector large enough "to permit effective resourcing of all aspects of organisation and union action"²⁹⁶ and allowing a leading union to emerge in each industry. The leading union would be the most relevant union with the greatest industrial leverage and would take the lead on the form and content of bargaining, skills development and job content, and advocacy of strategic policy requirements.²⁹⁷ To achieve this, the CTU wanted the new amalgamated unions to operate in one industry only and to resist organizing workers outside that industry.²⁹⁸ Part of the motivation for these mergers was to enable affiliates to resist employer pressure for negotiations at the enterprise level.²⁹⁹

The TUF is opposed to the concept of creating a leading union within each industry. The TUF believes not only that small unions can survive and provide good service to their members but that this is especially important to provide for the representation of specific workers, such as clericals. Clericals were not likely to see industrial unionism as attractive because they work in small numbers scattered across industries. Bargaining and a union focused on an industry might easily ignore the specific needs of clerical workers. In addition, as mainly female workers, clericals might feel less comfortable in a union dominated by male industrial workers.³⁰⁰ If representation was to be based on only a few industrial unions, these workers might be left with no one to represent them.

The CTU's ideal of amalgamations leading to industry unions has not, however, been the practice, even with regard to its usual ally, the Engineers. The Engineers has not hesitated to absorb members regard-

295. See NZCTU, *Union Structures & Inter-Union Relationships* (1992).

296. *Id.* CTU was concerned that amalgamation had been hindered by worker choice, employer strategy, and industrial change.

297. See *id.* at 2-3.

298. See WELL-RESOURCED, EFFICIENT, INDUSTRY FOCUSED UNIONS, *supra* note 134, at 7.

299. See CHAISON, *supra* note 179, at 148.

300. Interview with Maxine Gay, union organizer, in Palmerston North (May 17, 1992). Gay had been an organizer for the New Zealand Clerical Workers Union and the Public Services Association before assuming the role of general secretary and president of the TUF. *Id.*

less of their industry.³⁰¹ The ECA not only makes this possible, it makes it easy. Under New Zealand's law before 1991,³⁰² a registered union had the sole right to cover a defined occupation or industry within a designated geographical area.³⁰³ Under the ECA, however, an employee can choose any union as its representative and can change representatives at any time without limit. Not only does this give individual employees freedom to choose, it means that a union can grow by enticing employees to change affiliations and can thus come to represent groups outside those it traditionally has. As a result, union membership has been anything but stable.³⁰⁴

Indeed, the Engineers has been accused of boosting its numbers by poaching members from other unions, including several CTU-affiliated unions.³⁰⁵ The CTU has refused to censor the Engineers because the CTU felt it had no right to interfere in internal union behavior. The Engineers has defended itself as simply heeding the CTU's call for strong industry-based unionism.³⁰⁶

This problem has been a continual source of contention between the Engineers and MCWU/TUF. The MCWU argues that the Engineers's conduct is destroying effective unionism by increasing divisions among

301. Even before the passage of the ECA, the Engineers had a history of mergers. It "absorbed a jewelry workers' union in 1987, laundry workers', gold miners', and cement workers' unions in 1989, and draftspersons' and stoneworkers' unions in 1990." CHAISON, *supra* note 179, at 147.

302. New Zealand became the first country to legalize collective bargaining when the Industrial Conciliation and Arbitration Act (the IC&A Act) was enacted in 1894. See A. J. GEARE, *THE SYSTEM OF INDUSTRIAL RELATIONS IN NEW ZEALAND* 56-64 (2d ed. 1988); Alan Geare, *The Proposed Employment Relations Act*, 18 N.Z. J. INDUS. REL. 194, 194 (1993).

303. See Peter Conway, *National's Blitz: Labour Market Reform*, 11/12 RACE GENDER CLASS 2, 5-6 (1991).

304. For a detailed discussion on the law affecting union membership and how this has affected unions, see generally, Dannin, *supra* note 64.

305. The TUF and MCWU accused the Engineers of poaching and exempted the Engineers from their own anti-poaching positions because the Engineers were poaching other union's members. See *Growth to be Promoted*, M & C WORKERS NEWS, June 1996, at 6. On the other hand, others could find "remarkably little evidence of unions 'poaching' members from other unions." Raymond Harbridge & Anthony Honeybone, *External legitimacy of Unions: Trends in New Zealand*, 17 J. LAB. RES. 425 (1996); cf. Lea Vaughn, *Article XX of the AFL-CIO Constitution: Managing and Resolving Inter-Union Disputes*, 37 WAYNE L. REV. 1 (1990) (AFL-CIO unions developed voluntary methods to resolve such disputes).

306. See Mathew Dearnley, *Union Battle Threatens to Rock CTU*, N.Z. HERALD, Sept. 7, 1993, at 1. When the Communications and Energy Workers Union (CEWU) collapsed in late 1995, most CEWU members were postal workers, not involved in the Engineer's industry—manufacturing. The CTU, however, said that the posties should join the Engineers. The TUF opposed this and offered to assist the posties in setting up their own union or in any other decision they wished to make, with the exception of joining the Engineers. See *Posties Form New Union*, M & C WORKERS NEWS, Mar. 1996, at 12.

workers and enabling employers to play on those divisions.³⁰⁷ The TUF contends that in some cases employers have assisted unions in poaching other unions' members in return for cooperative unionism, "the development of business dominated unions where so-called 'workplace reform' objectives of helping the employer become more efficient, productive and internationally competitive take precedence over workers' rights, wages and working conditions."³⁰⁸ In short, some of the Engineers' support for multi-employer unionism is based in its desire to grow larger, and this desire, in turn, has exacerbated basic divisions within the labor movement.

Most workplace terms in New Zealand have been set at the enterprise level. This change occurred almost as soon as the ECA was enacted. By 1992, eighty percent of firms surveyed were covered by an enterprise contract and eight percent by an employerwide contract. Just before the ECA was enacted, only nine percent had an enterprise contract and three percent had a multi-plant, employerwide contract, with the rest being multi-employer awards.³⁰⁹ McAndrew found that this radi-

307. In fact, the MCWU specifically targeted the Engineers members at Mitsubishi and elsewhere:

Now, what I want to do is, for example, the Ford Motor Company in Auckland where the Engineers gave concessions, I want to go up there and issue a leaflet to those people, saying: 'You don't have to put up with this rubbish. You can join a good union if you want. We can force your union to get in a good advocate, someone that actually knows something about the industry.' And I want to circulate that leaflet in the middle of the year to the people in that plant and invite them to take action to defend their interests.

Even if they ignore it, which I expect they will, at least when the Engineers Union and the employer sit down to negotiate, both know there's someone out there that they don't like that's willing to represent those people in a militant fashion and organize them. And so that acts to restrain them 10% and means that they give 10% less concessions. That means when I go to Mitsubishi and they say: 'This is what they've done at Ford's,' it won't be as bad as what they might otherwise have done.

* * *

Allowing there to be competition, I don't see as being necessarily unhealthy, basically because many unions have become totally collaborative, and I don't see them breaking out of that mold, and I don't see why they should have a right to captive prisoners, that people should have no hope of getting out of them and organizing in a genuine fashion. So a law that gives people the freedom to reorganize, I don't see, necessarily, that there's anything wrong with that.

Clarke Interview, *supra* note 111.

308. *Membership Poaching Declaration*, M & C WORKERS NEWS, Dec. 1993, at 6; *see also Disunity Costs Tegel Workers*, M & C WORKERS NEWS, Sept. 1995, at 6; *Tasman Targets Union*, M & C WORKERS NEWS, Sept. 1995, at 3.

309. *See generally*, McAndrew, *supra* note 253. Many workers remained in limbo, their conditions determined by old expired awards or with no contractual arrangements, something

cal shift had occurred relatively easily, with the impetus to move from awards to individual contracts coming from the employer eighty-eight percent of the time. He also found that most of the bargaining preceding these agreements was actually more in the nature of employers' imposing terms.³¹⁰

Does bargaining on an enterprise basis promote an enterprise focus and thus promote the employer's business? New Zealand's current bargaining structures based in the enterprise have not necessarily led to improvements by anyone's measure. CTU economist Peter Harris observes:

By 'fracturing' the employment relationship to enterprise level, the Employment Contracts Act massively shrinks the capacity for industry strategic approaches to key issues of skills development, career structure, national performance standards, improved work methods to best international practice, and greater worker confidence in the viability of the industry, rather than the current employer.³¹¹

In fact, the various forms of multi-employer representation that now exist in the United States came into existence because both employers and unions agreed that they were useful to both parties. They too have been an important basis for promoting workplace justice and practical needs, such as training. Weakening those structures may well have the same impact as the move to the enterprise as the basis for setting terms has had in New Zealand.³¹²

Thus, although in New Zealand under the ECA there has been an increase in flexible forms of representation, increased union competition and a precipitous decrease in multi-employer forms of bargaining, this has not promoted bargaining, as that term is normally understood, or led other desirable results. As the Employment Court said, currently negotiations for an employment contract in New Zealand "can amount to the presentation by one intended party to the contractual relationship of a form of contract to the other and the former's refusal to deviate from its

quite close to the American system of employment at will. *Id.* at 17. These figures do not include firms which have moved to individual contracts.

310. *See id.*; see also Rasmussen, et al., *supra* note 167, at 456.

311. HARRIS, *supra* note 155, at 10.

312. For a discussion of these structures, see Dannin, *supra* note 61, at 24-26; Hamid Azari-Rad, et al., *The Effects of the Repeal of Utah's Prevailing Wage Law on the Labor Market in Construction*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 32, at 207.

offer.”³¹³ The question for the U.S. system is whether this would be considered an improvement in labor relations that the law should promote.

C. Assessing the ECA as a Model for U.S. Labor Law Reform

Samuel Estreicher, a vigorous proponent of the sorts of labor reforms discussed here, argues moving to labor-management cooperation based in enterprise bargaining with value-added unions will reverse declining membership among American unions.³¹⁴ This will occur, he says, because employers will be less opposed to this new form of unionism, which will impel unions to become partners in making an enterprise more productive.³¹⁵ Furthermore, workers will be more attracted to less adversarial unions.³¹⁶ On these terms, a labor law system would be successful based on four specific criteria: (1) if it promotes productivity improvements which attract employers to embrace unions as partners; (2) if union membership increases; (3) if there is a positive social impact; and (4) if workers are thus motivated to become members of value-added unions as opposed to traditional adversarial unions.

1. Whether Productivity Improvements Have Motivated New Zealand Employers to Embrace Unionism

Are workers attracted to joining value-added unions, and do employers want unions as partners in making productivity improvements under win-win bargaining? Existing evidence from both the United States and New Zealand suggests that the answer to both questions is no.

First, the assumption that value-added unions promote employer productivity appears to be incorrect for several reasons. Several studies have shown that workers organized by traditional unions are more productive than are unorganized workers.³¹⁷ In other words, whatever these unions have added might be missing with less powerful, more compliant unions; thus, employers might not experience increased productivity and might not see a need for any union.³¹⁸ Indeed, this speculation has been

313. Northern Distribution Union (Inc) v. 3 Guys Ltd, [1992] ERNZ 903, 915.

314. See generally Estreicher, *supra* note 8.

315. See *id.*

316. See *id.*

317. For cites to studies, see Kohler, *supra* note 24, at 282, n.13.; see also Kelley & Harrison, *supra* note 28, at 247.

318. It is not possible to assume that management will always make the right decisions. The actions and reactions of automobile companies during the past few decades are littered with examples of poor and in some cases criminal choices. See BOWLES ET AL., *supra* note 30, at 12–13. Some union oppositionalism may make management slow down and rethink its proposals.

borne out by the New Zealand experience. The assumption that an ECA-like regime would increase productivity by allowing employers to remove work practices that reduced output has not been borne out. The ECA has indeed given managers more power to manage, and they have used that power to eliminate what they saw as inefficient work practices. However, these managers have not generated higher productivity.³¹⁹ "[T]he gains to employers have been limited to lower pay and greater freedom to manage, not in higher output per worker," writes New Zealand economist Brian Easton.³²⁰ The reasons for this unexpected outcome are unknown. Easton speculates:

Perhaps insofar as there were worker controlled work practices they did not affect productivity. On reflection that is not so surprising. Workers have an interest in higher productivity because they can extract higher pay. Perhaps there were only few or marginal occasions when they restricted efficiency in a way that reduced their pay.³²¹

Furthermore, employers are unlikely to prefer value-added unions. Individual employers are likely to be unable to measure productivity and to discern precisely what is responsible for any changes in productivity. What employers are far more likely to be able to measure are wage cuts and labor costs. Reductions in labor costs are not the same thing as increases in productivity, but that distinction may be meaningless to an employer who is more concerned with how much it costs to make a certain number of units.³²²

In addition, it may be that the power of workers determines whether an employer is encouraged to take these factors into consideration or is allowed to ignore them. It may also be that unions with sufficient power to oppose or slow management decisions play a useful role in the management of the enterprise.³²³ The lesson, though, is that if employers will

319. See Easton, *supra* note 211, at 209.

320. *Id.* at 215.

321. *Id.*

322. There may also be a complex interaction between social factors and employer decisions that affect productivity:

Indeed, the kind of technical factors emphasized in conventional productivity theories—such as the rate of capital formation and technological change—cannot adequately account for the slowdown in U.S. productivity growth. . . .

' . . . Social factors provide a much more promising explanation [for the decline in mining productivity]—the miners' rejection of unsafe working conditions, the coal-mine operators' stonewalling on the safety issue, and the subsequent breakdown in labor-management relations.'

BOWLES ET AL., *supra* note 30, at 7; (1990). Easton, *supra* note 211, at 221.

323. See KORTEN, *supra* note 32, at 207–14, 222.

not listen to workers' concerns, the result may be declining productivity. Weak, compliant unions cannot get employers' ears.

It also ignores U.S. history to assume that employers would be receptive to unions as partners in management. In the mid-1940s management feared that unions had expanded the scope of bargaining into areas that were not properly those in which unions should be interested. It was felt that "absence of defined limits gave to collective bargaining its sinister edge."³²⁴ Management wanted to reduce the scope of bargaining and fought to do so. GM, for example, was willing to take a huge loss in order to drive this point home. GM refused to bargain on any matters designated within the sphere of management and "opposed any form of labor-management cooperation that gave the union a place, however minor or advisory, on management's side of the line."³²⁵ Given this history,³²⁶ is there any reason to believe that employers are now eager to share an enlarged menu of bargaining with unions?

All these factors suggest that employers will not want to take on a union as a partner in improving its productivity. New Zealand employers have overwhelmingly preferred to go it alone. Reading what employers in New Zealand say about unions and what they have been doing, the evidence is that employers have no interest in entering into partnership with unions. Nothing suggests that U.S. experience would be different.

2. Union Membership under the ECA

Estreicher argues that his proposed system will increase union density both because this system will gain the support of employers and workers.³²⁷ However, experience with ECA-style unionization is a powerful rebuttal to this idea. Union membership in New Zealand was more than cut in half within the first five years of the ECA's existence, and union density dropped from 41.5 percent of the workforce in 1991 to 19.9 percent in 1996.³²⁸ There is no evidence that the free fall has

324. DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE* 163 (2d ed 1993).

325. *Id.* at 169.

326. *See id.* at 159-73. The same history also suggests that unions do not value control issues as does management. The GM unions struck a bargain with management to let management manage in return for money. Early on a confident union official had claimed that collective bargaining would progressively cut into management prerogatives because these things affected the workers and built the union's strength. However, by the mid-1940s wage increases had become the chief union goal. *Id.* at 171-75.

327. *See generally* Estreicher, *supra* note 8.

328. *See* Aaron Crawford et al., *Unions and Union Membership in New Zealand: Annual Review for 1995*, 21 N.Z. J. INDUS. REL. 188, 189 (1996). Another study in late 1996 found that private sector unionism had fallen to twelve percent. Overall union density was twenty-three percent, boosted by over ninety percent union density in the public sector. *See*

stopped, and that union representation will not fall farther under the ECA. The magnitude of the ECA's impact on unions in New Zealand cannot be overemphasized. In just five years New Zealand unions suffered the same level of losses, which took over forty years to accrue in the United States.

No doubt there are many reasons why New Zealand unions have declined so dramatically. One important reason seems to be that unions have been so weakened under the ECA that they have little to offer most workers. Union decline has gone hand-in-hand with deteriorating working conditions, particularly for those in the lowest paid positions. These economic losses hit almost immediately. There have been classified advertisements by experienced, skilled workers seeking fulltime work for as little as \$50³²⁹ a week³³⁰ or even eager to accept no-pay, experience-only jobs.³³¹ In November 1992, fifty percent of employment contracts in a study—and these were the better contracts—provided for a minimum adult wage of \$328 a week or less, with some contracts providing a rate below the legal adult minimum of \$245 a week.³³²

It might be argued that these conditions only mean that the law has not had enough time to have an impact. However, even after five years, low wages persist. The average minimum adult weekly pay rates among New Zealand's largest employers in early 1996—arguably the ones offering the best terms—ranged from a low of \$306 in agriculture to a high of \$475 in transportation.³³³ In February 1996, Prime Minister Bolger, the leader of the party which had enacted the ECA, admitted that there has been only 0.1 percent annual average real wage growth from March 1990 to March 1995.³³⁴ This reality is a far cry from the NZBR's 1993 ill-founded claim that in two years workers had seen their pay rise by eight percent.³³⁵

Of course, union density in New Zealand may reveal nothing about unions as negotiators, since employers are permitted to negotiate with

Anna Smith, *Labour Act Not as Flexible as Imagined*, DOMINION (N.Z.), Nov. 27, 1996, at 25.

329. All figures are in New Zealand dollars.

330. See *Situations Wanted*, PRESS WEEKEND, May 30, 1992, at P-14.

331. See When a Christchurch cafeteria advertised a job for a kitchen-hand for no pay, experience only, the cafeteria got seventy-three applicants. Russ Francis, *New Zealander Warns of Free Trade Havoc*, VANCOUVER SUN, Jan. 16, 1992 at E3; for other examples, see Dannin, *supra* note 94, at 120-29.

332. See Harbridge, *supra* note 174, at 121; Raymond Harbridge & Stuart McCaw, *Monitoring Collective Bargaining*, in NEW ZEALAND IN RESEARCHING MANAGEMENT STRATEGIES AND BARGAINING: PAPERS PRESENTED AT THE UNION / TERTIARY RESEARCH CONFERENCE, VICTORIA UNIVERSITY, WELLINGTON 3, 14 (Linda Sissons, ed., 1991).

333. See DEPT. OF LABOUR, CONTRACT 12 (1996).

334. See Rasmussen, *supra* note 213, at 116.

335. See Kerr, *supra* note 209, at 4-5, 10-11, 15.

any representative they choose. Estreicher argues that employers will be attracted to value-added unionism. A cynic might well suggest that employers would certainly support a system that means lower pay for workers because the decline in pay can translate into increased profits for companies and increased dividends for shareholders. However true this might be of New Zealand employers, there is no evidence that they have embraced partnership with these value-added unions as a means to achieve lower labor costs. Not only have they been able to achieve labor cost savings on their own, but, as in the United States where "[t]here is growing recognition that employer opposition to unions is an increasingly important, if not dominant, determinant of changes in union density rates,"³³⁶ employer opposition to unions is also strong in New Zealand. The power that the ECA gives employers to control recognition of unions has not given employers any reason to agree to negotiate with unions, even with a union that is willing to be a partner.³³⁷ This could have been predicted from recent history which demonstrated that New Zealand employers were accustomed to having unilateral control of the workplace, even in the presence of unions.³³⁸ When the ECA gave them more power to act unilaterally, most employers decided to go it alone.

3. The Social Impact of the ECA

It might seem self-evident that workers would not be happy with a system that delivered low wages. However, the dimensions of worker experience under the ECA is more complex than this. There is strong evidence that New Zealand workers have not been not happy with their lot under the ECA freedom of contract regime. This is now a long-standing problem. A 1993 CTU poll found that forty-four percent of workers wanted to leave their jobs.³³⁹ Many complained that they had less power to control their environment.³⁴⁰ Work accidents had increased by fifty percent and the use of stimulants and mild drugs had increased.³⁴¹ When employees were asked about changes in their work

336. Chaison & Rosse, *supra* note 258; See also Hoyt Wheeler & John McClendon, *The Individual Desire to Unionize*, in *THE STATE OF THE UNIONS*, *supra* note 89, at 47, 65.

337. David Brody observes that in the new dynamic U.S. sectors, "no amount of union enthusiasm for cooperative relations and employee involvement is likely to persuade employers that collective bargaining is preferable to a union-free environment. And . . . what incentive would . . . employees have for joining a union?" BRODY, *supra* note 324, at 258.

338. See Ellen J. Dannin, *The Impact of Labour-Management Cooperation on New Zealand Unions*, 20 VIC. U. WELL. L. REV. 293 (1990).

339. See Greg Jackson, *Study Finds Many Want to Quit Job*, PRESS (N.Z.), May 21, 1993, at el; see also Rasmussen et al., *supra* note 167, at 457.

340. See *id.*

341. See *id.*

conditions, the results were mixed.³⁴² They felt they were working harder, that communication had increased and that they were learning new skills; but they felt less trust and security. All other measures were mixed including job satisfaction, cooperation with management, and promotion opportunities.³⁴³

The impressions of unhappiness elicited by the poll are reflected in workers' actions. Unhappiness at work extends even into the public sector. Staff turnover among the public sector rose 17.8 percent for the year 1993/1994 and an additional 21.4 percent for the year 1994/1995.³⁴⁴ When workers feel unhappy with work conditions but disempowered—that is, when they feel they have no voice—the only way they can improve their situations is to leave. Leaving is what New Zealand workers have been wanting to do and increasingly have been doing.

Worker discontent is also leading to increasing levels of strike activity and increasingly expensive strikes.

STRIKES IN NEW ZEALAND—1992-1995

<i>Year</i>	<i>No of Stoppages</i>	<i>No of Employees Involved</i>	<i>Person Days of Work Lost</i>	<i>Estimated Loss in Wages and Salaries \$m.</i>
1992+	54	26,803	113,742	19.372
1993	58	21,303	23,770	2.683
1994	69	16,042	38,262	4.580
1995	69	32,048	53,352	6.813
1996*	73	42,571	69,996	9.828

Source: Statistics New Zealand, Work Stoppages: January 1997³⁴⁵

+ reflecting strikes related to the pendency and enactment of the ECA

* all 1996 provisional

342. *See id.*

343. *See id.*

344. *See Rasmussen, supra* note 213, at 116.

345. *See Graeme Hunt, Labour Disputes Increase as ECA Loses Its Gloss, NAT'L BUS. REV.*, Sept. 19, 1997, at 27.

Many of the recent strikes have taken place in the public sector, reflecting a growing unhappiness among government workers.³⁴⁶

This unhappiness is a problem not only for the workers concerned but for New Zealand society as a whole. Turnover and strikes are expensive for all involved. In fact the rates of turnover and of strikes may help explain two phenomena: the decline in training and the failure to improve productivity. High turnover or the risk of it inhibits training and tends to lead to an undertrained and thus less productive workforce.³⁴⁷ Where employee turnover is high managers cannot expect employees to provide the sort of information that can enhance company performance.³⁴⁸

Perhaps New Zealand employers may eventually become sufficiently concerned by this to question the ECA regime. So far this has not happened. Despite the evidence, despite depressed workers' conditions, and despite high employee turnover, New Zealand managers believe they have had good workplace relations and high employee morale and satisfaction.³⁴⁹ However, there has long been a large gap between employee and employer perceptions of workers' feelings towards their jobs.

PERCEPTION OF WORKPLACE IMPROVEMENTS³⁵⁰

	Employers' View	Employees' View
Job Security	60%	14%
Job Satisfaction	51%	23%
Communication	52%	31%
Trust	42%	15%
Cooperation	61%	22%

346. See generally Rasmussen, *supra* note 213.

347. See Paul Osterman, *Pressures and Prospects for Employment Security in the United States*, in *EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR: INTERDISCIPLINARY APPROACHES AND INTERNATIONAL EVIDENCE*, 228, 233 (Christoph F. Beuchtmann, ed 1993). Or as economist Brian Easton puts it: "[L]ong term flexibility is undermined by short term flexibility, which inhibits the worker from developing a loyalty to the firm, and the acquisition of firm specific skills, while also discouraging the firm developing those skills in its work force." Easton, *supra* note 211, at 216.

348. See Schwochau et al., *supra* note 36, at 397.

349. See CLIVE GILSON & TERRY WAGAR, *EMPLOYEE INVOLVEMENT AND HUMAN RESOURCE MANAGEMENT IN AUSTRALIAN, NEW ZEALAND, AND CANADIAN ORGANISATIONS* 12, 13, 17 (1996); see also Legat, *supra* note 158, at 107 (nineteen percent annual turnover common).

350. See Whatman et al., *supra* note 107, at 68.

This again suggests that there is poor communication, despite the common use of techniques such as labor-management cooperation, which is often believed to improve communication. These results further support the conclusion that in New Zealand labor-management cooperation is not being used to empower workers or to gain their input into improving their working conditions but rather to persuade these workers to accede to their employer's goals.

This evidence suggests some important insights into labor relations. It is striking that, as New Zealand employers have gained power, they have lost touch with their workers. Even more, this has happened despite an increased use of labor-management cooperation. This suggests that employers may be less likely to understand their employees when a system tends towards a very large disparity of power. In other words, the NLRA's insights about power balancing are important and fundamental to a functional industrial relations regime.

4. How Value-Added Unions Fare versus Traditional Adversarial Unions

Do workers prefer membership in value-added unions over traditional unions? No study can be used to reach a definitive conclusion as to whether one or the other approach has been the clear favorite when workers have been faced with a real decision about joining a union as opposed to answering a survey. Were a study to be done, it would require teasing apart the impact of industry growth and decline, worker perceptions of employer actions, relative degree of felt power, the prior union membership and experience of workers who have joined one union as opposed to another, the resulting membership of workers who have left a union, the existence of employer coercion, and actions which demonstrate individual employee choice as opposed to mergers brokered at the union organizational level. Here, however, it is sufficient to find evidence that demonstrates that at least some of the time workers have opted for the adversarial union model over the value-added model or that the collective actions of workers as found in union growth demonstrates that workers have not rejected the adversarial union model for the value-added model.

In fact, the New Zealand experience provides no evidence that workers choose more conciliatory unions over traditional unions. More specifically, when the MCWU is pitted against the Engineers, the MCWU is not necessarily less successful in attracting workers. The TUF/MCWU position of "no wholesale concessions given to employ-

ers, nor soft deals done to try and curry their favour' »³⁵¹ seems to have found support among enough New Zealand workers to mean that these organizations have been growing.

Specific incidents provide anecdotal support for the conclusion that at least some workers have been attracted by the more traditional union over the value-added union. For example, fifteen Northern Distribution Union members at the South Auckland Nissan assembly plant took a voluntary layoff rather than accept integration into the Engineers.³⁵² The Public Service Association has also lost members who felt it was too conciliatory.³⁵³ Furthermore, at sites such as Mitsubishi where the Engineers was also once a dominant union, the MCWU has become the union which not only has the largest number of members but also is the lead union in negotiations.³⁵⁴ This does not mean that there have not been instances in which workers have chosen the Engineers over the MCWU. There certainly have been situations where this has happened. However, what is important here is that they have not done this in all cases.

As to the second measurement of employee preference, overall patterns of union movement growth, the TUF has been growing and gaining members and affiliates, despite its initial small size, despite the ECA, and despite severe redundancies in industries it represents. Meanwhile, the CTU has been losing members under those same conditions. When the TUF was formed in 1993, the CTU had thirty-three affiliated unions which represented 321,119 members.³⁵⁵ Two years later, the CTU had twenty-five affiliated members (not as a result of disaffiliations but through mergers of members), but the number of members had declined to 284,383. This is a decline of eleven percent over two years. The TUF began with nine affiliates in 1993 and 20,800 members.³⁵⁶ Two years later it had grown to fifteen affiliates with 25,454 members—that is, an increase of twenty-five percent in two years.³⁵⁷

351. *Growth to Be Promoted*, M & C WORKERS NEWS, June 1996, at 6.

352. See Herbert Roth, *Chronicle*, 17 N.Z. J. INDUS. REL. 247, 249 (1992).

353. See Grant Duffy, *PSA Resignations Raise Fundamental Issues*, PSA J., Apr. 1992, at 7; Christopher Moore, *John McKenzie: Always a Fighter But Never Blind*, PRESS (N.Z.), May 7, 1992, at 13; Clarke Interview, *supra* note 111; *South's NUPE Gathers Steam*, LABOUR NOTES, Dec. 1992, at 6, 7; *Regional Contracts in Health Only Way Forward*, PSA J., Apr. 1992, at 7; Roth, *supra* note 352, at 124.

354. See Mitsubishi, *supra* note 199, at cl.1.1.

355. See Crawford et al., *supra* note 328, at 191.

356. See *id.*

357. See *id.* It is impossible to compare the Engineers with the MCWU in this way, because it would necessitate teasing apart the impact of mergers, which have been a major source of growth for the Engineers in particular during the last few years. The nature of these mergers is such that they may reveal nothing about worker preferences.

Although the CTU is still more than ten times larger than the TUF, these trends cannot be interpreted to lend support to Estreicher's predictions as to how labor-management cooperation would function.³⁵⁸

David Brody argues that the U.S. labor movement will not prevail by retreating from a "them and us" basic orientation in an effort to appeal to nonunion employers.

It is their employees that have to be persuaded, and if and when that time comes, what will persuade them will be the only kind of appeal that has worked with American workers since the days of Samuel Gompers: namely, the identification of the union with their demand for industrial justice.³⁵⁹

Indeed, at least one study has shown that it is not only employees who are attracted by unions which act like traditional unions. New Zealand employers who have dealt with more assertive unions have tended to have more favorable views of them.³⁶⁰

III. TRANSLATING THE NEW ZEALAND EXPERIENCE TO THE UNITED STATES

If the value-added union model is not attracting members in New Zealand, is there any reason to assume it will operate differently in the United States? As discussed above,³⁶¹ the United States and New Zealand are sufficiently similar that, at a minimum, there is no reason to believe similar results would not occur here. Indeed, they may well be worse, for U.S. unions have undergone such a long period of decline that they may be unable to take on a sufficiently activist role to regain their former strength. Thus, the ECA experience should be carefully studied before a similar system is enacted in the United States. If, on the other hand, New Zealand's experience is directly applicable to the United States, and there is no reason to think it would not be, adopting our own ECA could spell the death of unionism. On these grounds, anything resembling it should be rejected if one believes unions make a valuable contribution.

Although there is a gulf between these two extremes, both historical and current experience suggest that the New Zealand situation under freedom of contract is directly relevant to what would happen in the

358. See BRODY, *supra* note 324, at 258.

359. *Id.* at 263.

360. See Ian McAndrew & Paul Hursthouse, *Reforming Labour Relations: What Southern Employers Say*, 16 N.Z.J. INDUS. REL. 1, 8 (1991).

361. See *supra* text, at nn. 82-84.

United States under a system based on freedom of contract and labor-management cooperation. Furthermore, history and current events both demonstrate that, no matter what they may say when polled, workers are not attracted to a union which wants to be their employer's partner.

A. Historical Experience—Old Debates in New Forms

It is easy to assume that a statute of the NLRA's vintage must no longer be relevant. Changes in technology, the workplace, and commerce and the advent of globalization seem to have so profoundly altered the world that few laws could fit our new situation. It is easy to assume this only until one starts to read the debates which took place around the passage of the NLRA. Sixty years ago the Wagner Act hearings examined and rejected reforms that were very similar to many now being urged.³⁶²

The NLRA's framers had before them the world that existed as the result of a regime based upon freedom of contract. David Montgomery recently explored the details of the freedom of contract regime at length in *Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century*.³⁶³ Workers were weak, and government acted in a way that exacerbated the disparity of power. Montgomery found that courts frequently intervened to impose terms not agreed to or even known to the workers when those terms strengthened the employer.³⁶⁴ On the other hand, government was willing to support employer actions even though they violated statute.³⁶⁵ Indeed, workers entered into employment not as an exercise of freedom but from necessity because a worker who does not sell today's labor to-

362. See Peter Feuille, *Unions as Antagonists, Not Partners*, in THE STATE OF THE UNIONS, *supra* note 89, at 85, 91; Julius Getman & Thomas Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1425-26 (1983); David Brody, *Labor's Crisis in Historical Perspective*, in THE STATE OF THE UNIONS, *supra* note 89, at 277, 294-300; James J. Brudney, *A Famous Victory: Collective Bargaining and the Statutory Aging Process*, 74 N.C. L. REV. 939, 948-58 (1996); see also RICHARD BLOCK, ET AL., LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE: THE STATE OF THE WORKPLACE IN THE 1990S 5-9 (1996).

363. See e.g., DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1993).

364. See *id.* at 43-45, 57-59, 151-52.

365. In 1877, for example,

Cincinnati employers refused to reduce the hours of labor to conform to a new state law, which made eight hours a legal day's work. When thousands of workers paraded through the streets to demand obedience to the law, they found their city infested by almost two thousand guardsmen, eight Gatling guns, and a battery of heavy artillery—defending the manufacturers who defied the law!

Id. at 101.

day cannot sell it tomorrow.³⁶⁶ Indeed, Montgomery compares the efficacy of freedom of contract versus collective action in bettering workers' lot and concludes that job exit on an individual basis does not change work conditions as effectively as collective action.³⁶⁷

Consequently, the ability to associate openly to advance their own interests, and to act together to regulate their own lives, was the most precious of all liberties. Without it, constitutional rights than has been historically conceived and elaborated in terms of the attributes of property, the exchange of commodities, and the protection of privileged minorities from majoritarian government, had little to offer to those who worked for others in exchange for wages.³⁶⁸

Sixty years ago, testimony convinced Congress that this regime should not be preserved, because it had plunged the country into economic and social chaos. The Wagner Act hearings took great care in examining the factors that led to this result. They concluded that employers were willing to pressure employees to forego the unions of their choice.³⁶⁹ Furthermore, the government helped make employers particularly effective in squelching unionization by giving employers the powerful advantages of incorporation. That is, it supported employer collectivity. Indeed, the discussion concerning government support for inequality is particularly pertinent in an age of multi-national corporations, a form which gains its power from the assistance of government and law. When nothing balances the scales, the power of incorporation and the forces of competition gave employers power which they wielded in ways that led to devastating results. Economist Arthur Suffer testified that, in that period, the government had failed to equalize the advantages employers had as a result of constitutional protections provided the institution of private property, as he said:

The drive among employers for competitive advantage and the autocracy of management possible under the rights of ownership has reduced the workers on many occasions almost to the

366. *See id.* at 49.

367. *See id.* at 158-59.

368. *Id.*

369. For example, when management at Pacific Greyhound Lines learned of one organizing drive, management contacted the drivers, called them into the office individually, and handed each one: a contract, the newly formed union bylaws and constitution, and a form to revoke the power of attorney that the drivers had given the union. NLRB 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 234 (1949). For personal experiences with employers and unions during the Depression era, see, for example, SLAVES OF THE DEPRESSION: WORKERS LETTERS ABOUT LIVES ON THE JOB (Gerald Markowitz & David Rosner eds., 1987).

status of industrial serfs. On the other hand, the pace of competition set by the most unscrupulous has reduced most of the employers at various times to the stage of bankruptcy.³⁷⁰

As the committee explored these problems and how the law had contributed to them, the committee became more inclined to curb that power so that the law would operate in a more socially useful way.³⁷¹ The committee concluded that employers act collectively for their individual interests and expect the community to resolve any problems they create:

This leaves employers free to shirk their responsibilities of so managing the economic system as to make it serve its main purpose of providing the population with the best possible living. In an industrial society worthy of the name, owners and employers should be leaders and builders as well as profit takers. Is there any way of holding them to these responsibilities as long as they are free to refuse to deal with their employees on a basis which enables their employees to protect their economic right to employment at the best possible terms?³⁷²

The Wagner hearings focused particularly on the labor-management cooperation model versus the traditional union model. The NLRA's drafters had before them the fresh experience of the failed National Industrial Recovery Act (NIRA), which had promoted the labor-management cooperation model through employer representation plans (ERPs). On the one hand, "[c]orporate employers argued that labor's rights could be fulfilled through employee representation plans (ERPs), that is, by a system of works councils."³⁷³ On the other hand, collective bargaining requires representatives whom employers recognize and deal with in good faith; representatives chosen free from employer domination; and respect for the sanctity of agreements entered into. Before the NLRA was enacted, these conditions did not exist. One witness testified:

Again and again cases have come before the National Labor Board in which the employer flagrantly violated section 7(a) but took refuge in the claim that he observed the language of the

370. NLRB, *supra* note 369, at 284.

371. See David Brody, *Section 8(a)(2) and the Origins of the Wagner Act*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 32, at 29.

372. NLRB, *supra* note 369, at 316.

373. David Brody, *The Breakdown of Labor's Social Contract: Historical Reflections, Future Prospects*, *DISSENT*, Winter, 1992, at 32, 37; see also Feuille, *supra* note 362, at 91; Kohler, *supra* note 27, at 518-34.

statute. He made the defense that he met, received, and conferred with representatives of his employees. In one extreme instance an employer came to the National Labor Board and held that he had observed the law, although it was clear that he has had no intention of coming to an agreement.³⁷⁴

If the passage of sixty years can obscure the relevance of this debate, more recent experience with the ECA reaffirms that lacking these protections still makes workers vulnerable to abuse. Arthur Suffer observed that labor regarded the prior legislation, § 7(a) of the NIRA,³⁷⁵ as inadequate because it was “‘merely a pious declaration of the right of labor to organize and to bargain collectively . . . [which went] to the right of every employer to determine his own course as he will, regardless of the wishes of the workers.’”³⁷⁶ He concluded that it was impossible to expect “that the rules of the game will be fair, if those with power and selfish interests at stake are allowed to make them.”³⁷⁷

The findings from these hearings appear in the NLRA at § 1, which states that individual workers do not possess “full freedom of association or actual liberty of contract” and thus cannot bargain as equals with “employers who are organized in the corporate or other forms of ownership association.”³⁷⁸ The NLRA’s solution is to “restore equality of bargaining power between employers and employees.”³⁷⁹ In other words, as law had fostered changes that disrupted equality, law must act to restore the pre-existing equality. This suggests that unions must echo the current corporate form if they are to have the power to represent worker interests. Corporations today tend to exist and to draw their power from features such as interlocking corporate directorships and multinational operations. For unions to equal that power, they must exist in more than the enterprise form.³⁸⁰ The NLRA was not the first statute to recognize

374. Testimony of Dr. Francis Haas, NLRB, *supra* note 369, at 147.

375. See 48 Stat. 198 (1933). For a brief discussion of § 7, see Brody, *supra* note 371, at 29.

376. NLRB, *supra* note 369, at 315.

377. *Id.* at 316.

378. NLRA § 1; 29 U.S.C. § 151.

379. *Id.* (emphasis added). Some argue that society may now have a renewed faith in liberty of contract. See Brudney, *supra* note 362, at 1029, n. 301.

380. See NLRB, *supra* note 369. The original title of this act was the Labor Disputes Act.

§ 2 The tendency of modern economic life toward integration and centralized control has long since destroyed the balance of bargaining power between the individual employer and the individual employee, and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living, with consequent detriment to the general welfare and the free flow of commerce. . . . It is

that the worker's wage cannot be tied only to the market. In 1910, French law recognized the role wages play in a worker's security. In that case, as with the NLRA, law assisted work in transcending its economic utility and to take on a social and collective dimension that transcended the mere performance of tasks by individuals for pay.³⁸¹

The NLRA hearings provide even richer insights into the reform agendas which promote eroding boundaries between employer and union spheres in the name of labor-management cooperation. A fundamental principle of many who advocate labor-management cooperation is to view workplace conflict as a psychological problem resulting from distorted images, rather than as an inherent problem within the hierarchical workplace relationship and inequality of power.³⁸² Labor-management cooperation is intended to permit the parties to get past these psychological problems in order to increase production for the employer and satisfaction for the employee, thus leading to a win-win situation for both.³⁸³

The evidence from serious studies tends to show that labor-management cooperation programs fail because they are based on a false premise. They assume that tinkering with the employment relationship and attempting to remove adversarialness through psychological changes is possible.

The adversarial relationship between labor and management does not derive from some historical accident or from a colossal misunderstanding that "better communications" or a "more mature approach" can resolve. It stems from the fact that businesses survive by beating their competitors—and, other things being equal, this means squeezing as much as possible out of workers. Unions did not cause this conflict; they arose as a response to it. QWL, too, is a response to this conflict—but it is management's response.³⁸⁴

A recent study of teams provides interesting insights into this issue. It found that although, in the company studied, some positive effects

hereby declared to be the policy of Congress . . . to provide for the general welfare, by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining its standards of living, by encouraging the equalization of the bargaining power of employers and employees, and by providing agencies for the peaceful settlement of disputes.

NLRB, *supra* note 31, at 1.

381. See Robert Castel, *Work and Usefulness to the World*, 135 INT'L LAB. REV. 615, 618-19 (1996).

382. See Kohler, *supra* note 27, at 513-18.

383. See WELLS, *supra* note 35, at 2-3; see also Parker, *supra* note 39.

384. WELLS, *supra* note 35, at 13.

were associated with team membership, such as lower absenteeism, team members also suffered from higher stress, greater work-family conflict, and increased smoking. On the whole, however, the study failed to find the expected association between team membership and job satisfaction. When the researchers then probed more deeply into the nature of the teams they were studying in terms of "amount of say in decision-making, exposure to organizational changes, and self-definition of team membership,"³⁸⁵ they found that team members regarded themselves as having little decision-making power. Furthermore, although teams are supposed to introduce members to multi-skilling, the study found no difference in the skill level of team and nonteam workers in the workplace. Moreover, when the study investigated whether the employer's definition of who was on a team corresponded with the workers' self-definition, the researchers found there was a difference in point of view. When outcome measures were re-analyzed based on the workers' self-definition, they all, positive and negative, became non-significant.³⁸⁶ These results capture the lack of evidence that these sorts of systems make a contribution of any significance to the organization of work today.

The NLRA's fundamental insight is that the boundary between employer and employee must be maintained and must be clear; otherwise the more powerful party will encroach on the weaker.³⁸⁷ Only when a party is clear as to its own interests can it bargain effectively and make appropriate compromises. Labor-management cooperation cannot erase the fundamental differences between the employer and the employed, nor should it try to. Not only is workplace codetermination more effective when it exists through unions, rather than without them,³⁸⁸ experience shows that participation in strategic decision-making can only take place where unions are already strong.³⁸⁹ Given the current weakness of U.S. unionization and these insights, proposals for a labor-management cooperation system of labor relations are likely to have series of unfortunate outcomes similar to those we have seen in New Zealand.

385. Knudsen & Grunberg, *supra* note 36, at 12.

386. *See id.* at 13-16. Experience at Mazda was that workers were pressed so hard to achieve high levels of production, they were not cross-trained and were often required to do the one job at which they were best. *See* FUNCINI & FUNCINI, *supra* note 27.

387. *See* Brody, *supra* note 371, at 29; *see also* James Gross, *The Demise of the National Labor Policy: A Question of Social Justice*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, *supra* note 32, at 54.

388. Kelley & Harrison, *supra* note 28, at 247.

389. Thomas Kochan & Kirsten Wever, *American Unions and the Future of Worker Representation*, in *THE STATE OF THE UNIONS*, *supra* note 89, at 363, 375.

Although the NLRA was enacted over sixty years ago, it embodies wisdom and experience that continue to be relevant. Indeed, it has been noted that, although there has been an increasing call for labor-management cooperation in the United States, only thirty-five percent of workplaces even claim to have transformed their production systems.³⁹⁰ Given the tendency to remain with the old system, there seems even less urgency to embrace labor-management cooperation and the existence of a transformed workplace.³⁹¹ In short, those who study these issues seriously find that there is little evidence that supports the conclusion that this history is no longer relevant.³⁹²

B. Current Experience

Current U.S. experience also suggests that labor-management cooperation and freedom of contract continue to be inadequate bases for constructing a labor relations system. When given an informed and free choice, workers have not been attracted to labor-management cooperation once they have experienced how it is used. In addition, a union's promoting labor-management cooperation and a value-added approach have not guaranteed success in winning members.

Case studies show that the form in which many workers have experienced labor-management cooperation programs is that management tends to revert to traditional methods of control.³⁹³ Failure to fulfill promises of increased worker satisfaction, self-realization, empowerment, and autonomy can result in a worker backlash directed against the union leaders who engaged in cooperation.³⁹⁴ Estreicher notes that the president of the UAW local that bargains with Saturn also faced strong opposition as a result of his support for labor-management coopera-

390. See Larry Zacharias & Cathy Schoen, *Flexible Production Systems, Workforce Polarization, and Worker Collective Action*, in PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL [IRRA] MEETING 207, 208-09 (1995); but see Janice Bellace, *Labor Law Reform for the Post Industrial Workplace*, 45 LAB. L.J. 460, 61-62 (1994).

391. See *id.*

392. See BRODY, *supra* note 324, at 253-57.

393. See WELLS, *supra* note 35, at 70-71. For example, a case study of Mazda's early years found that workers felt patronized and manipulated at team meetings. They felt that management believed that if it said teamwork and consensus often enough it could co-opt the workers even while giving them no involvement in the decision-making process. See FUNCINI & FUNCINI, *supra* note 27, at 138. Workers felt Mazda bossed them around as much as GM but dressed it up by calling it consensus.

394. WELLS, *supra* note 35, at 70-71. The dissidents felt that Mazda had let them down by being just like any other company. By contrast, they believed that their UAW local had betrayed them by being unlike any other union. The UAW, they said, turned on its own cause, ignoring the interests of workers at Flat Rock for the sake of currying favor with Japanese automakers—collecting dues from 3000 new members in the process. FUNCINI & FUNCINI, *supra* note 27, at 197.

tion.³⁹⁵ Worker experience with teams at Mazda's Flatrock, Michigan plant led to precisely this outcome. Two years after the plant opened, Mazda workers voted to replace the cooperative union officials with dissidents. "Few workers in America had as much experience working under a Japanese management system. Their decision to replace the cooperative, 'procompany' union with more militant leaders was not the product of youthful naivete" and occurred even though applicants had been screened to be more cooperative.³⁹⁶ Union dissident movements at NUMMI also won as a reaction to the labor-management cooperation program there.³⁹⁷

The embrace of cooperation may explain the UAW's failure to win votes at other Japanese automobile transplants.

[T]he UAW, intent on creating a cooperative image with Japanese automakers has refused to challenge management over [health and safety] issues. As a result the UAW has not been able to persuade nonunion workers at Japanese plants that it can contribute to the development of a better, more equitable team system. It was not surprising, then, that workers at Nissan-Smyrna, who were already earning over one dollar more per hour than their opposite numbers at unionized Mazda-Flat Rock, did not feel compelled to become part of a union that, in exchange for its two hours of wages per month in dues, simply promised to go along with the team system that was already in place.³⁹⁸

In other words, workers may feel no desire to choose a union which has not been vigorous in representing their interests, or they may feel no need for a union that essentially acts as a junior partner in the management of the enterprise. This dynamic is certainly consistent with the experience in New Zealand.

Workers are not likely to be attracted to labor-management cooperation programs for several reasons. First, while there is some evidence that participation is positively associated with worker performance and satisfaction, the effects are so small as "to raise questions regarding the practical benefits of such programs."³⁹⁹ Labor-management cooperation programs tend to encourage the worker to identify with the employer and the employer's goals and to substitute these for worker and union

395. See Estreicher, *supra* note 75, at 11, n.30.

396. See FUNCINI & FUNCINI, *supra* note 27, at 210, 219.

397. See *id.* at 219; see also Dunlop, *supra* note 201, at 30-31.

398. FUNCINI & FUNCINI, *supra* note 27, at 226.

399. Schwochau et al., *supra* note 36, at 379; see DUNLOP COMM'N REPORT, *supra* note 201, at 45.

goals. As this creates conflicts for the worker between solidarity and performing the job,⁴⁰⁰ the worker may become less enthusiastic about the program. This is more likely to be the case if, as happened at Mazda, the worker sees cooperation as closely connected to unpleasant characteristics commonly associated with these programs, such as accelerating speedups, compulsory overtime, jobs lost to machines, and lower occupational health and safety protections with little or nothing received by the worker in return.⁴⁰¹ Furthermore, increased productivity, which may but does not always result from labor-management cooperation,⁴⁰² may lead to job loss.⁴⁰³ Teams may also be associated with lost jobs when company downsizing occurs in conjunction with the introduction of a labor-management cooperation system.⁴⁰⁴ When jobs are lost, unions also lose members. Furthermore, if workers have come to associate their union with unpleasant consequences, unions are unlikely to be seen as attractive. In other words, the experience of labor-management cooperation may be disempowerment rather than empowerment. Taken in these terms, it is easy to see why workers would not be enthusiastic about it.

Indeed, workers may believe that one employer is sufficient and that a cooperative union is offering them nothing of value.⁴⁰⁵ It may be that narrowing a union's concerns to those of economics—and limiting even that focus to the employer's bottom line—is not attractive to the public which then tends to view unions as representing special interests.⁴⁰⁶ Indeed, U.S. experience has been that membership in traditional unions grew at a time when employers were free to offer cooperative, value-added unions. Eventually, that experience was taken as demonstrating

400. See generally, WELLS, *supra* note 35, at 78–95, 96–98; see also GRENIER, *supra* note 61, at xix. Grenier explains that, while workers get a sense of belonging to their group, they feel less community with other workers in the plant. *Id.* at 17. In fact, teams may be set up to compete against other teams.

401. See WELLS, *supra* note 35, at 79.

402. A survey of recent studies found that most had reported gains in productivity; though one found no improvement in productivity when company records were examined, and self-reporting. Results were also mixed as to whether teams reduced absenteeism. See Knudsen & Grunberg, *supra* note 36, at 3–4; see also GRENIER, *supra* note 61 at 7–13.

403. See WELLS, *supra* note 35, at 76–78.

404. See FUNCINI & FUNCINI, *supra* note 27, at 226.

405. During my years working for the NLRB and in interactions with union members in the years since leaving the Board, the most common complaint from union members I have heard is that their union has either sold them out or is in bed with the employer. In my experience, no one has ever complained that a union had been too active. This suggests that the adversarial union may well be more of a myth than a reality. The New Zealand experience suggests U.S. unions have contributed to their own decline by not being more adversarial. U.S. unions, however, have been in decline for such a sufficient period that they may be too weak now to take on a more adversarial role.

406. See Kohler, *supra* note 24, at 289–90.

that only collective bargaining provided a satisfactory form for ordering the workplace.⁴⁰⁷

It is important to bear in mind that unions are not organizations like any other. They are more than merely vehicles for collective action:

[U]nions are a threat to established authority structures in a way that most other collective arrangements are not. In the U.S. at least, unions represent employees in the bottom ranks of the workplace hierarchy, but to be effective they must persuade the managers at the top of the hierarchy to provide employees with work-related benefits that would not otherwise be provided. This means that unions represent a challenge by the order-followers to the normal (i.e., nonunion) authority of the order givers. In short, among all their organizational characteristics unions are first and foremost a threat to the nonunion workplace order of things.⁴⁰⁸

In short, U.S. experience, both historical and contemporary, coincides with the New Zealand experience under the ECA. The combined experience of these two nations demonstrates that labor-management cooperation is seriously flawed as a basis for labor law.

CONCLUSION

Many currently propose an agenda for radical labor law reform in the United States based on extrapolations from polling data, economic analysis, and theory as to what leads to a properly functioning labor relations system. Although a regime based on neutral or shared values seems attractive in the abstract, empirical evidence demonstrates that it is seriously flawed. All these proposals mirror those advanced by proponents of the Employment Contracts Act in New Zealand. Furthermore, they have since been incorporated into the ECA or have come into being since its enactment. Labor-management cooperation has been implemented widely, flexible forms of employee representation are available and have been tried, and the main union umbrella organization has embraced value-added unionism.

However, empirical evidence reveals that this regime does nothing either to improve union representation or to advance productivity or other important goals. There have been no productivity improvements relative to other systems; indeed, there has been very low productivity

407. See Getman & Kohler, *supra* note 362, at 1422 (1983).

408. Feuille, *supra* note 362 at 90.

improvement in absolute terms. New Zealand unions have not increased their membership. Instead, they have gone into freefall, declining in six years from 41.5 percent to 19.9 percent union density, a loss it took U.S. unions forty years to achieve.⁴⁰⁹ New Zealand unions have been unable to attract members for a number of complex reasons, but an important one is that they are so weak they are able to offer members very little. Average annual real wage growth has been only 0.1 percent from March 1990 to March 1995.⁴¹⁰ Furthermore, value-added unions have not been embraced by employers. The ECA has contributed to increased employee unhappiness and the deskilling of the workforce phenomena that should be cause for serious concern. Finally, there is no evidence that workers will reject a traditional union for a value-added union. The TUF, the traditional union umbrella group, enjoyed a twenty-five percent increase in membership in its first two years of existence while the CTU suffered an eleven percent loss.⁴¹¹

Although it is normally impossible to test proposals for labor law reform, New Zealand's experiences coupled with historical and current experience in the United States suggest that reform based on a labor-management cooperation proposal would be destructive to U.S. unions and to important goals of the society such as increased productivity. Theory and abstract analysis are useful but have their limits. When theory is based on insufficient empirical evidence, it is of little use in predicting outcomes. Fortunately, in this case, we have powerful empirical evidence against which to assess the reform agenda. This empirical evidence demonstrates that the sort of regime many are currently advancing has consistently destroyed or weakened unions and debased the lot of workers. Ultimately it is a system that workers have rejected and, at least in the case of the NLRA, the government has repudiated. The empirical evidence urges us to be cautious in moving toward a system which has so quickly and so often been found inadequate.

409. See Raymond Harbridge & Aaron Crawford, *The Impact of New Zealand's Employment Contracts Act on Industrial Relations* 28 CAL. W. INT'L L.J. 235, 250 (1997); see also Crawford, *supra* note 328, at 189.

410. See *id.*

411. See *id.*