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Solidarity Forever? Unions and Bargaining Representation under New Zealand's Employment Contracts Act

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Solidarity Forever? Unions and
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It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.¹

I. INTRODUCTION

Union density has declined in all countries for years. In the United States, union density is currently so low that we can foresee a time when we will refer to U.S. unions only in the past tense. Thus, the United States now faces a watershed event in the setting of workplace conditions. This worldwide decline has led many to examine the value of unions, the character our society would have without unions, and the wisdom and means of stemming their decline.² Popular proposals include minority unions, changed National Labor Relations Board (NLRB) procedures, and enhanced labor-management cooperation (LMC). Although each reform proposal has proponents who passionately advocate its merits, the discussions are highly speculative because no social sciences laboratory exists to run experiments on each.

Fortuitously, we can come fairly close to examining the operation and impact of what has been advanced as a wholly different way of workplace governance. In 1991, New Zealand enacted the Employment Contracts Act (ECA), legislation that is premised on a completely different model than U.S. labor law. It affords a rich opportunity to study the impact of some key ideas

1. S. REP. NO. 573, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2312 (1949).

2. See, e.g., Michael Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767 (1991); Werner Sengenberger, *Intensified Competition, Industrial Restructuring, and Industrial Relations*, 131 INT'L LAB. REV. 139 (1992).

advanced for labor law reform. The ECA, in effect since May 15, 1991, is founded on free market principles.³ It rejects the fundamentals of the Wagner Act.⁴ The ECA's novel legislation is currently being advanced in North America, Europe, and Oceania as a model for labor law reform. A number of countries are seriously considering and are likely to enact this legislation.

This Article is part of a series examining many of the novel legal issues created by the ECA.⁵ Here, the focus is on how the ECA affects unions in establishing the right to act as bargaining representatives and in performing their duties once they have achieved that status. The comparative approach of this Article provides insights which we can bring to the discussion of reforming representation procedures, permitting minority unions, and enhancing and promoting labor-management cooperation.

II. BARGAINING REPRESENTATION AND THE ECA: SOME INITIAL CONSIDERATIONS

When a single worker engages another as an employee this transforms the first worker into an employer and brings to life

3. Proponents of the ECA are mainly disciples of radical laissez faire ideology who believe that, "given clearly defined and assigned property rights, unconstrained voluntary negotiations between private parties produce optimal results." They oppose legislative interventions into the labor market. Their arguments assume that freely negotiated private contracts provide efficient solutions to the dual problem of the opportunistic behavior and future contingencies that inhere in employment relations. Studies show, however, that market failures do exist and that regulation may produce superior results. Christoph F. Beuchtmann, *Introduction: Employment Security and Labor Markets*, in *EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR: INTERDISCIPLINARY APPROACHES AND INTERNATIONAL EVIDENCE* 3, 55-56 (Christoph F. Beuchtmann ed., 1993) [hereinafter *EMPLOYMENT SECURITY*].

4. In the United States, law professors, whose thoughts on economic matters were highly influential on ECA proponents, are the most prominent advocates of these positions. For a discussion of its ideological origins, see Ellen Dannin, *We Can't Overcome: A Case Study of Freedom of Contract and Labor Law Reform*, 16 *BERKELEY J. EMPL. & LAB. L.* 1 (1995) [hereinafter *Dannin, A Case Study*]; Ellen Dannin, *Labor Law Reform in New Zealand*, 13 *N.Y.L. SCH. J. INT'L & COMP. L.* 1 (1992) [hereinafter *Dannin, Labor Law Reform*].

5. See Clive Gilson & Ellen Dannin, *Getting to Impasse: A Comparison of Impasse and Unilateral Implementation Under the NLRA and ECA* (unpublished paper presented at the Tenth World Congress, International Industrial Relations Association, Washington, D.C., May 31 - June 4, 1995); Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 *COMP. LAB. L.J.* (forthcoming 1996) [hereinafter *Dannin, Bargaining*]; Ellen Dannin, *Brother, Can You Spare a No-Wage Job: Labour Law Reform in New Zealand*, 10 *SOCIALIST REVIEW/REVUE SOCIALISTE—A CANADIAN ANNUAL* (forthcoming 1995) [hereinafter *Dannin, Brother*].

issues that are fertile grounds for disputes. Key among these issues are how to perform the work and reward the worker. Resolving these matters may involve discord; some would even say it must cause strife, for they see the employer-employee relationship as one that makes conflict inescapable. Employers will always want as much control and work for as little pay as possible. Employees naturally will want autonomy and as much pay as possible. Thus, an inherent conflict exists in the hierarchy formed between labor and management. Labor is required to perform outputs and relinquish its labor power and its determination of the disposal of surplus to management.⁶

The now popular opposing view is that conflict is a symptom of a pathology, of something gone awry in the natural state of employment relations, which is an association of mutual gains.⁷ This conceptualization of employment is a descendant of a line of thought that has endured since the Middle Ages: hierarchy is part of the natural order.⁸ During the Middle Ages, philosophers argued that hierarchy functions properly only if all accept their place as a religious obligation. Each person subordinates individual desires for immediate pleasure to seek an intangible reward not available on earth. No one can subvert this natural order, including the person at the peak of the pyramid. The

6. See, e.g., THOMAS KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 22 (1994). The debates over the ECA raised this issue. The Service Workers Federation argued that the ECA's predecessor legislation, the Labour Relations Act (LRA), did not create adversarial relations; rather, conflict pre-existed it, but the LRA contained and regulated the conflict. Service Workers Federation of Aotearoa, *The Employment Contracts Bill: Submissions of the Service Workers Federation of Aotearoa 2* (n.d.); see also Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 57, 69-70 (Matthew Finkin ed., 1994) [hereinafter *EMPLOYEE REPRESENTATION*].

7. David Brody, *The Breakdown of Labor's Social Contract: Historical Reflections, Future Prospects*, *DISSENT*, Winter 1992, at 32, 38-39. Not only employers, but unorganized workers as well, may view conflict in this light. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, in *EMPLOYEE REPRESENTATION*, *supra* note 6, at 146, 153. Unorganized workers know the union wants to raise their conditions to those of organized workers in order to eliminate their employers' and their own competitive advantage. With personal survival at stake, employees now see themselves as unavoidably in competition with other workers. Gottesman, *supra* note 6, at 63-64. The traditional view, that wages should be taken out of competition to fight the ratcheting down of working conditions, seems to have been lost, even though we can see the process of ratcheting down on a global scale.

8. See, e.g., WILLIAM OF OCKHAM, *A SHORT DISCOURSE ON THE TYRANNICAL GOVERNMENT* 77-95 (Arthur S. McGrade ed. & John Kilcullen trans., 1992).

consequences of such an attempt are seen in Shakespeare's *King Lear*.⁹ When the father and king decides to abdicate to his daughters and heirs, thus upsetting his place in the familial and social hierarchies, the result is cataclysm and suffering until the natural order is restored.¹⁰ Of interest here, *King Lear* is a conflation of the family's hierarchical order with that of work, which is governance in *King Lear*. This is fitting, because labor law evolved from family law as work evolved from a familial to a social function.¹¹

Hierarchy, as conceptualized in medieval and later philosophy, is an important element of the philosophy of LMC.¹² The parallels of thought and analysis, including some religious elements, are obvious. Proponents of these plans see the interests of employer and employee as naturally unitary and inevitably beneficial to both, as long as the parties are educated to understand and not to resist the essential nature of the relationship.¹³ LMC supporters say, "As well as conflict, there is also cooperation, for managements need workers' compliance, while workers depend on employers for their jobs and cannot afford to adopt a policy of total resistance" ¹⁴ LMC often is promoted as a means of increasing productivity, which has obvious benefits for everyone in the workplace.¹⁵ Thus, both parties cooperate for their mutual

9. WILLIAM SHAKESPEARE, *KING LEAR*.

10. *Id.*

11. See Thomas Kohler, *The Overlooked Middle*, in *EMPLOYEE REPRESENTATION*, *supra* note 6, at 224, 229.

12. Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 *INDUS. REL. L.J.* 233, 262-65 (1990). Another way of conceptualizing the issue is that the default position in the workplace is employer control and worker deference. A very different way to think about labor law would be to have a system in which unionization or worker control would be the default position.

13. Insight into this connection is not a new idea even in this decade. In the 1920's and 1930's company unions debated in these very terms. See Patricia Greenfield & Robert Pleasure, *Representatives of Their Own Choosing: Finding Workers' Voice in the Legitimacy and Power of Their Unions*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 169, 181-89 (Bruce Kaufman et al. eds., 1993) [hereinafter *FUTURE DIRECTIONS*]. For collected citations of such sentiments, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *COLUM. L. REV.* 753, 808-12 (1994).

14. P.K. Edwards et al., *Introduction: The Workplace and Labor Regulation in Comparative Perspective*, in *WORKPLACE INDUSTRIAL RELATIONS AND THE GLOBAL CHALLENGE* 3, 7 (Jacques Belanger et al. eds., 1994).

15. For an overview of various conceptions of LMC, see McLeod, *supra* note 12, at 233; Cynthia Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 *TEX. L. REV.* 921, 961-62 (1993). Under the Wagner

benefit.¹⁶ Faith, a theological element in the medieval iteration of this idea, is now an ideological certainty in the innate value of freedom of the market and of contract as ultimate rewards for those who pursue the virtuous path. Thus, there need not, and may not, be immediate reward for furthering these goals; there may even be pain instead of gain. This hierarchy's value is justified by its essential rightness. In other words, it is a matter of faith.¹⁷

Issues of the workplace's nature and the role unions play in it are captured by the debate between advocates and opponents of LMC.¹⁸ Critics argue that LMC is nothing more than a covert,

model, improved labor relations will promote employers' needs by creating a more stable and productive workforce and a strong economy through the greater purchasing power of the workers. KOCHAN, *supra* note 6, at 26.

16. An interesting cautionary note on the assumptions that inform these schemes is found in Maryellen Kelly & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in UNIONS AND ECONOMIC COMPETITIVENESS 247 (Larry Mishel & Paula Voos eds., 1992), which found that LMC schemes, in the absence of unions, had many consequences that employers regard as adverse, including lowering productivity. Barenberg, *supra* note 13, at 959-60.

17. See, e.g., Guy Molyneux, *Conservatives: Are They Now Softheaded?*, L.A. TIMES, Oct. 17, 1993, at M2. Those who doubt this element of the free market philosophy should read news reports and discussions of the austerity plans imposed in Third World countries and in countries moving from more controlled markets to capitalism. They are replete with quasi-theological statements touting the need to move through pain to achieve the goal of freedom. They persist as dominant world views, even though there is admitted wreckage left as a result of their implementation.

World Bank official Geoffrey Sheperd describe[d] New Zealand as 'intellectually a complete and a logical model', [although] he readily admits that the World Bank has conducted no study of New Zealand's reforms. So those who are looking for a well-studied, well-evidenced example should be careful about invoking New Zealand. It is important to distinguish between ideological preference and careful, rigorous evaluation.

Ngairé Woods, *Analysis: Shrinking the State* (BBC radio broadcast, July 13, 1995). This ideology and faith were also present among ECA proponents. Cf. Interview with Anne Knowles, Labor Market Manager, New Zealand Employers Federation, in Wellington, N.Z. (May 21, 1992).

18. See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381 (1993); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992). At times this debate is expressed crudely as the adversarial system embodied in the Wagner Act versus cooperative schemes. See, e.g., Hyde, *supra* note 7, at 171 n.76. Even a superficial reading of § 1 of the National Labor Relations Act (NLRA) or the NLRA debates, however, shows that the Act was designed to promote cooperation in resolving disputes. See LEGISLATIVE HISTORY, *supra* note 1, at 146; *Recommendations of Professor Charles J. Morris to the Commission on the future of Worker-Management Relations*, Daily Lab. Rep. (BNA) No. 6, at D25 (Jan. 10, 1994). The NLRA's insight was

insidious, and highly effective means of asserting dominance and control in the workplace.¹⁹

New Zealanders who promoted the ECA, primarily the New Zealand Employers Federation (NZEf) and the New Zealand Business Roundtable (NZBR), grounded their philosophy in the unitary nature of the workplace. The NZEF argued, for example, that the highest priority for workers and employers was the viability of the enterprise.²⁰ To unitarists, workplace conflict is a sign that the parties are unable to see their mutuality or that some outside force has blinded them to it.²¹ Unitarists see unions as the outside force most likely to create conflict and thus, destroy productivity in the workplace.²² The New Zealand Service Workers Federation noted, "The myth is expressed most vividly, and in almost sexual terms by the Employers Federation: without the interference of unions, the employee/employer 'relationship would likely become mature and be consummated.'" ²³

that cooperation can only exist between equals and that employers organized in the corporate form cannot meet as equals with individual employees. Thus, there can be no useful or meaningful cooperation between the two. See Barenberg, *supra* note 13, at 795-96. In other words, its drafters designed the NLRA to be the original LMC plan. See STEVEN M. FETTER ET AL., U.S. DEP'T OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, SECOND INTERIM REPORT 39 (1987).

19. Both are only examples of other explanations for how employers and employees interact, how they deal with conflict, and how they establish order. Each theory of the workplace assigns roles to unions, with most traditionally seeing unions as the representative, protector, and collective voice of the workers.

20. See Anne Knowles, *Four Months down the Track: Is the Employment Contracts Act Working?*, EXAMINER, Sept. 5, 1991, at 19; Electricity Corporation, Submission to the Labour Select Committee on the Employment Contracts Bill 10 (Feb. 1991). A similar view was expressed by employers during debates for the NLRA. Barenberg, *supra* note 18, at 1460.

21. DEBORAH CODDINGTON, TURNING PAIN INTO GAIN 164-76 (1993).

22. The New Zealand Business Roundtable (NZBR) submission on the ECA argued that the existing system had ritualized and institutionalized the supposed conflict that existed between employers and workers. New Zealand Business Roundtable, Submission to the Labour Select Committee on the Employment Contracts Bill 1 (1991). A virtually identical view was advanced during hearings for the NLRA. Barenberg, *supra* note 18, at 1460 n.350.

23. Service Workers Federation of Aotearoa, *supra* note 6, at 2 (citation omitted). Over the past two decades, New Zealand has suffered tremendously from changes in its foreign trade. Around the world, identification of worker with employer has been, in part, a product of global forces that have opened national markets by removing protections, as well as a worldwide rise in unemployment rates. As Michael Gottesman observes:

The fear that grips most workers today is not that they will be fired or permanently replaced, but that their jobs will disappear. They worry that their employer will lose out in the competitive world and go under, or that the investors will move their capital (and thus the jobs) to another locale (perhaps

The ECA is an incarnation of the unitary workplace. It shares insights and arguments advanced by proponents of LMC.²⁴ As with other unitarists, including many proponents of LMC, the ECA accepts that intrusions into the employer-employee relationship, such as unions, are destructive or, at best, unnecessary. In 1989, Penelope Brook, an advocate of the ECA, asked her readers to imagine a less directive labor system and one based more on "defining and enforcing property rights in labour and maintaining a law of contract"²⁵ than one which was more directive, that is, one which specified "how workers may organise, who may be party to employment negotiations and how they may enforce the results of their negotiations."²⁶ The system "would be facilitative, seeking only to establish such rights and systems of contractual law as would enable employees and employers to determine the nature of their relationship in the most mutually beneficial way."²⁷ Issues such as efficiency in bargaining and establishing workplace terms would be the basis for a decision to unionize.²⁸

In November 1990, just before the National Party introduced the draft ECA, the NZEF issued *The Benefits of Bargaining Reform*. The NZEF said their publication was designed "to change employer attitudes so that they would take full advantage of the menu of opportunities the National Party [was] offering them."²⁹ The publication enumerated NZEF goals for industrial

another country) whose lower wage scales enable more effective competition. Having absorbed this message, workers today have become persuaded that the key to the survival of their jobs is that their employer be an effective competitor—including, if necessary, a competitor based on lower labor costs.

Gottesman, *supra* note 6, at 63. The fear and uncertainty that flow from these massive changes prompt workers and governments to abandon old values, which they blame for their woes, and seek new ways of ordering society. This captures much of what has happened in New Zealand.

24. For a U.S. example of an advocate who joins these threads, see Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, Daily Lab. Rep. (BNA) No. 95, at E1 (May 17, 1995) [hereinafter Estreicher, *Labor Law Reform*]; Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, Daily Lab. Rep. (BNA) No. 107, at E-10 (June 5, 1995) [hereinafter Estreicher, *Dunlop Report*].

25. Penelope Brook, *Reform of the Labour Market, in* ROGERNOMICS: RESHAPING NEW ZEALAND'S ECONOMY 182, 193 (Simon Walker ed., 1989).

26. *Id.* Professor Estreicher currently advocates a position close to Brook's in the United States. See Estreicher, *Labor Law Reform*, *supra* note 24, at E-1.

27. Brook, *supra* note 25, at 193.

28. *Id.* at 193-95.

29. Patricia Herbert, *Employers' Federation Almost Outdoes Itself*, DOMINION, Nov. 26, 1990, at 10.

relations in a short essay entitled "The Vision—An Ideal Organisation" and contrasted the *Ideal* with *Reality*.³⁰

In the *Ideal*, a successful company completes an annual update of its five-year strategic plan. "[E]ach employee is committed to a set of operational and personal objectives, through participation in the planning process."³¹ The workers are self-managing, individually fulfilled, problem-solving team workers who work through "[s]taff associations, [which] where they exist are strong and loyal" and facilitate the sensitive and rapid defusing of controversy to obtain mutually satisfactory results.³² Management provides information freely and regularly and shares profits with the workers, "after capital retention and dividend decisions have been made."³³

Reality has organizations controlled by "[p]ower, secret information, unpublished agendas, [and] prejudices."³⁴ These organizations are rule-bound and inflexible. "Employees display all the expressions of low self esteem, lethargy and hostility."³⁵ In *Reality*, life is grim: "Innovation is suspect. Quality is the preserve of the quality control manager. Service means servitude. Going the extra step can be tantamount to betrayal of one's colleagues, an Uncle Tom of the industrial system."³⁶

Unions in *Reality* harm workers by being the only conduit for communication and by communicating only about wage demands, grievances, or "an alleged infringement of long-held rights; usually trivial and rarely an expression of concern about improving the performance of the company, or the long term futures of the employees' jobs and livelihood."³⁷ Collective bargaining results in setting conditions that are irrelevant to the state of the particular employer. "There is no concept of 'win/win'."³⁸ Unions act in ways detrimental to the enterprise and to their members by being solely motivated by a desire to retain control. Otherwise, bargaining freedom would be "the first step in which workers and

30. NEW ZEALAND EMPLOYERS FEDERATION, *The Vision—An Ideal Organisation*, in THE BENEFITS OF BARGAINING REFORM 3-4 at 3 (1990).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 4.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

employers decide their own destiny. That success would highlight the superfluous nature of union involvement."³⁹

According to the NZEF, abolishing the "paternalistic and outmoded" Labour Relations Act (LRA) would usher in a new world in which "[u]nions and their captive audiences would be forced into the world of reality, and employers would be foolish not to communicate that reality. Ultimately, employer and employee would resolve their differences and bargaining would take on a very different aspect."⁴⁰ Communication would improve "because wage bargaining is a natural forum on which to build communication."⁴¹

The Benefits of Bargaining Reform says unions are "superfluous."⁴² Many NZEF publications argue that unions are either unnecessary or have evil motives that lead them to cause conflict in the workplace. Anne Knowles, Labour Market Manager for the New Zealand Employers Federation, 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 legislation will be removed, allowing the employer and employees at an enterprise to have full and open communication."⁴³

The ECA's drafters tried to redesign unions, because they believed that unions are unnecessary and even destructive to the workplace. This might lead one to conclude that the ECA's sole purpose is to destroy unions and lower wages.⁴⁴ The drastic decline in union density and union membership since the enactment of the ECA does nothing to allay such concerns. New Zealand's twenty-three percent union density in December 1994 was a drop of approximately forty percent from its pre-ECA figure of sixty-five percent in May 1991. In the same period, union

39. *Id.*

40. *Id.* at 9.

41. *Id.* For a different view of the nature of such bargaining, see RICHARD EDWARDS, RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA 50-53 (1993).

42. Herbert, *supra* note 29, at 10.

43. Anne K. Knowles, *Employment Contracts Bill: What's In It For the Workers?* EXAMINER, Apr. 24, 1991, at 7. Along the same lines, Electricity Corporation contended: "The aims and objectives of many unions so endowed with exclusive bargaining rights frequently bears little relationship to the real needs of an employer and his or her staff." Electricity Corporation, *supra* note 20, at 5.

44. See JOHN DEEKS ET AL., LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND 511 (2d ed. 1994).

membership plunged from 603,118 to 375,906, a drop of approximately thirty-eight percent.⁴⁵ Such a decline has no known parallel in any country during peacetime. Indeed, Raymond Harbridge and Anthony Honeybone describe the situation in New Zealand as the "collapse of collective bargaining."⁴⁶ Furthermore, some studies of this period showed that unions were involved in a minority of negotiations.⁴⁷

Although these statistics do not dispel the belief that the ECA is anti-union, such a conception of the ECA does nothing to explain how the ECA has facilitated this decline. Furthermore, it misses essential truths about the ECA. Nowhere in the ECA are there any prohibitions on union activity. If anything, its language and operation appear scrupulously evenhanded. If it talks of any goals, they are those of freedom, self-actualization, and productivity. Overt anti-unionism does not explain the ECA's impact; its dominant philosophies are freedom of contract, neoclassical economics, and equality of employers and employees. The ECA implements these by instituting an evenhanded treatment based on the premise that employee and employer can negotiate fairly, productively, and as equals.

If philosophies of fairness, freedom, and equality have caused a decline in New Zealand's unions, more serious problems arise. We are forced to focus on uncomfortable questions: How do freedom and equality denigrate the existence of unions? Are the ECA proponents correct in arguing that unions are antithetical to important values in our societies? If so, the public relations task alone is enormous. The answer, evident after an examination of the ECA and the way it has operated during its first few years, is that it is the way in which the ECA understands and promotes equality and freedom which are, for unions, the most destructive aspects of the ECA.

45. Raymond Harbridge et al., *Unions and Union Membership, in New Zealand: Annual Review for 1993*, 19 N.Z. J. INDUS. REL. 175, 176 (1994); Raymond Harbridge & Kevin Hince, *Unions and Union Membership, in New Zealand 1985-1992*, 18 N.Z. J. INDUS. REL. 352, 355 (1993).

46. Raymond Harbridge & Anthony Honeybone, *The Employment Contracts Act and Collective Bargaining Patterns: A Review of the 1993/1994 Year*, in EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE: 1993/94, at 1, 3 (Raymond Harbridge et al. eds., 1994).

47. DEEKS, *supra* note 44, at 520-21.

Examining how these goals play themselves out provides a much more interesting and useful understanding because it permits extrapolation beyond New Zealand's specific situation. As legislation intended solely to promote freedom of contract and a free labor market, the ECA has a profoundly detrimental impact on unions. If it has this impact, even though not intended to be anti-union, this suggests that these ideologies may be seriously flawed as foundations for labor laws. This impact leads to questioning the nature of the freedom espoused and whether unions play a sufficiently valuable role that the law should support their existence. Other countries are considering enacting their own ECAs and not necessarily for anti-union reasons. Thus, an analysis that focuses on how freedom of contract and the market perform as a basis for labor contracting is likely to be widely useful.

This Article presents cases, not to produce a treatise on the current state of the law as it pertains to bargaining representatives, but rather to explore the ways that New Zealand's courts have interpreted the ECA and to extrapolate from these decisions information as to what makes functional or dysfunctional law in this area. Thus, even cases that have since been overruled are useful to this analysis.⁴⁸

III. BASICS OF REPRESENTATION UNDER THE ECA

When the ECA came before New Zealand's Parliament, new Labour Party Member of Parliament Jim Anderton proposed the following amendment:

Where an employee is a member of an employees' organisation, and the rules of that organisation provide that membership of that organisation shall authorise the organisation to represent its members in negotiations, such membership shall

48. Many of the issues and cases discussed here were also the focus of attention and concern of the International Labour Office's (ILO) Committee on Freedom of Association and formed the basis for its finding that the ECA is at variance with ILO principles. See INTERNATIONAL LABOUR OFFICE, 295TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, Case No. 1698 (Nov. 1994) [hereinafter ILO REPORT]. The ECA is so different from most labor relations statutes that talking about it accurately and trying to describe its operation requires care and precision. This is particularly the case in discussing representation authorizations and union representation of members. Being conscious of these and giving them proper weight and place is not an easy task.

prima facie be evidence of the authority of that organisation to represent that employee.⁴⁹

Within most labor relations systems this amendment would be unnecessary because they view the act of membership as being so inextricably intertwined with representation that the existence of one presupposes the other. The ECA does not permit this automatic connection and assumption. No one could have thought that the ECA inadvertently disconnected the two after Anderton's defeated attempt to reintegrate membership and representation.⁵⁰ Union membership and representation under the ECA is akin to viewing a film frame by frame. Although each frame shows reality, the single frame is so out of context as to be unintelligible.⁵¹

By defeating the amendment, ECA proponents opted to disaggregate every aspect of membership and representation. What is elsewhere a single act of joining and then being represented by a union in bargaining, grievance processing, and legal actions is a diffused and complex process in New Zealand. Union membership does not automatically mean union representation. Indeed, unions could not even condition membership on employees' agreeing to link the two.⁵² As a consequence, union

49. PARL. DEB. (Hansard) 1580 (Apr. 30, 1991) (N.Z.). Labour Party member Larry Sutherland proposed a similar amendment. *Id.* at 1582.

50. *Id.* at 1582-88, 1589.

51. An interesting literary analogy is MARTIN AMIS, *TIME'S ARROW* (1993), a novel about a Nazi doctor told in reverse chronology. Instead of being a mass murderer, he becomes a person who has helped create a people from ashes and smoke.

52. The Dairy Workers' Union unsuccessfully attempted to link the two by requiring broad authorization as a condition of membership. The Employment Court commented:

Employees are free to choose their bargaining representatives. It is contrary to the philosophy of the legislation for an association of employees (a union) or anyone else to seek to restrict them in that choice by requiring such employees to accept the union as their bargaining agent as a necessary consequence of membership Across the spectrum of unions it is now well recognised that employees may be union members and may remain so but without having given a bargaining authority or having withdrawn or revoked the same. Although negotiation of employment contracts is a clearly important function of a union, benefits such as representation in disputes, in personal grievances and actions for the recovery of wages underpaid are simply some common examples of the range of benefits available to employees because of union membership in circumstances where they may wish either to bargain individually or collectively for themselves or to have another representative do so. In its rejection of the applications for union membership of Hautapu employees other than those where full bargaining and other representative authority was given, the union acted wrongly.

N.Z. Dairy Workers Union, Inc. v. Hautapu Whey Transp., [1994] 2 E.R.N.Z. 549, 570 (1994).

representation in bargaining does not automatically allow the union to advance the cause of those for whom it bargains, including taking strike action. Negotiating a contract does not mean a union can sue to enforce contract violations or to protect its members. Each step is conditioned on proof that the principal has authorized its representative to perform the act.⁵³

This Article explores primarily three areas in which disaggregation creates special difficulties. Disaggregation: (1) enlarges employers' scope to oppose employees' authorization of union representation; (2) permits employers to refuse to bargain with an authorized bargaining representative; and (3) allows employers to use the authorization requirement as a procedural hurdle to foil union effectiveness in bargaining and in prosecuting violations of the ECA and suits for breach of contract. Each of these difficulties makes unions incrementally less effective and thus less attractive to potential members.

A. *Employer Opposition to Union Authorization*

1. Some Basics on ECA Treatment of Bargaining Representatives

The ECA evenhandedly permits an employee or an employer to select a representative to negotiate and enforce employment contracts or prosecute statutory violations.⁵⁴ The other party then must "recognise the authority of that person, group, or organisation to represent the employee or employer in those negotiations."⁵⁵ ECA proponents theorized that authorization

53. The ECA provides that anyone who purports "in negotiations for an employment contract, to represent any employee or employer shall establish the authority of that person, group, or organisation to represent that employee or employer in those negotiations." Employment Contracts Act [ECA] § 12(1) (1991) (N.Z.). Section 12(2) provides that once such authorization is given, the bargaining partner "shall . . . recognise the authority" to represent. *Id.* § 12(2). The ECA requires no more than to recognize the authority. Rick Barker, Service Workers Federation, explained that "the law is the employer has to recognize the union, recognition is like walking down the street, and I recognize a friend and you just have to say hello and that is the end of it. It doesn't mean that you have to do anymore about it." Interview with Rick Barker, National Secretary, Service Workers Federation of Aotearoa, in Wellington, N.Z. (May 14, 1992).

54. ECA § 10.

55. *Id.* § 12(2). For a U.S. advocate of a similar system, see Timothy McConville, *Monopoly Unionism Under the National Labor Relations Act: An Abrogation of Common Law Agency Doctrine*, 46 LAB. L.J. 469 (1995).

would take place after the principal conducted a businesslike analysis. As Penelope Brook describes it,

[this] decision to delegate bargaining to an agent, whether by employers, by employees or by both, will similarly depend on an analysis of costs and benefits. The benefits associated with the use of specialists to process information and carry out negotiations will be set against the costs of an agent failing to represent the true interests of his or her party. The balance may be tipped in favour of unionism if the unions are able to supply other services, such as education, pension schemes or medical centres.⁵⁶

This description fails to appreciate and account for significant differences in the situations of employees and employers.⁵⁷ The ECA assumes that human beings are the same as corporate individuals.⁵⁸ Thus, if this assumption is inaccurate, it will skew the operation of the ECA.

Humans and corporations differ in fundamental ways. As a matter of law, employers organized as corporations or partnerships are collective entities. In addition, corporations are only fictional persons who cannot function except through representatives. If they want to speak, they do so through designated parts of their corporate anatomy. They must designate parts of their collectivity to interact with the world. Equally important, the law does not require corporations to have consciences or to learn the basics of cause and effect. The law limits corporate liability and permits those who make decisions for the corporation to escape personal consequences. Each of these aspects of corporate existence would take place whether the ECA existed or not; however the structure of the ECA and corporations fit well together.

Employees may work together, but they face obstacles to collectivity. When workers take collective action, it appears that

56. Brook, *supra* note 25, at 194.

57. Martha Minow raises similar problems in the context of discrimination and anti-discrimination efforts. Laws that apply equally to all persons but which fail to account for relevant differences may not be equal in impact or effect. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); ROBERT MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* (1991).

58. This conflation of individuals and corporations is common among adherents to neo-classical economics. This "ignores a vast literature in history, sociology, and other disciplines that shows beyond doubt that organizations do not usually behave as individuals do and that groups of varying sizes have different patterns of behavior." Thomas McCraw, *The Trouble with Adam Smith*, AM. SCHOLAR, Summer 1992, at 353, 371.

they do so only to further their personal ends. Worse, worker collectivity is a usurpation of workplace hierarchy. It cuts against ingrained attitudes of obedience and workers' incorporation into, and interest in, the employer's well being. Workers experience many forces that make it easier to remain individuals. Additionally, workers are neither fictional nor collective persons. Their individual existence continues whether or not they unite. Furthermore, they can only speak collectively by being willing to stifle their individual voices. Workers have consciences and can learn cause and effect. They are keenly aware that organization may have unpleasant consequences and may leave them without the means to support their families.

Appointing a representative is thus as unnatural a way for people to interact with the world and to cope with the pressures of the workplace as it is natural for a corporation. Nothing requires or fosters collectivity for employees in a way comparable to corporation law. All these distinctions are significant in their impact on the parties under ECA coverage. As the Public Service Association (PSA) representative Joris de Bres explained of the ECA:

[A]ny collective democratic decision is broken down into individual choice. It sounds attractive, but at the beginning of the process of bargaining it breaks people up. They have to determine to come back together. Once they've determined to come back together there is actually a collection of individual choices to be individually represented together and any of them can pull out of that again. It makes it very difficult for a union to have a role on a more mature basis in terms of people accepting majority decisions and then entering into bargains or agreements with the employer. Because it's always actually no more than a collection of individuals. The law now defines each worker as an individual.⁵⁹

The ECA does not acknowledge differences in the way employers and employees make use of the legislation's provisions. This ignores different reactions that the two are likely to have to the other's representative. The ECA provides that a union (as employee representative) or an employer's representative can act only if the agent provides authorization satisfactory to the other

59. Interview with Joris de Bres, Central Operations Manager of the PSA, in Wellington, N.Z. (May 7, 1992).

party.⁶⁰ This literal equality fosters actual inequality, for employer authorization is profoundly different from an employee's authorization.

An employer who separates a union representative from its principal strengthens its hand in bargaining. An anti-union employer may decide to separate the two simply because it dislikes unions and suffers no ill consequences from not acceding to the union's authorization. Employers also have the ability to persuade employees to withdraw authorization. An employee has no corresponding incentive to thwart the employer's choice of representative. Employees usually want bargaining to proceed and recognize that this can only happen through an employer spokesperson. With few exceptions, separating an employer from its spokesperson does not benefit employees. Even if employees wished to separate an employer from its representative, they lack the means to do so.⁶¹ Thus, authorization requirements have vastly different consequences for employers and employees.

2. Union Access to Employees

The LRA, the legislation preceding the ECA, allowed unions to enter an employer's premises to recruit and interview potential members or to collect fees or other charges. Refusing entry carried a fine of up to \$1000.⁶² The LRA also mandated two paid two-hour "stopwork" meetings a year.⁶³ The ECA does not permit such free access. It gives "a person, group, or organisation . . . seeking to represent any employee or employees in negotiations" access to seek authorizations, but only with employer approval.⁶⁴ Authorized representatives also have access to

60. ECA §§ 12, 13. The burden of proving this authorization is on the agent. ECA §§ 12, 59.

61. Not only are they unlikely to refuse to bargain, in the ECA environment at least one union was willing to negotiate with a representative who had not been authorized by any employer as a representative. The union hoped this would induce employers to recognize and negotiate with it. The New Zealand Dairy Industry Employers Association negotiated with its corresponding union for a successor to its award and then, when it had reached an agreement on the terms of the contract, it sought bargaining and ratification authority from employers who had been parties to the award. *N.Z. Dairy Workers Union, Inc. v. Hautapu Whey Transp.*, [1994] 2 E.R.N.Z. 549, 555 (1994).

62. Labor Relations Act [LRA] § 56 (1987) (N.Z.).

63. *Id.* § 57.

64. ECA § 13.

employees to prepare for negotiations.⁶⁵ The Employment Court has held that an employer may not deny or delay access during an employee's nonworking time or add additional conditions as a way to deny access.⁶⁶ Access for other purposes is no longer a statutory right but can be negotiated in a contract or permitted by an employer.⁶⁷

Under the ECA, unions can achieve access for most purposes only by making concessions during negotiations. U.S. unionists might easily dismiss the change to the less supportive ECA as unimportant because they have always had to organize without legislated access. Indeed, the U.S. Supreme Court recently limited rights of access that the NLRB believed necessary to protect employees' section 7 rights.⁶⁸

Organizers who for decades had legally mandated access, however, would feel the ECA's impact more harshly. Generations of New Zealand organizers abruptly entered the ECA era without the necessary organizing strategies. Attorney Robyn Haultain explained the impact this change had on unions:

One of the reasons that it was hard for our union and lots of other unions to respond, I think, was that for the previous 15 odd years, the unions had fairly much unrestricted access to workplaces and this tradition of running union meetings in the employers' time, when the workers were getting paid, was really well established and so it was very easy to get people to come to a union meeting when they get off the job for an hour and get paid for it. Great. Everybody loved it and rushed along to the meeting, even if they are not interested in the description of the meeting or the outcome.⁶⁹

65. *Id.* § 14(1).

66. National Distribution Union, Inc. v. Foodstuffs (Auckland), Ltd., [1994] 1 E.R.N.Z. 653, 660 (1994).

67. Employers also can voluntarily grant access. Organizer Maxine Gay described being allowed to enter a law office to re-sign former clerical members just after the ECA went into effect:

I returned there and held meetings to seek to represent the workers for a collective employment contract, and the bosses were quite happy to let them go on because they really thought that I was going to be booted out. I came out of there with 27 members, including some staff solicitors who really knew that they were going to get done over.

Interview with Maxine Gay, PSA Organizer, in Palmerston North, N.Z. (May 17, 1992):

68. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Home Depot U.S.A., Inc.*, 317 N.L.R.B. No. 100 (May 31, 1995).

69. Interview with Robyn Haultain, Attorney, in Wellington, N.Z. (May 19, 1992).

If all reduced access did was to force organizers to learn new skills, it would not be a serious problem. The problem, however, is how this issue of access ties in with the parts of the ECA. First, although employees have given a union authorization to represent them, the law allows the employer to decide unilaterally if the authorization is satisfactory and thus gives the absolute right to permit or deny access. Second, the ECA focuses only on representation and negotiation. As a result, it considers access necessary only for the purposes of seeking authorizations to represent or, once those are given, to negotiate.

In other words, the ECA does not recognize the importance of activities which elsewhere form a key part of the collective bargaining relationship, such as policing the agreement and ascertaining members' current conditions.⁷⁰ Unions act "as workers' collective monitor of managerial behavior. . . . The union has a greater capacity than either individual workers or company union representatives to assess managerial honesty because it can draw on information about the behavior not only of the immediate employer, but of comparably situated employers."⁷¹ The ECA also does not envision as important the cultivation of relationships between unions and their members as a means of assuring workers of their union's ongoing concern, protection, and accessibility or of demonstrating their presence to the employer. The importance of access as a means of cultivating and maintaining union-worker relationships was underscored when, just after the ECA became effective, major unions lost important worksites precisely because employees there became convinced that they could not rely on absentee unions.⁷²

It might appear that New Zealand unions are still better off than U.S. unions, because they have some legislated rights of access. In the United States, even though unions generally have no right of access to organize employees, enforce the agreement or represent their members, absent an agreement with the

70. Although none have chosen to do so, a liberal interpretation a New Zealand court could apply is to allow access to do these things because a union would need to ascertain current conditions, even when a contract is in place, in order to prepare to negotiate with its successor.

71. Barenberg, *supra* note 18, at 1470.

72. One reason the union lost in Alliance was that, when the employer cut workers' pay, the union wasn't visiting regularly enough to learn what had happened. Interview with Robyn Haultain, *supra* note 69.

employer, they nonetheless may gain the equivalent through information requests.⁷³ Furthermore, once U.S. unions achieve access rights in a collective bargaining agreement, they are better able to enforce those rights, because the agreement is between the employer and the union. Under the ECA, a union denied access might not learn that it needs to take action. If a violation occurs, the union is not present in the workplace to help employees stiffen their resolve. It might have to resort to legal process to gain access. This patent lack of power makes it less likely individual employees would come forward to assert their rights. Workers are less likely to trust their fates to a representative who cannot demonstrate his competence and ability to promote their interests.⁷⁴

All these barriers to effective representation resulted from the ECA's limited focus on gaining authorizations and negotiations for a contract as the sole purposes of representation. It fails to support unions in all areas in which representation could be meaningful. The ECA fails to comprehend the ongoing nature of the employment relationship and the need for a representative once a contract is negotiated. By further failing to comprehend the need for access to the workplace during the contract term, the ECA fails to meet the needs of workers seeking to bargain under its disaggregated representational system.

3. Union Party Status

The ECA presumes the natural parties to any employment agreement to be the employer and the employee. No one else may become a party to the contract without the parties' assent.⁷⁵ It is easy to see how this flows from a belief in the unitary workplace. Here again, the ECA treats employer and employee representatives equally. If the workplace is not unitary or if employees and employers are not equal, limiting party status will have unequal effects.

73. Unions are entitled to information that is relevant to the performance of their representational duties. If an employer withholds or fails to timely provide such information, the employer may be in violation of § 8(a)(5). NLRA § 8(a)(5); 29 U.S.C. § 158(a)(5). See *Acme Industrial Co. v. NLRB*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

74. Gottesman, *supra* note 6, at 66.

75. ECA § 17.

Employer representatives do not need to be parties to a contract because the law provides reasonable substitutes. A union needs party status because, as a fragile, collective body, it has an ineradicable split in identity from the persons it represents. This presents a serious burden that nonparty unions must overcome if they are to protect their members and the bargain they have struck. Thus, lack of party status is not a symbolic issue. Without party status and without according meaning to unions with party status, unions are unable to take effective action. The Wagner system, in contrast, assumes the collective bargaining agreement is between the employer and union. Employees are beneficiaries rather than parties to the agreement.

If party status is not automatic for the union-negotiator, the union must persuade the employer to agree to party status and, conceivably, must make concessions to secure it. Enticing an employer to make such an agreement clearly is not easy. The NZEF, the major employer umbrella group in New Zealand, advised its advocates (negotiators) to refuse unions party status.⁷⁶ For the period 1993 to 1994, only fifty-two percent of contracts named unions as parties. This bare majority indicates greater success for this strategy than it might otherwise suggest, for it represents a range of from two percent coverage in the restaurant and hotel industries to a seventy-five percent coverage in community and public services, with most industries clustering about thirty-five to forty-five percent.⁷⁷ Without the very large public sector, the fifty-two percent figure would shrink to as low as one-third. In the private sector, the majority of employers deny union party status.

76. During the ECA debates, the New Zealand Employers Federation (NZEF) advocated excluding any agent, not just unions, from being a party to an employment contract. New Zealand Employers Federation, Employment Contracts Bill 1991: Submission at A-3 (Jan. 30, 1991).

The key thing was—the Employers Federation decided one of the most appropriate strategies for employers was to deny the unions party status to any agreements. And it has been quite an incredible happening for us that they are willing to negotiate with the union, but do not want to accede to party status to any agreements as one way of deferring to the Employers Federation, to say, look, we haven't noticed a demand. But to also be able to keep faith with what they view as being as a philosophy of being pro-worker and reasonably pro-union.

Interview with Rick Barker, *supra* note 53.

77. Harbridge & Honeybone, *supra* note 46, at 25.

Assuming a union held its forces together and consummated a contract, with or without party status, authorization to represent employees collectively in bargaining does not change the fact that the contract is between the employer and employee. Each employee who wanted the contract's coverage still must sign the contract. Rick Barker explained:

See what people get is the misimpression is [sic] that collective bargaining presupposes collective contracts. Well, they are not collective contracts in the sense that you would believe in internationally or in an American sense. They are, in effect, individual contracts which happen to coincide with other individuals and so the individuals all came in, put their pen to the paper on the same document. We have a number of contracts that we have signed as an organization on behalf of those who we represent and what we have to supply to the employers is a list of names and a copy of the authorization they have signed with us to make us the agent, so it is administratively very complicated and is almost as difficult as you can get.⁷⁸

The ECA's failure to provide unions automatic party status was one ground for concern that the International Labour Office's (ILO) Committee on Freedom of Association's Final Report identified when it investigated complaints filed concerning the ECA.⁷⁹

4. Withdrawal of Authorizations

According to its drafters, achieving the ECA's stated end of promoting an efficient labor market meant allowing "employees to determine who should represent their interests in relation to employment issues."⁸⁰ More specifically, an object of the ECA

78. Interview with Rick Barker, *supra* note 53. The level of formality Barker describes may not be the case for most workers. A survey of students found that nearly half did not know what sort of contract they had and five percent said they had none. Debbie Peterson, *Secondary School Students in Paid Work 1994*, in *LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994*, at 189, 193 (Philip S. Morrison ed., 1994). Perhaps the respondents did not know what sort of contract they had because there had been no recognizable contracting activity. Indeed, the study found that 51% had no input regarding their work terms. *Id.* In any case, the students' lack of awareness had risen by ten percent over a similar survey conducted two years earlier. *Id.* at 194. Other studies corroborate these figures. See Dannin, *A Case Study*, *supra* note 4.

79. ILO REPORT, *supra* note 48, para. 258.

80. Employment Contracts Bill (Long Title of the ECA) (c)(ii).

was “to establish that . . . [e]mployees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees’ collective interests.”⁸¹ Freedom, self-determination, and individual choice are all important, even unassailable values. Again, however, these values operate differently within union and employer contexts. Corporate law operates as a barrier to the corporation’s easy dissolution. In other words, for corporations—the very bodies that actually are engaged in market transactions—the law recognizes that values other than absolute freedom may be paramount in certain settings.⁸² To function effectively, unions require some limits that protect their organizational lives. In the case of unions, the ECA recognizes no values that are more important than freedom.

In many ways, the problem is rooted in the analogy used to define the nature of a union’s relationship with its members. Although the ECA sees unions as outsiders, it allows them to exist if a party considers them to be providing a worthwhile service. As long as unions are no more than a means of delivering a service, they can be selected or discarded when the buyers of the service (employees) conclude they can secure superior services elsewhere in the market.⁸³ National Party member Bruce Cliffe declared that under the ECA:

Unions must now work for and earn their members. They must provide a service, they must deliver agreements, and they must want to protect their members. In other words, unions must provide the service that is usual in a normal competitive

81. ECA § 5(a). Freedom of association was so fundamental that it composed Part I of the ECA. “[T]he ‘Freedom of Association embodied in Part I of the act is not the traditional protection for collective action but a freedom to disassociate.” PETER CHURCHMAN & WALTER GRILLS, *EMPLOYMENT CONTRACTS ACT REVISITED* 4 (1994).

82. One area in which corporations can rely on the reality of their aggregated nature is labor law. Unions that cooperate with other unions to assert economic pressure on non-struck parts of a corporation can not rely on a collective form. This result undercuts the NLRA’s aim of equalizing bargaining power. James Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 *BUFF. L. REV.* 463, 473 (1994). Atleson concludes, “In sum, American law limits the extent to which the worker community can protect itself against corporate structures that drastically alter power relationships.” *Id.*

83. NZBR Board Member Alan Jones stated that “unions need to provide services which are valuable, affordable, and relevant. If their customers think they are worthwhile they’ll survive; if not, they won’t, and we’ll see more groups of employees seeking advice from other agencies in the market.” ALAN JONES, *WHAT WERE WE AFRAID OF? THE EMPLOYMENT CONTRACTS ACT—THE PAST—THE PRESENT—AND THE FUTURE* 14-15 (1992).

business. Any successful enterprise understands the importance of competition and I believe that the unions will now realise that competition is the way it could be in labour relations.⁸⁴

More specifically, ECA proponents argue that unions do not serve many employees, because they negotiate only an average wage for each classification, regardless of individual qualifications.⁸⁵ The NZEF has contended that unions were bent on suppressing individuality. Peter Carroll, General Manager of the Auckland Employers' Association, claimed that unions wished to have "everyone toeing the same line with no deviation" and despised those "not conforming with the union line."⁸⁶ From this, it followed that individuals, especially exceptional workers, should be allowed to opt out of the negotiated wage and that not doing so would make them less inclined to be effective workers.⁸⁷

84. PARL. DEB. (Hansard) 1659 (Apr. 30, 1991) (N.Z.). The NZEF blamed the LRA for fostering a system in which unions had no motivation to promote the interests of members and employers:

The system has created unions which are highly protected monopolies with guaranteed customers (through compulsory membership), guaranteed cash flow (through compulsory deduction of union fees), and no competition (through exclusive coverage provisions). Such guarantees mean that unions are not market driven; rather, an artificial market has been created for them.

New Zealand Employers Federation, *supra* note 76, at B-5. The NZEF's solution was that unions "should be exposed to the same competitive environment other providers of goods and services must face." *Id.* After enactment of the ECA, NZEF Board Member Alan Jones argued:

As unions shrink and are, therefore, less ubiquitous, they will want to focus. No one believes compulsory unionism will return. Therefore unions will want to market themselves where they can be afforded. That is not amongst the lowest paid Thus unions will have made at least one major, if historically perverse, adjustment to the new environment: by ignoring those who were their roots they will be able to ensure their own viability.

Jones, *supra* note 83, at 14; cf. McConville, *supra* note 55, at 469.

85. The common criticism of egalitarian communication is that it excludes difference or disagreement and requires homogenization. See Barenberg, *supra* note 13, at 797. Mahoney and Watson point out that minority interest employees may perceive the uniformity that collective bargaining provides as creating internal distributive inequity and, if they are denied a voice, as creating procedural inequity. Thomas Mahoney & Mary Watson, *Evolving Modes of Work Force Governance: An Evaluation*, in FUTURE DIRECTIONS, *supra* note 13, at 158.

86. Peter Carroll, *Towards Voluntary Unionism: Serving People, Not Institutions*, EXAMINER, Dec. 6, 1990, at 23.

87. Brook, *supra* note 25, at 194. Even though the discussion was in terms of the exceptional worker, it failed to consider that the majority of employees that the legislation covers would not need or could not hope to secure any benefits through such a system. What they most needed was basic protection from arbitrary action and collective resources to enable them to secure decent conditions. In exchange for these, speaking with a less than individualized voice might satisfy most. Paul Weiler, *Governing the Workplace:*

Making unionism voluntary would induce unions to improve their services and would boost workplace productivity.⁸⁸ Penelope Brook asked if there was any benefit to be gained by giving unions an exclusive right to negotiate on behalf of a group of workers,⁸⁹ and suggested that unions might benefit from greater freedom to "define the range and price of their activities (subject to their ability to attract members)"⁹⁰

ECA proponents never addressed the inconsistency in their vision of a unitary workplace without conflicts between individual employers' and workers' identities, needs, and purposes with their idea that individual employees have needs so inherently in conflict with one another that they need individualistic bargaining.⁹¹ In addition, this characterization of workers ignores the fact that "most work takes place in 'teams', in which the output of each team member depends on what other members do; team production is interdependent. This has two consequences: first, it is usually difficult or even impossible to isolate the contribution to output of individual members of the team; second, productivity

Employee Representation in the Eyes of the Law, in FUTURE DIRECTIONS, *supra* note 13, at 81, 88.

88. See, e.g., Lindsay Fergusson, Labour Relations: The State of the Debate, Address Before the Institute for International Research Conference on Managing Change in Industrial Relations 6-7 (Aug. 17, 1989); Murray Loach, *Freedom in Employment*, in LABOUR MARKETS AND EMPLOYMENT: NEW ZEALAND BUSINESS ROUNDTABLE STATEMENTS ON LABOUR RELATIONS 13, 14 (NZBR ed., 1988); NEW ZEALAND BUSINESS ROUNDTABLE, REVIEW OF THE OPERATION OF THE LABOUR RELATIONS ACT IN THE 1988/89 WAGE ROUND 6 (1989) [hereinafter NZBR].

89. Brook, *supra* note 25, at 194.

90. *Id.* at 196. In the United States, Professor Estreicher has articulated a position close to Brook's in this respect. He advocates law reform to promote "value-added" unionism. Estreicher, *Labor Law Reform*, *supra* note 24, at E1-E2.

91. This criticism should not obscure the fact that unions have historically and systematically excluded women and minorities. Women advocated more inclusive bargaining and attempted to bring new issues to the table, including discrimination, health and safety, maternity leave, and hours of work. Linda Hill, *Theories of Corporatism: A Feminist Critique*, in LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994, *supra* note 78, at 151, 155-56. Indeed, ECA proponents argued that women and minorities would especially benefit from changing the bargaining method. *Id.* at 156. Ironically, however, women workers proved to have more in common with their male co-workers than ECA proponents thought, for they achieved better conditions under the LRA than under the ECA. Suzanne Hammond & Raymond Harbridge, *The Impact of the Employment Contracts Act on Women at Work*, 18 N.Z. J. INDUS. REL. 15, 28 (1993); *Negotiation Still a Talking Point*, EVENING POST, Feb. 25, 1995, at 21.

depends on members helping each other and sharing information."⁹²

Labour Party spokesperson or Shadow Minister for Labour Helen Clark argued that allowing a worker to change authority to represent during bargaining would create instability: "The Minister of Labour is so obsessed with choice that he cannot understand that in some of those matters choice could lead to anarchy and instability."⁹³ Ken Douglas of the Council of Trade Unions (CTU) worried that the law lacked ways to select bargaining representatives other than the parties' muscle and willingness to use it:

There is no stability of representation required in the bill. The bargaining agents can be changed as often as workers like during the course of negotiating a contract, they can be changed at contract renewal time, and the agencies for bargaining need not be the same as those for administration or enforcement of the contract.⁹⁴

The Engineers Union criticized the ECA for failing to address the essential conditions necessary to functioning labor law such as selecting or removing a bargaining agent and defining the scope of a bargaining agent's responsibilities.⁹⁵ It contended that the ECA further allowed an employer to determine who could become a bargaining agent⁹⁶ and allowed individual rights to "override the collective good of an enterprise and of the wider body of people working within it."⁹⁷

The issue of choice over stability demonstrates that the ECA is not anti-union so much as it is naively doctrinaire. Union concerns are obvious: unstable coalitions and unpredictable resources in terms of people and dues. Unions, however, are not the only ones concerned about the problems created by unhindered choice. Employers are worried that this instability is detrimental to their interests. One employer, Telecom, foresaw

92. Tim Hazeldine, *Employment in New Zealand: Then and Now*, in LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994, *supra* note 78, at 19, 24.

93. PARL. DEB. (Hansard) 1428 (Apr. 23, 1991) (N.Z.).

94. Ken Douglas, *The Employment Contracts Bill: Two Very Different Perspectives*, EXAMINER, Apr. 18, 1991, at 18.

95. Rex Jones, *A Private Union's Perspective*, Address delivered at the Longman Professional Conference, Auckland 8 (May 7-8, 1991).

96. *Id.*

97. *Id.* at 9.

that the law would lead to multiple bargaining representatives and negotiations, that would threaten industrial relations within the company.⁹⁸ Carter Holt Harvey, Ltd., was concerned by workers' ability to retract authorizations, even late in the bargaining process, and by the ECA's failure to deal with splits that might develop among workers when they saw the tentative settlement which their agent had achieved.⁹⁹ Peter Carroll, Chief of the Auckland Employers Association, stated:

As a private opinion, I think that it's going to be freedom at the expense of stability, which will be found undesirable by employers and responsible unions and it may be confusing for workers too.

At some stage in this act, or in some later legislation, the possibility for introducing procedures for the recognition of bargaining agents may be necessary. One has to have some procedures for recognising how an agent gets his authority.

I think this is where there is most trepidation by the larger employers, that we could be buying freedom at the cost of stability.¹⁰⁰

Volatility was destructive to company interests. The proliferation of bargaining representatives coupled with a lack of continuity in representation prevented the parties from building trust and understanding.¹⁰¹ The ECA pressured agents to deliver. This created a situation in which "the agent was acting for a small group of employees and continuing involvement with [a] company was based purely on that agent's performance record

98. PARL. DEB. (Hansard) 1480 (Apr. 23, 1991) (N.Z.). Carter Holt Harvey, Ltd., worried about "the possible multitude of bargaining agents; the diversity of their own interests, the logistics of proving authorization to represent employees, the ability of the parties to retract that authorisation, the status of individual vs collective contracts, the status of contracts on expiry, etc." Carter Holt Harvey Ltd., Submissions to the Parliamentary Select Committee on the Employment Contracts Bill 11-12 (n.d.).

99. Carter Holt Harvey, Ltd., *supra* note 98, at 16.

100. Rebecca Macfie, *Buying Freedom at the Cost of Stability?*, NAT'L BUS. REV., Feb. 18, 1991, at 1. McDonald's Corporation urged that workers should have to continue with the bargaining representative they had chosen at the beginning of collective bargaining and be unable to change representatives at a later stage even if they were dissatisfied with the results of collective bargaining. It also argued for majority decision-making by employees. McDonald's System of New Zealand Ltd., Submission to the Labor Select Committee on the Employment Contracts Bill 3, 4 (Mar. 29, 1991).

101. Allan Taylor, Implications for Private Sector Bargaining, Address delivered at the Longman Professional Conference, Auckland (May 7-8, 1991); Barenberg, *supra* note 18, at 1470-71.

being satisfactory to that small group of employees, at the disadvantage to the majority of other employees and the company."¹⁰² Encouraging bargaining agents to seek short term goals of delivering better terms harmed industries' long term interests.

In the Packaging Industry, as a single example, much effort has been spent in restructuring wage classifications that will encourage "upskilling" that is so necessary to its survival. This exercise has involved "give and take" on both sides. As a major employer in that industry, we are not satisfied that just any bargaining agent will be even conversant with, let alone committed to these goals; we would submit that a bargaining agent somehow should be directly affected by the outcome.¹⁰³

Bill Birch, National Party Minister of Labour, dismissed these concerns, arguing that, by allowing individuals to choose whether to belong to a union or to bargain individually or collectively, the ECA was "non-prescriptive" and left parties free to make their own choices.¹⁰⁴ He believed this freedom necessarily would benefit business:

That is what labour market reform is all about—increased productivity and better ways of doing things, leading to better output, more exports, better profits, a higher standard of living, and better wages. That it is the bottom line. It is time for us to seek improvements in our work arrangements so that we are more efficient, more productive, and more export oriented.¹⁰⁵

Former union representative and management consultant, Rob Campbell belittled employer concerns, stating:

Some of the less far-sighted and competent employer representatives have been seen in action at the Select Committee bemoaning the difficulties [making strategic plans about labour relations] will cause them. The same employers are clearly fearful that they may face a number of bargaining agents from within their workforce. This is an interesting case from an economist's point of view as it presents the prospect of a buyer being concerned at facing too many sellers! Certainly in situations where the employer has no clear strategy and lacks skills the prospect is daunting, but no labour relations system

102. Taylor, *supra* note 101, at 9.

103. Carter Holt Harvey, Ltd., *supra* note 98, at 14-15.

104. PARL. DEB. (Hansard) 1429 (Apr. 23, 1991) (N.Z.).

105. *Id.*

structured around the needs of the poorly prepared or incompetent employer has much of a future.¹⁰⁶

Shortly after its enactment, it was possible to see who was the better prognosticator of the impact of the ECA's freedom of choice on stability. Joris de Bres of the PSA explained how the limitless freedom of association operated:

Our problem now is that you've really got a total individualization. There's no legal recognition of that step in the process that says once you've made a democratic decision, you stick with it for the term of the contract. That would have made a big difference.

It's in those little technical difficulties of getting the process going on a collective basis that I think we see our greatest challenges. Anytime there's a sort of dip in the negotiation, if we got that far, or in trying to establish how to bargain because the employer might want 24 contracts and we want 3 or the like, there are huge administrative obstacles, like getting individual authorizations, the ability for any group to withdraw those authorizations at any time in the process. And while in theory it empowers the individual, it weakens the collective. That's at the heart of it for us. There are going to be some pluses and minuses, for instance, in any settlement that you reach with an employer if you get that far. And if there's any hint of that before a settlement, before the ratification process is over, any group can, and some groups have, withdraw their authorization. Because they don't want any variation in their conditions. So . . . the Act is premised on . . . the individual having an absolute power, vis a vis the collective. But the reality beyond that is that the employer then has the additional power of being able to deal essentially with individuals.¹⁰⁷

106. Rob Campbell, *The Employment Contracts Bill: Two Very Different Perspectives*, EXAMINER, Apr. 18, 1991, at 18-19. These issues demonstrate a potential problem in the United States should law reform lead to legalizing nonmajority unions as a way of stemming the decline in union density. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, in EMPLOYEE REPRESENTATION, *supra* note 6, at 13, 43; Joel Rogers, *Reforming U.S. Labor Relations*, in EMPLOYEE REPRESENTATION, *supra* note 6, at 95.

107. Interview with Joris de Bres, *supra* note 59. The Vice-President of the National Right to Work Defense Foundation proposes a similar system for the United States. He states that by enacting the NLRA,

Congress abrogated essential elements of the agency doctrine with respect to private sector employees. As a result, individual workers have lost fundamental liberties which were available to them at common law. Rather than allow the common law and free market to yield voluntary and indiscriminate agencies

According to de Bres, the ECA hindered unions' ability to counsel patience in volatile situations. In 1992, for example, negotiations came to the brink of shutting off electrical power around the country. On this situation, de Bres noted:

Because we have no way left . . . because normally when things settle down and they say, "Oh well, that was O.K. That was reasonable advice." Now they told us 3 weeks ago, "If you don't serve that notice we will leave and serve it ourselves." And so, there is much less room for a union to present a bit of a longer term view or a broader strategic analysis of proposals for industrial action for instance. It's basically "If you don't do it, if you don't serve the notice we'll go." And we are constantly now bargaining with our own members about strategies and so on. So yes, it's had that effect.

There's no doubt, the Employment Contracts Act has both empowered and disempowered workers. It's empowered them individually. It's disempowered them collectively. So, it doesn't matter . . . the chief executive of the Department of Conservation might want one union to deal with and an orderly system, but if we had, as we did a couple of weeks ago, we had one bad meeting, where people disagreed with something an organizer was saying—you get people saying, "If this doesn't improve we'll leave." I don't think it's affected the majority of workers yet, but it's sort of divided off anybody who wants to divide off. And the employer can't do anything about that either. He might refuse to negotiate with them, but then in turn they would have their rights. But the one has a sort of strength against them. It's a sort pseudo-power of workers based on division.¹⁰⁸

In other words, the ECA's emphasis on the individual encourages employees to see their well-being as founded not in solidarity, compromise, patience, and the long term, but in demanding that individual desires immediately be satisfied. This is antithetical to enduring relationships or, ultimately,

between employees and their representatives, the Congress imposed upon employees exclusive representatives with clearly adverse interests. McConville, *supra* note 55, at 478.

108. Interview with Joris de Bres, *supra* note 59.

democracies.¹⁰⁹ This was certainly the experience of unions under the ECA.

You've got to get all sorts of written authorization. At the end of the day, because of the individual nature of it, for instance, . . . When we went back to people to say, "Will you sign individual authorities for us to serve notice of industrial action?" The whole issue's been relitigated. Some people who voted against, they happen to be, in our terms, quite a small minority. The votes were all carried significantly. The people who voted against, who would normally accept a majority were saying, "Well, I voted against it. I'm not going to authorize you to serve that notice."¹¹⁰

Individual voice, with easy exit under the ECA, "does not promote deliberation among employees about shared preferences, leaving management with conflicting signals from disagreeing workers."¹¹¹

The drafters of the ECA clearly foresaw these problems. Two weeks before introducing the ECA into Parliament, Ralph Stockdill of the Industrial Relations Service cautioned Minister of Labour Bill Birch that the system was unstable because workers need not commit to a bargaining agent for any period of time. Bargaining was likely to become protracted should workers not approve an agreement their agent had reached and, as a consequence, withdraw the agent's authority, necessitating beginning negotiations again, with all preliminary matters left unresolved.¹¹² He argued that employers might have to deal with more, rather than fewer, bargaining agents,¹¹³ because the ECA did not limit the number of agents even to one for each employee.¹¹⁴ Despite

109. Cf. Kohler, *supra* note 11, at 229-30. The workplace is thus lost as a place where individuals can learn to be citizens of a democracy by practicing seemingly insignificant routines that build habits for action as individuals within society. *Id.* at 230.

110. Interview with Joris de Bres, *supra* note 59.

111. Richard Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in FUTURE DIRECTIONS, *supra* note 13, at 13, 27.

112. See Memorandum from R. A. Stockdill, General Manager, Industrial Relations Service, Department of Labour, to W. F. Birch, Minister of Labour 2 (Dec. 7, 1990) [hereinafter Memo from Stockdill to Birch].

113. *Id.* A major source of unhappiness with the old system had been the necessity of dealing with multiple agents representing each job classification. For citations and the terms of the debate, see Dannin, *Labor Law Reform*, *supra* note 4.

114. See Memo from Stockdill to Birch, *supra* note 112. A similar problem may arise under certain amendment proposals to the NLRA that would permit "members only" representation, thus resulting in a proliferation of representatives. Matthew Finkin, *The*

his advice, the government chose a system that promoted a devolution to the individual in bargaining.

Although there was an initial decrease, the number of unions began to increase after the ECA's enactment even though the number of members and density continued to decline dramatically. The proliferation of unions under these conditions means that there are many small and, most likely, ineffective unions at a time when unions need strength to face the challenges of the ECA.

DATE	UNIONS	MEMBERSHIP	DENSITY
MAY 1991	80	603,118	65%
DEC. 1991	66	514,325	56%
DEC. 1992	58	428,160	46%
DEC. 1993	67	409,112	43%
DEC. 1994	82	375,906	23.4%

Table 1¹¹⁵

The proliferation of unions did not necessarily mean that there was only one union representing workers in each workplace, a result that many ECA proponents had advocated.¹¹⁶ Instead, some workplaces experienced a situation like that of Air New Zealand's pilots. The traditional union negotiated collective contracts for some pilots, while another union represented others, and the rest were on individual contracts.¹¹⁷

The problems that emerged from the lack of a systematic method of ascertaining representation can serve as a lesson to

Road Not Taken: Some Thoughts on Nonmajority Employee Representation, in FUTURE DIRECTIONS, *supra* note 13, at 199.

115. Harbridge, *supra* note 45, at 176; Harbridge & Hince, *supra* note 45, at 355; Georgina Bailey, *Nation's Workers Walk Out on Unions*, EVENING POST, July 15, 1995, at 1. The source for data in each time period is different, which may contribute to some of the changes. Accompanying this increase in the number of unions and decrease in members was an increase in negotiations. The National Distribution Union, moved from 55 negotiations before the ECA to 700 after its enactment. ILO REPORT, *supra* note 48, para. 154(c).

116. See Dannin, *Labor Law Reform*, *supra* note 4, at 24-25.

117. Hazeldine, *supra* note 92, at 24.

those who advocate nonmajority unions as a solution for declining union density in the United States.¹¹⁸ The New Zealand situation demonstrates that stability and clear procedures are important prerequisites for unionization and that merely allowing unions to come into existence will only produce a meaningless result.

B. Bargaining with Authorized Representatives

Nothing in the ECA required an employer to bargain with its employees' representative. Instead, employees could authorize a representative only to have their employer exercise its absolute freedom to choose whether to negotiate. Thus, engaging in negotiations was an act completely disaggregated from employee authorization. By allowing the freedom to choose whether to negotiate, an employee's authorization of a bargaining representative was rendered a meaningless act. Here, as discussed earlier, the ECA's evenhanded language, which gave this right both to employers and employees, operated only to disadvantage employees and to the advantage of the employers. Only employers were likely to employ this option and even the drafters must have been aware that this was the case. As discussed earlier, not only are workers more eager to bargain and thus more willing to treat with the employer's representative, but they also lack the innate power employers have over workplace conditions, which can be used to force employees to accede to the employer's wishes.

If the ECA drafters lacked the ability to draw these conclusions, employers and their representatives made it clear that they championed absolute power over codetermination. During the ECA's pendency in Parliament, the NZEF contended that an employer who recognized an employee's agent was not obliged to negotiate as a result. Rather, involvement of the agent would itself be a matter for negotiation.¹¹⁹ Allied with this position, but more forcefully put, was the demand for absolute employer control over workplace conditions. Oddly enough, employers claimed they were as powerless unless they were allowed full control. For example, Progressive Enterprises argued that if it could not control the formation of employment contracts there would be "dissension

118. For a discussion of these proposals, see Estreicher, *supra* note 106, at 43.

119. Letter from Steve Marshall, Director General of the New Zealand Employers Federation, to Noel Galvin, Clerk of the Labour Select Committee 1-2 (Feb. 18, 1991).

among employees as to the manner of establishing their employment contract . . . with the Company left as an affected bystander obliged to accept whatever is put before it."¹²⁰ Progressive Enterprises further contended that not only should employers have the discretion whether to recognize the workers' chosen representative, but they must also have final authority on determining workplace terms and conditions.¹²¹

Initially, the departments involved in drafting the ECA forecast difficulties if employers had unfettered discretion to recognize their employees' agents. This discretion naturally would lead to practical problems. Giving employers such absolute power also would contravene the philosophical underpinnings of the ECA by nullifying workers' freedom of association and choice, thus making the Act unbalanced.¹²² By failing to resolve the conflict between employers' and employees' rights and instead relying on the abstraction of freedom of choice to determine the outcome of the conflict, the government invited confrontation and unproductive strikes, lockouts, and other forms of unrest in the workplace.¹²³

As the introduction of the bill that would become the ECA drew near, the departments made a surprising reversal and took a more sanguine view of giving employers this power:

[A]lthough a group of workers may have chosen a particular bargaining agent, recognized by the employer as required by the legislation, the employer will have the right to refuse to negotiate. Thus, employers will effectively be able to challenge the workers' choice of bargaining agent.¹²⁴

This changed position was stunning in its simplistic and rigid ideological confidence that was so divorced from reality.¹²⁵ In order for Stockdill, an experienced and savvy government official,

120. Progressive Enterprises, Ltd., Submission to the Labour Select Committee on the Employment Contracts Bill 5-6 (n.d.).

121. *Id.* at 8.

122. See Memorandum from R. A. Stockdill, General Manager of the Industrial Relations Service of the Department of Labour, and D. J. Martin, Assistant Commissioner of the State Services Commission, to Minister of Labour and Minister of State Services 4-5, 9 (Nov. 12, 1990) [hereinafter after Stockdill & Martin Memo].

123. *Id.* at 9-10.

124. Memo from Stockdill to Birch, *supra* note 112, at 2.

125. This was not the only instance that saw coherence sacrificed for ideology in the operation of the ECA. See, e.g., Paul Roth, *A Contract Law Perspective on the Individual/Collective Employment Contract Nexus: What is the Status of a Section 19(2) Agreement?*, 8 OTAGO L. REV. 77, 92 (1993).

to write this memorandum, he had to ignore contemporary press reports and employer organizations' statements encouraging employers to have the final say in bargaining. Those made it clear that the norm would be unilateral governance.¹²⁶ It also confused submission with consent. Stockdill was willing to ignore that pitting employer against employee in this matter, with no guidance from the state, destroyed even the illusion of bargaining equality. Most peculiar was the position that an employee representative selected by the employer might be anything other than illegitimate.¹²⁷ The memo defied common sense by envisioning that the choice of representative was based on simple logic, essentially a cost-benefit analysis. The Stockdill memo failed to appreciate that workers might feel strong attachment to their representative and be unwilling to "change their choice" to one the employer preferred, regardless of the benefits of doing so.¹²⁸ Had anyone reversed the words "employer" and "employee" in the memo, the difficulties would have been patent. Finally, the memo overrode one of the stated purposes of the ECA: "to allow employees to determine who should represent their interests in relation to employment issues."¹²⁹

The Stockdill memo and the ECA embody the view that an employer's status alone entitles him to control the process of setting workplace terms, even though those terms have important consequences for both employers and employees. This position also suggests that the drafters saw the employment relationship,

126. In a lawsuit brought in 1992, the employer argued it had the right to change the terms of employment contracts unilaterally because it was the philosophy of the ECA to promote agreements reflecting market conditions. The court found, however, that sanctity of contract accompanied freedom of contract. *Northern Distrib. Union, Inc. v. 3 Guys, Ltd.*, [1992] 3 E.R.N.Z. 903, 921-22 (1992).

127. *Greenfield & Pleasure*, *supra* note 13, at 178.

128. One reason the memo suffered from these flaws was that the legislation was the product of a highly undemocratic drafting process. The drafters made no effort to solicit or provide for the concerns of other than a very limited part of New Zealand society. The only non-governmental body consulted was the New Zealand Employers Federation. See Memorandum from Bill Birch, Minister of Labour, to Cabinet Legislation Committee Annex B, 2 (Dec. 1990). Left out of the process were many potentially interested parties, including the New Zealand CTU, "workers, unions and employers in general." *Id.* at 3. The government itself admitted "[t]here has been limited consultation on the Bill." *Id.* Thus, it was easier to take seriously employer's concerns that, even though their employees might have chosen a particular bargaining representative, that representative might not be a legitimate representative in the sense of doing what was best for the enterprise and thus the workers.

129. Employment Contracts Bill (Long Title of the ECA).

however it was conducted, as having no consequences outside the workplace. This placed undue faith in individual employers, particularly when one considers that the ECA was designed to play a pivotal role in the economy.¹³⁰ Such a view, however, did comport with a strong belief in the power of freedom of contract to lead to a positive outcome on a larger scale.

Nevertheless, giving employers absolute freedom to decide whether or not to deal with employees' authorized representatives is not the only impediment the ECA has created for collective bargaining. For employers who wanted an excuse to refuse to bargain, the ECA provides numerous grounds on which employers can legitimately refuse. It would be unfair, however, to suggest that all employers take advantage of these protections. Some employers see union representation as advantageous. Francis Weevers, a management consultant, explained:

They are much better off to have the work force which is comfortable in terms of its relationship with the employer and in which the employer recognizes that the employees have an entitlement to be represented by the union. And that the employer is relaxed about that than actively trying to separate them from their union because the negative impact of that is that people then don't trust the employer. They suspect that. They wonder about the employer's motivation.¹³¹

Nonetheless, others have taken a different view and have used the ECA to create roadblocks, starting with simply refusing to talk to the union about collective agreements. Joris de Bres explained:

We went to see the employer, said we are authorized to come to negotiate with you on a collective contract. They said, we don't want a collective contract. We recognize you as their

130. It is worth noting here that legislators have conceived most labor law, including the NLRA and its predecessor legislation, § 7(a) of the National Industrial Recovery Act of 1933 (NIRA), less as labor law than as instrumentalities to promote economic recovery. The NLRA and NIRA, however, subscribe to different economic rationales. The NIRA was

industrial recovery legislation that, through codes of fair competition, enabled industries to cartelize their depression-ridden markets. The exchange was entirely deliberate—representational rights for workers as a price for market controls for industry The Wagner Act contained an explicit economic rationale: collective bargaining would give rise to the mass purchasing power necessary for sustained economic growth.

Brody, *supra* note 7, at 36-37.

131. Interview with Francis Weevers, Principal of Francis Weevers and Associates, Ltd., in Wellington, N.Z. (May 20, 1992).

representative, but we've got nothing to talk about, but we're perfectly happy for you to come along as the representative of each individual to assist in the negotiation of their individual contract.

We cannot require—despite the clear wish of the worker—we have no mechanism other than strike to advance the case for a collective contract and the court does not require anything. The law does not require anything of an employer in terms of actually meeting, let alone bargaining in good faith.¹³²

Refusal to recognize and bargain with authorized unions usually involves employers: (1) attempting to bypass the union and to deal directly with employees to set employment terms, in effect, setting up its chosen bargaining representative; (2) actually creating and recognizing an entity other than the authorized union, tantamount to a minority union; and (3) making threats and pressuring employees to revoke authorizations.

In some cases, more than one of these actions occurred, and often they were used together. For example, forcing employees to revoke authorizations may occur in tandem with a demand to deal directly with the employer; indeed, employer associations have seen them as tightly connected. The NZEF and NZBR characterized *Adams v. Alliance Textiles*¹³³ as a case in which the court turned back a union's attack "on an employer's attempts to

132. Interview with Joris de Bres, *supra* note 59. Agreements available and means of bargaining under the ECA differ markedly from those of other legislation. The form of contract, collective or individual, reveals nothing of the process which produced it. Employees may become individual signatories to a collective employment contract (CEC) 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 emerged from actual collective negotiations, or that it came about by operation of law at the expiration of a CEC, thus perpetuating terms negotiated collectively. ECA § 19(4).

An IEC is simply "an employment contract that is binding on only one employer and one employee." *Id.* § 2. 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." *Id.* 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 that establishes the terms for all other employees employed by that employer. *Id.* § 19(2). The ILO's Committee on Freedom of Association found the ECA's failure to promote collective bargaining was incompatible with ILO principles. ILO REPORT, *supra* note 48, ¶¶ 254-55.

133. [1992] 1 E.R.N.Z. 982 (1991), *appeal dismissed as moot*, [1993] 2 E.R.N.Z. 783 (C.A. 1993).

negotiate directly with its employees.”¹³⁴ To them *Alliance* demonstrated that the court understood that employers could “take strong industrial action in support of negotiations for a collective employment contract.”¹³⁵ The *Alliance* decision eventually led to a situation in which a judge could state that negotiations under the ECA bear no resemblance to the actions normally associated with that word. Under the ECA, negotiations may mean no more than “a presentation by one intended party to the contractual relationship of a form of contract to the other and then former’s refusal to deviate from its offer.”¹³⁶

1. Direct Dealing

The ECA’s refusal to prescribe or proscribe conduct created a difficult impediment to overcome before collective bargaining could take place. Rick Barker of the Service Workers Federation explained that the permissive and individualistic nature of the legislation failed to foster collective bargaining and impeded organization.

[W]hat they were able to say to unions was not that you can’t do this or can’t do that. You can do whatever you like. They simply prescribe for a completely open situation and by creating a system of almost total anarchy, there’s going to be the complete antithesis of organization.¹³⁷

Thus, the ECA gave employees the freedom to choose a bargaining representative or not and employers freedom to choose to negotiate with that representative or not. Having the ability to choose “or not” legitimize a wide range of behavior.

Key to the issue of direct dealing as a species of permissiveness is section 20(3) of the ECA and how courts would interpret this section. Section 20(3) states:

Any employer may, in negotiating for a collective employment contract, negotiate with—

- (a) The employees themselves; or

134. NEW ZEALAND BUSINESS ROUNDTABLE AND NEW ZEALAND EMPLOYERS FEDERATION, A STUDY OF THE LABOUR-EMPLOYMENT COURT 36 (Dec. 1992).

135. *Id.* at 37. *Alliance* is one of the few reported cases in which the employer also created a company union.

136. Northern Distribution Union, Inc. v. 3 Guys Ltd., [1992] 3 E.R.N.Z. 903, 915 (1992).

137. Interview with Rick Barker, *supra* note 53.

(b) If the employees so wish, any authorized representative of the employees.¹³⁸

This section's wording could support either of two interpretations: (1) arguably, using the permissive word "may" gives an employer discretion to choose whether or not to bargain with its employees or their authorized representative; or (2) section 20(3)(b) can be read as forbidding an employer from bargaining with its employees if they have authorized a bargaining representative. Deciding which is the proper interpretation is difficult and requires canvassing what is known about the ECA's perception of bargaining.

First, the ECA does not exclude or include anything in terms of what can be bargained. It has few strictures on bargaining conduct beyond forbidding the use of duress in obtaining a contract.¹³⁹ This permissiveness was not an oversight. Indeed, influential ECA proponents advocated entrusting all bargaining matters, substantive and procedural, to the parties and the market forces.¹⁴⁰ Treasury, the department ascendant in this period, wanted to "bring labour market contracting firmly within the law of contract and general law."¹⁴¹ The ECA approaches, but does

138. ECA § 20(3).

139. The ECA provides that if an employment contract or any part of it is procured "by harsh and oppressive behaviour or by undue influence or duress" or if the contract or any part of it "was harsh and oppressive when it was entered into," the court can set the contract aside in whole or in part, or order that compensation be paid. ECA § 57(1), (4).

140. Electricorp had advocated: "The legislation that is enacted must not be prescriptive if the freedom of association that it espouses, and that is so critical to the development of efficient labour market relationships, is to be achieved." Electricity Corporation, *supra* note 20, at 22. Section 3 of the draft ECA had provided, "Nothing in this Act limits the right of any person to negotiate for an employment contract in a manner other than that provided by this Act." Employment Contracts Bill (Long Title of the ECA) § 3. This allowed parties to "contract out" of the ECA and thus had the potential to make the law a nullity.

Under the ECA, parties could negotiate the number and the type of contracts, but they could never get to the terms and conditions of work. The draft also would have allowed an employer to force the parties outside the meager protections of the ECA. *Id.*

141. Memorandum from Bill Birch, Minister of Labour, to the Chairman, Cabinet Strategy Committee ¶ 15 (Nov. 1990). Treasury, guided by Treasury Minister Ruth Richardson, stood for a complete free market approach that would apply only the common law to labor relations. As Murray French of the Wellington Regional Employers Association described the situation:

[I]ndeed a large degree of influence was exercised by the spokesman for Finance, Ruth Richardson, albeit that she in fact at that time had very much a far more radical approach to labor relations and that essentially was that there was no need for an act at all, it would simply be covered by normal contract law. And in fact labor relations legislation could be something in the order of three or four clauses. And indeed that was a serious possibility at one time.

not fully embody, this approach. Nonetheless, the idea of a free market in labor contracting permeates the ECA and informs its providing employers the freedom to choose not to deal with employees' designated representatives. In essence, this is the same situation as a buyer who might decide not to deal with a particular vendor.¹⁴²

Labor negotiations, however, materially differ from negotiations with a commercial vendor.¹⁴³ In a commercial vendor context, either party can walk away from negotiations and pursue other deals, never to meet again. Even if an employer refuses to deal with a union, however, it is unlikely that this will cause the relationship to terminate. The employees most likely will continue to work for their employer but with no means to assert their freedom of choice and association.¹⁴⁴ The ECA's drafters assumed that the labor market was competitive. If they were wrong in this assumption, then all deregulation accomplished was removing protections from the most disadvantaged employees.¹⁴⁵ The drafters were not concerned that they were establishing public policy not on "sound, empirical research but [on] unworldly theorizing."¹⁴⁶ Instead of tackling the ECA's conflict and potential mistaken foundation, the drafters confidently let market forces resolve these matters. What they did not intend, but what naturally had to happen, was that this simply shifted responsibility to the courts to interpret and resolve this fundamental issue. Indeed, this confidence in the courts was not misplaced,

Interview with Murray French, Wellington Regional Employers Association, in Wellington, N.Z. (May 14, 1992).

142. See Gottesman, *supra* note 6, at 70.

143. EDWARDS, *supra* note 41, at 56-59. This difference should not be unexpected because strong evidence exists that labor markets do not function in the way auction markets do, given turnover costs. What appear to be rigidities (sluggish workforce adjustment and wage stickiness) are actually the outcome of efficient transactions between workers and firms. Beuchtmann, *supra* note 3, at 47. Boyer argues that the neo-classical model can only operate in a simplistic form that ignores important factors. Robert Boyer, *The Economics of Job Protection and Emerging New Capital-Labor Relations*, in EMPLOYMENT SECURITY, *supra* note 3, at 69, 117. This is a problem because it is not empirically based. Brian Towers, *Employee Protection Policy, the Labor Market, and Employment: The U.K. Experience*, in EMPLOYMENT SECURITY, *supra* note 3, at 328, 338.

144. In contrast, the NLRA is based on a belief that the employment contract differs from commercial contracts as a result of the employee's dependency on the job and the psychology of subordination. Thus, constraints are necessary to keep the employer from acts that affect the employee's ability to self-represent. Gottesman, *supra* note 6, at 70-71.

145. Towers, *supra* note 143, at 337.

146. *Id.* at 338.

at least in the first years of the ECA's existence. "The courts could be relied on to rule against collective interventions by reference to freedom in the labor market."¹⁴⁷

This issue was so fundamental that it arose in a case even before the newly established Employment Court's rules of procedure had been drafted.¹⁴⁸ In that case, *Adams v. Alliance Textiles*,¹⁴⁹ the Employment Court held that the ECA required an employer to recognize a representative's authority once it is given;¹⁵⁰ it held, however, the implications of such recognition, were left undefined. In addition, because the ECA did not prohibit an employer's direct communication with its employees, the court inferred that the ECA permitted any communication, even ones which "undermine[d] the ability of the representative to negotiate or to negotiate effectively."¹⁵¹ Thus, the court held, *Alliance* violated no law when it bypassed its employees' chosen representative to bargain with the workers individually.¹⁵² Furthermore, the court said, *Alliance* violated no law even though it used highly coercive tactics to persuade the employees to negotiate directly.¹⁵³ The NLRA recognizes tactics such as threats and lockouts in order to force employees to deal directly with their employer as illegal.¹⁵⁴

Alliance essentially condoned Stockdill's suggestion that an employer be permitted to disapprove of a bargaining representative and insist upon the employer's own method of bargaining.

147. Guy Standing, *Labor Regulation in an Era of Fragmented Flexibility*, in EMPLOYMENT SECURITY, *supra* note 3, at 427.

148. Interview with Robyn Haultain, *supra* note 69.

149. [1992] 1 E.R.N.Z. 982, 986-87 (1991).

150. *Id.* at 1009.

151. *Id.* at 1010.

152. Patricia Herbert, *Employers Cash in on a Legal Advantage*, DOMINION, Dec. 27, 1991, at 6. According to Union attorney Robyn Haultain:

[The court] basically said that the worker could repudiate the authority that they gave the union merely by dealing directly with the employer. They took the view that it wasn't the employer that didn't recognize the union's bargaining authority, they basically said that the workers by choosing, and I use that word really advisedly, by choosing to deal directly with the employer had simply sacked us as their authorized bargaining representative and had made the decision to deal as individuals with the employer and that if the individual workers wanted their authorized representative to be recognized by the employer, then their job was to insist that happen.

Interview with Robyn Haultain, *supra* note 69.

153. *Alliance*, [1992] 1 E.R.N.Z. at 1033 (1991).

154. For a discussion of this aspect of the *Alliance* decision, see Dannin, *Bargaining*, *supra* note 5, at 10.

The employer in *Alliance* did just that, but the reality of allowing an employer to exercise this sort of power was that the representative form the employer preferred for its employees was no representation at all. It is likely that this will be the outcome of similar situations.

Three years later, the Employment Court appeared to retreat from this position in *New Zealand Medical Laboratory Workers Union v. Capital Coast Health*.¹⁵⁵ After protracted negotiations, Capital Coast distributed a letter in which it claimed it was trying to protect its employees from their union's irresponsibility. Capital Coast then attempted to persuade its employees to sign its offered agreement.¹⁵⁶ The Employment Court found the letter was "written with the intention of deliberately bringing [the union representative] into disrepute with the members of the union . . . who were using the union as their bargaining agent."¹⁵⁷ In *Capital Coast*, unlike *Alliance*, employees refused to meet without their union representative and did not acquiesce in the employer's demands.¹⁵⁸ Thus, the court could not conclude that they had chosen to change their representative, as it did in *Alliance*.

It is difficult to determine, however, what significance *Capital Coast* will have. This case was written while the ILO was scrutinizing the court's decisions. A particular focus of the ILO inquiring was charges that cases such as *Alliance* demonstrated that the ECA violated international labor standards.¹⁵⁹ On the one hand, at about the same time, the Employment Court accepted as standard practice a letter from a representative who wished to negotiate for and protect workers, which said, "If you choose to

155. [1994] 2 E.R.N.Z. 93 (1994). It is difficult to say how much this case changed employer behavior. See Lee Tan, *Romanos Workers Fight for Collective Bargaining Rights*, LAB. NOTES, Dec. 1994, at 6.

156. *Capital Coast Health, Ltd.*, [1994] 2 E.R.N.Z. at 103-04 (1994).

157. *Id.* at 102; accord *Ford v. Capital Trusts, Ltd.*, [1995] 2 E.R.N.Z. 47, 59-64 (1995); *Ivamy v. N.Z. Fire Serv. Comm'n.*, [1995] 1 E.R.N.Z. 724, 760-61 (1995).

158. *Capital Coast Health, Ltd.*, [1994] 2 E.R.N.Z. at 109-10 (1994).

159. The New Zealand CTU submitted a complaint to the ILO on February 8, 1993. The Committee on Freedom of Association was to examine evidence, taken through November 1993, at a later meeting held in March 1994. The Committee found cause for concern in its interim report. INTERNATIONAL LABOUR OFFICE, 292ND REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, Case No. 1698 ¶¶ 675-78 (March 1994). The Committee sent a mission to visit New Zealand from September 19-27, 1994. ILO REPORT, *supra* note 48, ¶ 133. The Committee mentioned *Capital Coast* as key to the question of whether the ECA violated international standards; it concluded that the situation needed further monitoring. *Id.* ¶ 261.

make further contact with members of your staff outside their normal hours of work for the purpose of discussing this Union's involvement with the negotiations and the need for them to belong to a Union, then that is your prerogative."¹⁶⁰ On the other hand, even in 1995, the Employment Court continued to issue decisions that reflected its awareness that international bodies were scrutinizing its outcomes.¹⁶¹

Direct dealing is a pervasive practice under the ECA. It occurs, not only during contract negotiations, but also in the context of handling grievances. New Zealand Nurses Association (NZNA) organizer Donna Payne explained that her union dealt with employers who regularly attempted to bypass the union when the employers disciplined employees or violated a contract.

There are more attempts not to recognize the NZNA and go straight to the staff direct I've seen that happen when I've had to review service or say they have a problem with an individual over their work performance, or something like that, then instead of not dealing with the NZNA, they go straight to the individual. I have one case up in Taranaki on behalf of the individual and they never responded to my letters; whereas, in the past they would have done.¹⁶²

Direct dealing highlights problems that arise when unions do not have ready access to workers and, therefore, have little ability to protect them. As an employer witness testified in *Capital Coast*, the employer recognized the union's right to be involved in the process of negotiation; however, it was making the employees responsible for keeping the union informed.¹⁶³ With curtailed access and few protections to assert their rights, workers had a hard time making certain that their union received the information it needed to fulfill its role as their representative.

160. *Caledonian Cleaners & Caterers, Ltd. v. Hetariki*, [1994] 2 E.R.N.Z. 400, 403 (1994). The employer allowed the employee involved, however, to walk out of the employer's attempted negotiations without disciplining her for doing so. *Id.* at 412.

161. See *Ford v. Capital Trusts, Ltd.*, [1995] 2 E.R.N.Z. 47, 60 (1995); *Ivamy v. N.Z. Fire Serv. Comm'n*, [1995] 1 E.R.N.Z. 724, 768 (1995).

162. Interview with Donna Payne, Organizer, New Zealand Nurses Association, in Wellington, N.Z. (May 8, 1992).

163. *New Zealand Medical Laboratory Workers Union, Inc. v. Capital Coast Health, Ltd.*, [1994] 2 E.R.N.Z. 93, 110 (1994).

2. Dealing with a Nonauthorized Representative

In *Alliance*, the employer was not content only to deal directly with its employees. It tried to wean employees away from their union by creating a bargaining representative for employees which the employer preferred. In other words, it did as Stockdill suggested: its workers were "obliged to change their choice of bargaining agent in order to gain agreement to negotiate and conclude a contract."¹⁶⁴ This took several steps. The company first attempted to negotiate with plant delegates, although they had no authority from employees to do so.¹⁶⁵ When this was unsuccessful, it created the Mosgiel Independent Thought Society, "an incorporated society whose constitution was drawn up by the company's lawyers and which was underwritten by the company to the tune of \$10,000."¹⁶⁶

The issue of "company unions" was a major focus of debates when the legislature passed the Wagner Act and again has become an important issue with the introduction of legislation to repeal or modify section 8(a)(2) of the NLRA. The NLRA's drafters felt that banning company unions was essential if worker choice was to exist.¹⁶⁷ Section 8(a)(2) is the linchpin to the NLRA's "restoring equality of bargaining power" between employees "who do not possess full freedom of association or actual liberty of contract" and "employers who are organized in the corporate or other forms of ownership" and to encourage the practice and procedure of collective bargaining.¹⁶⁸ It assigns separate spheres to employers and unions and prohibits either from interfering with the other.¹⁶⁹

164. Memo from Stockdill to Birch, *supra* note 112.

165. *Adams v. Alliance Textiles (N.Z.), Ltd.*, [1992] 1 E.R.N.Z. 982, 1001-02 (1991).

166. *Id.* at 999, 1104; *Alliance Tries Union Busting*, M & C WORKERS NEWS, Dec. 1991, at 7. Alliance also asked job applicants to indicate whether they preferred the union or the ITS. *Id.* The court's condoning such organizations was an issue of concern to the ILO's Committee on Freedom of Association. ILO REPORT, *supra* note 48, ¶ 137(h).

167. Despite removing an option workers might choose, the drafters did not see this as the paternalistic nullification of choice. Barenberg, *supra* note 13, at 776. Barenberg canvasses various views on the transformative impact company unionism has on workers' consciousness. At one extreme, it may have so strong an effect that it "help[s] sustain management's illegitimate asymmetric power." *Id.* at 802. At the other extreme, it fosters the unitary view and thus has a positive impact on the workplace. *Id.* at 803.

168. 29 U.S.C. § 151 (1995); see Greenfield & Pleasure, *supra* note 13, at 187.

169. Estreicher, *supra* note 106, at 21.

The ECA sees no need to “restore equality of bargaining power,” because it believes it was never lost. ECA freedom of choice prohibits eliminating any options, even options that nullify one party’s autonomy and ability to make meaningful choices. It thus contains no prohibitions against recognizing and bargaining with a nonrepresentative. As was the case in *Alliance*, company unions are likely to appear at a time of crisis when employees are seeking effective representation.¹⁷⁰ When the employer attempts to destroy its employees’ chosen representative and then presents its employees with the representative it favors, the company union becomes an attractive choice, even if employees know it is likely to be ineffective.¹⁷¹

To be effective in determining workplace conditions, employees need a representative “sufficiently powerful that the employer feels compelled to engage in negotiations about terms and conditions of employment.”¹⁷² If organizations that are willing and able to represent workers’ interests can be displaced by sham unions or bargaining agents, then eventually only ersatz unions will exist.¹⁷³ Whether the law creates and enforces an obligation to recognize the workers’ chosen union affects workers’ willingness to join a union. When an employer can avoid dealing with a union, workers will conclude that joining or supporting a union is futile. If an employer can impose a union on its employees, they may join it despite their preferences.¹⁷⁴ Thus,

170. Ellen Dannin, *When More Than Dues Are Due: Remedies for Section 8(a)(2) Violations*, 35 LAB. L.J. 574, 574 (1984); Pan American Grain Co., 317 N.L.R.B. No. 72 (1995).

171. Joel Rogers’s and Richard Freeman’s 1994 study reported this phenomenon. *Workers Want More Influence, Not Adversarial Relationship*, 232 Daily Lab. Rep. (BNA), at D15 (Dec. 6, 1994).

172. Colin Hicks, Submission on the Employment Contracts Bill 7 (Feb. 18, 1991).

173. *Id.*; Estreicher, *supra* note 106, at 35.

174. Hicks, *supra* note 172, at 8. In the United States, a 1988 Gallup poll showed that even though 56% of workers thought their bosses reacted positively to concerns raised by individual workers, 45% reported holding back their concerns and 54% said they would prefer raising their concerns through an association. Freeman & Rogers, *supra* note 111, at 27. An issue related to minority unions is the NLRA’s forbidding employers to solicit employee grievances in order to discourage them from joining a union. See, e.g., *Flexsteel Indus., Inc. and United Steel Workers of America*, 316 N.L.R.B. No. 745 (1995). Soliciting grievances with an implied or explicit promise of remedying them is a halfway house to a company union—it deflects employees from choosing a functioning union.

an employer may co-opt employees' freedom of choice by creating a favored representative.¹⁷⁵

The contrast on this point between the Wagner model and the ECA is clear. Under the Wagner model, the NLRA has concluded that if the law does not forbid employers from dealing with nonrepresentatives, unions find it difficult to retain workers' loyalty and cohesiveness in the face of strong employer opposition.¹⁷⁶ Employees would be unable to resist employer pressures to accept the company union even if they know it will not advance their interests. The ECA reaches a contrary conclusion: the parties must resolve this conflict of freedoms with minimal state interference. Indeed, given the unitary view of the workplace, the union favored by the workers likely will be one of which the employer approves.

3. Pressuring Employees to Revoke Authorizations

Because union representation under the ECA depends on employee authorizations, an effective way to eliminate any obligations to a representative is to persuade employees to withdraw their authorizations.¹⁷⁷ The ECA allows employees only a fragile collective, always subject to disintegration and inter-union rivalry. This has created a growth industry for attorneys and others who wanted to expand their current businesses by offering services as employee representatives. Joris de Bres of the PSA explained:

On the other hand, we're facing competition from non-union bargaining agents, lawyers, consultants and so on. We're facing some degree of competition from other unions, some of them not in the Council of Trade Unions who have set up separately. We are facing competition from new organizations set up as staff associations, for instance, either with employer support or because they're not satisfied with the service we give them. So we've got that sort of flank to be mindful of.¹⁷⁸

175. Barenberg, *supra* note 13, at 781-82.

176. Employees may believe they are getting a deal because they pay no dues, and therefore, any benefits they receive through a company union appear to be cost-free. This disguises the fact that any company union's expenses ultimately come from labor and management's joint surplus. *Id.* at 805.

177. Under the NLRA, an employer commits a violation if it solicits employees to abandon a union. *See, e.g.,* Wehr Constructors, Inc., 315 N.L.R.B. 867 (1994).

178. Interview with Joris de Bres, *supra* note 59.

If schism, shifting alliances, and employer insistence that employees abandon their representatives are insufficient to provide the employer with the workplace governance it wants, the ECA does not forbid employers from coercing employees to revoke their authorizations.¹⁷⁹ An open question has been how far an employer can go to avoid dealing with a bargaining representative. The ECA says nothing about what kind of pressure, if any, an employer can use to persuade employees to revoke their authorizations. At first, this failure to protect employee authorizations seems peculiar since they are so fundamental to the ECA processes and actions of lesser importance are given protection. For example, the ECA protects union membership,¹⁸⁰ holding union office, contract negotiation, and grievance handling¹⁸¹ but is silent on authorizing representation.¹⁸²

Instead, the ECA offers tempting opportunities for employers inclined to pressure employees to revoke their authorizations. In *Alliance*, the employer threatened those workers who had authorized the union to represent them with a lockout, subsequently locked them out, and told them they could not sign the employer's offered agreement until they had revoked their authorizations.¹⁸³ The union argued that this was harsh and oppressive behavior, undue influence, or duress in the procurement of a contract, which was a violation of section 57 of the ECA. The court saw the issue more blandly, as

179. This ability to coerce revocations was an issue of concern in the ILO's interim report. ILO REPORT, *supra* note 48, ¶ 137(f).

180. Establishing, maintaining, or resigning membership in an employee organization is to be unhindered. ECA § 6. Furthermore, the ECA fully protects freedom to associate with other employees. *Id.* § 5. Section 8 prohibits exerting "undue influence, directly or indirectly, on any other person with intent to induce that other person" to become, remain or cease from being a member of "an employees organisation." *Id.* § 8(a), (b); *see also id.* §§ 27(1)(e), 30. Even though it prohibited duress under those circumstances, the Employment Court interpreted duress in such a liberal way as to strip it of its effectiveness. *See Dannin, Bargaining, supra* note 5.

181. Section 28(1) and (2) prohibit discrimination against an employee who is an officer of an employee organization, acts as a negotiator, acts as a representative of an employee organization, forms a union, is involved in pressing a claim under a contract, or submits a personal grievance. ECA § 28(1), (2).

182. The employee's right to choose representation freely is the second specific goal in the Long Title to the ECA, appearing just after freedom of association. Employment Contracts Bill (Long Title of the ECA) (b). No provisions exist in the ECA that protect the employees' right to choose a representative.

183. *Adams v. Alliance Textiles (N.Z.), Ltd.*, [1992] 1 E.R.N.Z. 982, 993 (1991), *appeal dismissed as moot*, [1993] 2 E.R.N.Z. 783 (C.A. 1993).

whether strong statements by the employer expressing its criticism of the union's conduct in trenchant terms or expressing its own preference that the employees should choose to negotiate direct with the employer rather than through a representative amounted to breaches of . . . the Act and resulted . . . by means of subtle and even unexpressed hints of what the consequences might be of non-compliance with the employer's wishes, in the procurement of employment contracts by the means referred to in section 57(1)(a).¹⁸⁴

The Employment Court found that the ECA's express prohibitions were directed only against pressure regarding membership in an organization, as distinguished from pressure regarding the choice of a representative.¹⁸⁵ The court saw this as creating two issues: (1) "whether the nature, scope, and terms of a representation authority . . . is of any concern to the other party to the negotiations;"¹⁸⁶ and (2) whether, once an employee gives a union authority to negotiate, it can be revoked.¹⁸⁷ In *Alliance*, although the court found that many workers who had authorized the union to represent them later changed their minds as a result of the employer's lockouts and threats of lockouts,¹⁸⁸ this pressure to repudiate the union's representation did not violate section 57(1)(a). It also found that the employers' conditioning signing the employment contract on the employees' revoking the union's authorization to represent them was not evidence of undue influence.¹⁸⁹ Rather, the court held, the

184. *Id.* at 998; see also Walter Grills, *The Impact of the Employment Contracts Act on Labour Law: Implications for Unions*, 19 N.Z. J. INDUS. REL. 85, 91 (1994).

185. *Alliance*, [1992] 1 E.R.N.Z. at 1008-09 (1991).

186. *Id.* at 1010.

187. *Id.* at 1011.

188. *Id.* at 1017.

189. *Id.* According to Chief Judge Goddard, the ECA required employers to respect the employees' choice of representative:

Once the representative's authority is established and for so long as it continues in force:

1. the employer must negotiate, if at all, with that representative;
2. the employer may not insist upon negotiating with the employees direct or with some other representative;
3. the employer need not negotiate at all;
4. the employer may request or offer direct negotiation with employees;
5. the employer must not in so doing exert undue influence on the representative not to act or to cease acting;
6. the employer must not exert undue influence in relation to any employment issue on any person by reason of that person's association (or lack of it) with employees.

employer's pressuring employees to revoke their authorizations showed that the employer recognized the union as representative.¹⁹⁰

One commentator, Walter Grills, concurred in the court's refusal to find this a violation:

[W]hile an employer must remain neutral in respect to an employee joining or not joining a union, the employer does not have to remain neutral as to whether the employee utilizes the union as a representative in collective bargaining. Sections 6 and 7 are about membership in unions and clauses in contracts. They do not prescribe how an employer should treat representatives of employees.¹⁹¹

How can the ECA's protection of union membership, grievance handling, and union office holding be reconciled with the absence of protections against employer retaliation or coercion in connection with employee authorization to represent?¹⁹² The dissonance appears even greater since union membership is well protected, although it is of trivial importance under the ECA. Authorization is unprotected, even though it is what makes the exercise of most rights meaningful. Not protecting the act of authorization means that even the most extreme action to thwart authorization does not violate the ECA. This transforms

Alliance, [1992] 1 E.R.N.Z. at 1033 (1991).

To the extent that these provisions appear to impose a duty to bargain, when read together, they cancel or limit one another to such an extent that the obligations are minimal and illusory. *Id.*

190. The Court of Appeals, in dictum, expressed serious reservations about the Employment Court's decision to allow an employer to disregard the authority of a union which had clearly established its authority to represent the employees. The Court of Appeals said:

To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognized by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning, and spirit of the enactment. It would apparently mean that, although employees had authorized a union to represent them from the start, the employer need never negotiate with the union. Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass an authorized representative.

Eketone v. Alliance Textiles (N.Z.), Ltd., [1993] 2 E.R.N.Z. 779, 787 (C.A. 1992). The issue was moot and thus was not before the court so this statement was not binding.

191. Grills, *supra* note 184, at 91. The Court of Appeals held that employers are free to express anti-union views. Such statements could become grounds for a finding of undue influence, however, depending on the facts. *Eketone*, [1993] 2 E.R.N.Z. at 786 (1992).

192. ILO REPORT, *supra* note 48, ¶ 137(g).

authorization, the central right for employees who wish to empower themselves, into a perilous act. This makes freedom of association under the ECA little more than an empty rite.

This omission contrasts with the Wagner Act model where the representative selection process is the focus of its prohibitions. Although the NLRA gives an employer the right to express its opposition to unions and unionization,¹⁹³ the employer cannot threaten retaliation, discriminate, or commit other acts that render representation futile.¹⁹⁴ That no comparable protections exist under the ECA is primarily an expression of faith in the unitary workplace. If, however, that faith is misplaced, the lack of similar protections makes the system one of simple employer fiat.

The lack of support for employee freedom of choice belies the ECA's claims in this matter. Not protecting authorization is more detrimental to employees under the ECA than would be the case under the NLRA. Not only is the ECA employer free to engage in a wide range of conduct forbidden by the NLRA, it can engage in more effective duress or retaliation because it knows which employees to target. The ECA mandates disclosure of the employees' choice of representative to the employer. Under the NLRA, an employee either signs a card designating the union as its representative, casts a secret ballot, or is hired into a unit that already has an established representative. Nothing reveals the individual employee's choice to the employer, so the employee is free to choose. A system which binds individuals to the majority's representation choice protects those workers who are afraid to

193. NLRA § 8(c). Professor Barenberg suggests that the first amendment would permit broader time, place, manner restrictions on employer speech. Barenberg, *supra* note 13.

194. Acts such as these would be violations of § 8(a)(1) or (3). Statements and other actions that violate the NLRA include: threatening job loss or more onerous working conditions; informing employees that seeking union representation will be futile; humiliating employees; impliedly promising improvements in wages, hours, or other terms or conditions of employment in order to dissuade them from supporting union; restricting conversations; changing work rules because of union activity; or disciplining or otherwise discriminating against employees for their union activities. See, e.g., *Dayton Hudson Corp.*, 316 N.L.R.B. 477 (1995). If serious enough to cause a union to lose support, such acts can become the basis for ordering an employer to bargain with a union that a majority of the employees supported. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Flexsteel Industries, Inc.* 316 N.L.R.B. 745 (1995). The NLRA even protects employees from employer actions that are inherently destructive of their rights, without the need to offer proof that this was the employer's purpose. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27 (1967).

admit that they are union supporters.¹⁹⁵ When nothing reveals the employer's choice to the employer, the employee is freer to exercise uncoerced choice.

The LRA, the legislation that preceded the ECA, protected employees' choice in a way more akin to the NLRA. Maryanne Street observed the contrast in employees' freedom of choice under the LRA and ECA:

Such a freedom [to choose whether or not to belong to a union] ignores the constraints which apply to the workplace in terms of emotional pressure, fear of unwanted attention and subtle victimisation. Although the existing legislation expressly prohibited employers from exerting any undue influence on workers with regard to union membership (LRA 1987 s.72(2)), the law was in fact irrelevant either because of the dynamics of the workplace or because of the worker's ignorance of it and fundamental sense of powerlessness.¹⁹⁶

The LRA, however, provided a shield that protected employees from having to disclose their views:

[I]n some sense I found members hid behind the legislation. People who did want to be union members found it difficult. They were largely women, largely nervous and anxious, so for them having legislation meant that, well, of course, I don't want to be a law-breaker, Mr. Employer, so I am going to be a member. And this was really in small towns where nobody could police it anyway.¹⁹⁷

The ECA, in contrast, requires workers to disclose their preferences each time authorizations are given.¹⁹⁸ Each act of disclosure is dangerous, in part because authorization could be a futile act. An employer may choose not to recognize the employee's representative or to frustrate the bargaining process.¹⁹⁹ Unions' resulting lack of access to the employees and difficulty in meeting the ECA's procedural requirements leaves them incapable of protecting the employee. Thus, although the

195. Maryanne Street, *The New Act's Effect on Low Paid Members*, Address delivered at the Longman Professional Conference, Auckland 5 (May 7-8, 1991); Interview with Maxine Gay, *supra* note 67.

196. Street, *supra* note 195, at 5.

197. Interview with Maxine Gay, *supra* note 67.

198. ECA § 12.

199. Street, *supra* note 195, at 7.

ECA talks about choice, the LRA and NLRA have more mechanisms to protect employees' choice.

If an employer has freedom not to associate with a union, then what are the limits on its assertion of that freedom? The ECA provides no answer aside from forbidding actions that constitute procuring a contract "by harsh and oppressive behaviour or by undue influence or duress."²⁰⁰ It is unclear whether the courts will expand this prohibition to protect the process of authorization where the legislature has been silent. This omission represents the legislature's abdication of its obligation to make policy choices when it had to know there would be constant clashes between the exercises of freedom of association and choice. Parliament made a policy choice, and that policy choice was to let the market forces resolve the clash.

C. Representation Authority as a Procedural Hurdle

In 1994, the government told the investigative team from the ILO Committee on Freedom of Association that an employee's establishing authority to represent was "intended to ensure that the individual's choice of representative is respected and that the agent is genuinely representative of the employees. It also helps to ensure that employees cannot be bound to agreements or negotiations without their knowledge and against their interests."²⁰¹ Although the ECA allows an employer to bargain even with an entity not selected by its employees, the ECA places a heavy burden of proof on a union to prove that it received valid authorization to represent. This anomaly is difficult to reconcile. On the one hand, the validity of authorizations means nothing in the face of free choice, while on the other, requiring proof of valid authorizations is a paternalistic hurdle that employers can use to thwart free choice.

The government could have resolved the problem simply by establishing a regular procedure, such as a government-conducted election or check of authorizations to establish validity. When the ECA was pending in Parliament, many urged the government to include such procedures. Labour Party spokesperson for Labour Helen Clark criticized the ECA's failure to specify how unions were to establish representation authority as one of its most

200. ECA § 57(1)(a).

201. ILO REPORT, *supra* note 48, ¶¶ 193, 221.

serious flaws. She predicted that this would provide ample work for lawyers and the courts.²⁰² The Clerical Workers Union (CWU) pointed out specific flaws: first, each worker had to give his or her representative authority and then each worker also had to be named as a party to a collective employment contract; and second, the legislation failed to spell out how this authority was to be given and its scope. The CWU lamented:

How is it obtained? Does it have to be in writing or can it be verbal? Can it be given before negotiations start or do the words in Clause 11(1)—“authority to represent that employee or employer in those negotiations”—imply a specific authority for each set of negotiations?

The vagueness of the phrase “authority to represent” has major implications for Clause 11(2). It will make it easy for employers to challenge the authority of representative they do not want to negotiate with, for example by demanding evidence of the authority given by each individual covered by the contract.²⁰³

Employers, too, worried about the problems the legislation created by failing to establish regular methods of representation. Carter Holt Harvey recommended using majority votes to authorize bargaining agents.²⁰⁴ Without such a procedure, Carter Holt Harvey said, individual worker authorization would be chaotic, ponderous, and frustrating.²⁰⁵

These critics foresaw issues that have plagued unions and employees by creating hurdles primarily in two areas: (1) in bargaining and related actions; and (2) in legal proceedings to prosecute violations of the ECA or breaches of contract.

202. See PARL. DEB. (Hansard) 1428 (Apr. 23, 1991) (N.Z.).

203. New Zealand Clerical Workers Union, Submission to the Labour Select Committee on the Employment Contracts Bill 17 (Feb. 1991). The union added, “The more important point about Clause 11(2) is that the other party to negotiations merely has to *recognise* a representative’s authority. There is no requirement on employers to have to negotiate or reach a settlement with the employees’ chosen representative.” *Id.* at 17. The union characterized this situation not as providing freedom to negotiate but rather as giving employers the right not to negotiate. *Id.* at 18.

204. Employees, however, would ratify individually by signing the resulting agreement. Carter Holt Harvey, Ltd., *supra* note 98, at 13. Carter Holt Harvey’s recommendation may not have resolved some of the most fundamental problems with the ECA.

205. *Id.* at 16.

1. Bargaining and Other Concerted Action

The requirement that a union prove it is an authorized representative has created difficulties for unions and employees at every turn.²⁰⁶ The ECA, however, is equitable and may cause employers equal trouble in some circumstances. The ECA made any collective action difficult. In rare cases, this could create problems for employers. One employer who wanted to lock out its employees during a bargaining dispute found this was a difficult task under the ECA. The 400 employees worked at sites scattered throughout the country. The employer had to serve each employee personally because none of the employees had authorized anyone to receive lockout notices on their behalves.²⁰⁷ Serving 400 employees is not easy, so the employer first tried to evade this obligation. The employer first tried to served the union,²⁰⁸ arguing unsuccessfully that the union's authorization for negotiations also covered receiving notices.²⁰⁹

The employer next gave its supervisors envelopes containing written notices to distribute. The supervisors, in turn, attempted to effect service by giving them to union delegates (stewards) to distribute. In the words of Judge Goddard, "Now the delegates, knowing that the last thing likely to be contained in the envelopes would be good news, but suspecting in reality from all the surrounding publicity that these would be lockout notices, refused to have anything to do with them."²¹⁰ In the end, the employer mailed notices to each employee's home.²¹¹ By then the notices were untimely, and the employer had to change the lockout date.²¹²

Most often, however, authorization requirements create no barriers to any employer action, while they create daily and formidable hurdles for unions. These hurdles have been exacerbated in workplaces with high turnover or with a small number of

206. The ILO's Committee on Freedom of Association also raised this concern. ILO REPORT, *supra* note 48, ¶ 137(i).

207. *New Zealand Merchant Service Guild IUOW v. New Zealand Rail, Ltd.*, [1994] 1 E.R.N.Z. 482, 486 (1994).

208. *Id.*

209. *Id.* at 488.

210. *Id.* at 486-87.

211. *Id.* at 487.

212. *New Zealand Merchant Service Guild IUOW*, [1994] 1 E.R.N.Z. at 489 (1994).

workers at scattered locations. Authorizations had to be satisfactory to the other party. This meant that employers can, and do, demand fresh authorizations and one which are specific to the matter at issue.²¹³ Roslyn Noonan explained how this affected the NZEI, a large union spread throughout the country:

That has been terribly important because, under the Employment Contracts Act, as you know, there are appallingly, essentially irrelevant, but intended again to make a union's job extremely difficult, there are technical requirements if you are to bargain for people. It's not sufficient that people are members and paying a subscription fee. We have to have separate bargaining authorities from them and then within three months of the negotiation starting, we have to get individually signed ratification forms. It is just a nightmare task. Again, we have done it, relatively speaking, incredibly well. But huge resources have had to go into achieving that and it is still far from perfect. We are in the process now of following up, so lists are going out that say "These are the members and here's our record of who signed bargaining authority. Here's our record of who has signed ratification forms, and we need to fill in the gaps."

Having to [get authorizations] say once, on an annual basis, is probably a good thing but when you have to do it at least twice, it's a huge effort. You have to have bargaining authorities from them. Separate from that you have to have ratification. You can do it together for people who are just joining up. But, for the others, you can't because the ratification forms can't be older than three months prior to negotiations starting. The logistics of the whole exercise mean that you need the bargaining authority forms, you need to be getting them on a continuous basis. We now get them as we join people, but like every other union, we had a huge existing membership who had never signed specific bargaining authority forms.

The employer can decide that . . . the negotiations are taking too long and the bargaining authority forms are not valid. The whole thing has been intended to make it as difficult as possible for unions to operate and to give employers any excuse to deny recognition of the union when they want to do that they can do it no matter how perfect you are, because it's

213. New World Supermarkets, for example, demanded proof of authorization at each meeting. ILO REPORT, *supra* note 48, ¶ 157(c).

impossible to be absolutely perfect in those situations. We try to make the most of it, but I have to say that the cost of the whole process, individually to every member in terms of the bargaining authority form. When you put 20,000 members Let alone the envelopes, the cost of the labor for filling them and the printing and so on. That money would be better spent on members in other ways, but anyhow, we are committed to doing whatever is required and in showing that we can and we will, so the employers won't be able to use that as an excuse not to deal with us.²¹⁴

Joris de Bres of the PSA gave other examples of the difficulties created if, during negotiations, it became necessary to strike:

They were then going to take us to court, questioning whether we had in the form of the authorization that each individual worker had to sign for us to represent them in negotiations, whether that authorization also authorized us to give notice of strike action. And as a precaution now we've had to go to all our members and say, "Will you sign a further authorization for us to serve notice of strike action?" It becomes a huge procedural mess²¹⁵

With the fresh authorizations required at critical junctures, employees are presented with yet another point when they must positively reaffirm their commitment to the union (and inform their employer of that fact) or decide to strike out on another course, leaving the union without support when it most needs it. Mere apathy or inadvertence can leave the union without valid authority, just as can active opposition. Yet unions cannot refuse to seek new authorizations, for they then would be illegitimate representatives.

Some unions have searched, albeit unsuccessfully, for creative ways to use authorizations as a weapon. For example, in *New Zealand Meat Processors, Packers, Preservers, Freezing Works and Related Trades Industrial Union of Workers v. Richmond*²¹⁶ the employer sought "plant specific" collective employment contracts (CECs). The union demanded a company-wide CEC. The

214. Interview with Roslyn Noonan, National Secretary, New Zealand Educational Institute, in Wellington, N.Z. (May 26, 1992).

215. Interview with Joris de Bres, *supra* note 59.

216. *New Zealand Meat Process IUOW v. Richmond, Ltd.*, [1992] 3 E.R.N.Z. 294 (1992) (application for preliminary injunction); *United Food Workers v. Talley*, [1992] 3 E.R.N.Z. 643 (1991) (action for permanent injunction and declaratory judgment).

Employment Court, however, refused to limit bargaining to the scope of the union's authorization. Instead, the court held that the union had no power to act when the employer sought site specific bargaining²¹⁷ and that the employees retained the power to bargain for site-specific CECs. This meant that the employer was free to engage in direct dealing.²¹⁸ The union's clever tactic left it powerless to stop its members from signing site agreements.²¹⁹ By late November 1991, it had retained only one-third of its members at one plant and only a few at the other.²²⁰

The PSA tried to avoid these problems by using the opposite tactic when, on September 18, 1991, the Designpower agreement expired.²²¹ At that time, the employer wanted its employees on individual employment contracts (IECs); by early 1992, however, court interpretations of the ECA had made a CEC more advantageous to the employer.²²² By then, the union and its members took the opposite view for the same reasons.²²³ Workers who had not yet agreed to the company's contract terms refused

217. *United Food Workers*, [1992] 3 E.R.N.Z. at 720-21 (1992).

218. As Judge Palmer put it:

Confronted with this situation and the union's understandably unyielding insistence, as it impressed me, that it was authorized only to negotiate a company-wide collective employment contract, the defendant was plainly, I conclude, lawfully entitled to approach its intended workers and negotiate directly with them. What other choice, I rhetorically ask, did the company have in the material circumstances?

Id. at 724.

219. See Rebecca Macfie, *Employment Act Saps Strength From Union Muscle*, NAT'L BUS. REV., Oct. 18, 1991, at 24.

220. See Michael Turner, *Meat Workers in Last-Ditch Stand Over Contracts*, NAT'L BUS. REV., Nov. 29, 1991, at 19.

221. *New Zealand Public Service Ass'n, Inc. v. Designpower N.Z., Ltd.*, [1992] 1 E.R.N.Z. 669, 672 (1992). Designpower's parent corporation, Electricorp, or Electricity Corporation, expressed views in support of the ECA that make an interesting backdrop to events that occurred here. Electricorp stated that it viewed unions as having been imposed contrary to the wishes of the employer and employees and as having "continuously placed obstacles in the Corporation's path in achieving its employee relations objectives." Electricity Corporation, *supra* note 20, at 6. In addition, Electricorp said, the ECA would not lead unscrupulous employers to exploit their workers. "The commercially successful employer recognises the value of a skilled and well motivated workforce and understands the role that fair and appropriate employment conditions play in maintaining and motivating such a workforce." *Id.* at 7.

222. Certain court decisions had made it desirable, by that time, for employers at least to say they were seeking CECs and employees and unions to prefer IECs. See Gilson & Dannin, *supra* note 5, at 10-12.

223. *Designpower N.Z., Ltd.*, [1992] 1 E.R.N.Z. at 673 (1992).

to negotiate collectively and informed the company that they had withdrawn the PSA's authority to do so as well.²²⁴

Undaunted, the company wrote a memorandum to its employees that it had received the revocations of authority as well as employees' "pro forma letters" stating their preference for IECs. The memorandum noted:

It is the company's current preference that you be a party to the collective employment contract. *This is a legitimate right the company can exercise.* Therefore you will need to give consideration to nominating a bargaining agent to act on your behalf, or alternatively represent yourself at those negotiations. I will advise you of the date that collective negotiations will commence and seek advice from you as to whom you wish to act as your bargaining agent.²²⁵

On April 6, the company warned its employees that they would be locked out unless they began negotiations for a CEC.²²⁶ On April 13, it followed through and locked out those who had not signed agreements or given assurances that they would negotiate.²²⁷ Here again, the employer refused to deal with its employees' representatives and forced its employees to deal with it on its own terms.²²⁸

The PSA argued that the lockout violated section 5(a) of the ECA by transgressing employees' rights to "choose whether or not

224. *Id.* at 673-74; Jason Barber, *Lockout Comes as Court Hears Union's Case*, DOMINION, Apr. 13, 1992, at 3.

225. *Designpower N.Z., Ltd.*, [1992] 1 E.R.N.Z. at 686 (1992) (quoting Designpower's March 5 memorandum). This statement promoted the purpose expressed in (d), which "enables each employer to choose . . . [t]o negotiate or to elect to be bound by a collective employment contract . . .;" but completely overrode the idea expressed in (c), which "[e]nables each employee to choose either—(i) [t]o negotiate an individual employment contract with his or her employer; or (ii) [t]o be bound by a collective employment contract to which his or her employer is a party." Employment Contracts Bill (Long Title of the ECA).

226. *Designpower N.Z., Ltd.*, [1992] 1 E.R.N.Z. at 674 (1992). In its statement to parliament when the ECA was pending, the employer argued that "any temptation to perpetuate the view that protections are required based on the comparative strengths of the parties to an employment contract should be avoided." Electricity Corporation, *supra* note 20, at 8.

227. *See* Barber, *supra* note 60, at 3; *see also* *Hawtin v. Skellerup Indus.*, [1992] 2 E.R.N.Z. 500 (1992).

228. *But see* *Caledonian Cleaners & Caterers v. Hetariki*, [1994] 2 E.R.N.Z. 400 (1994), in which an employer was not allowed to terminate an employee who walked out of a meeting. The employer had tried to negotiate directly with her, bypassing her representative. *Id.* at 404.

to associate with other employees for the purpose of advancing the employees' collective employment interests."²²⁹ The court, however, found that the employer's actions had no effect on employees' rights to act collectively. Judge Colgan stated:

I am satisfied on an assessment of all of the evidence presented that, as the defendant asserts, it is indifferent to whether its relevant employees associate with others of them in relation to the company's desire to negotiate a collective employment contract I accept that Designpower is even now indifferent as to how the negotiations for a collective employment contract are to be conducted in the sense that its coercion of employees has not been for the purpose of persuading them to associate with others of them to advance their collective employment interests but has rather solely been to coerce them into negotiations for a collective employment contract.²³⁰

As a result of this case, the level of unionization among Designpower employees fell from eighty-eight percent to thirty-one percent within four and a half years.²³¹

The use of such a lockout would violate employees' NLRA section 7 rights because it gives employees the right to refrain from concerted activities.²³² In addition, and more important, section 7 protects collective action. It understands "collective" in a more natural sense than does the ECA. This result highlights the disaggregated nature of bargaining under the ECA, which allowed a CEC to result from individualized bargaining.²³³

Although it may seem desirable to an employer to be able to achieve this end, both employers and society must confront what it means for an employer to have and to exercise this sort of power. One New Zealand union representative observed:

229. *Designpower N.Z., Ltd.*, [1992] 1 E.R.N.Z. at 678 (1992).

230. *Id.* at 683-84.

231. ILO REPORT, *supra* note 48, ¶ 154(b).

232. 29 U.S.C. §157 (1995).

233. The ECA provided that a decision as to the number and type of contracts in the workplace was left to the parties. ECA § 18. This provision and the existence of CECs and IECs multiplied grounds for disagreement, which the ECA resolved through strikes or lockouts. One 12-page issue of *Labour Notes* reported five disputes in which the key issue was conflict over the form of agreement. Cf. Tan, *supra* note 155, at 6; John Maynard, *Mobil Workers' Action Wins Right to Bargain Together*, LAB. NOTES, Dec. 1994, at 7; Pat Bolster, *Drivers Thwart Push for IECs*, LAB. NOTES, Dec. 1994, at 8; Grant Cairncross, *Housing Agency Fails to Purge PSA*, LAB. NOTES, Dec. 1994, at 10; *Lab Staff and CHE in Court*, LAB. NOTES, Dec. 1994, at 11.

The general environment in most workplaces has moved from one of fear and insecurity to one of cautious hopefulness and sometimes even confidence that the worst is over. Companies which in the last three years have used the Act as a tool to reduce wages and conditions generally have low morale, low levels of loyalty toward, and trust in the management, low job satisfaction, and there also often exists amongst the workers some sense that 'our time will come again,' be it by way of regaining lost conditions or through finding alternative employment and being able to escape.

As any industrial relations practitioner will tell you, the history of a workplace is critical to its future. One wonders what sort of future these organisations will be able to create when so much ill will now exists because of what has occurred under the ECA.²³⁴

2. Court Proceedings

a. Union Standing to Bring a Lawsuit

On April 15, 1994, in the course of protracted contract negotiations, Capital Coast Health wrote to its employees to explain why it did not want their unions to be a party to the contract:

The parties to the contract are Capital Coast Health and the employees who indicate they wish to become a party. While it is not unusual for a union to be a party to a collective contract, the fact that there are at least four unions which may have members coming under coverage of this contract, makes this more difficult. Unions or other employee representatives not being parties to this contract, does not prohibit your union (or any other representative) helping you in enforcing the contract should this be necessary. In effect the choice becomes yours as to whom you want to act for you in any given situation.²³⁵

In fact, this claim seriously misstated how difficult party and authorization requirements could make contract enforcement or any other legal proceeding to protect employees and their rights.

234. Suze Wilson, *Organised Labour in the Employment Contracts Act Environment*, in *LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994*, *supra* note 78, at 281, 282.

235. *New Zealand Medical Laboratory Workers Union, Inc. v. Capital Coast Health, Ltd.*, [1994] 2 E.R.N.Z. 936, 113 (1994).

The plain truth is that unions face severe handicaps in prosecuting ECA or contract violations, even of contracts the union itself has negotiated. The structure of the law as it currently exists and as unions operated under it in the past suggest that party status will somehow obviate these problems and is thus something worth making bargaining concessions to secure. For example, the standing of a union, acting on its own behalf and without specific employee authorization, to bring a case when it was not a party to the contract, has been the focus of several Employment Court cases.²³⁶ At this point the law is sufficiently unclear as to what requirements a union must meet that a prudent union will act in all cases as if it is not a party to an agreement. A nonparty union safely can assume it can sue only as the expressly authorized agent of a party²³⁷ or if given special permission by the Employment Court.²³⁸ The burden of establishing the authority to represent another rests on the person asserting it.²³⁹

Some unions have tried to circumvent this problem by developing creative arguments that union rights were directly

236. See, e.g., *New Zealand Nurses Union v. Argyle Hosp., Ltd.*, [1992] 2 E.R.N.Z. 314, 344 (Empl. Trib. 1992) (nonparty union's ability to prosecute access issues as the sole party raised by the employer but Mediator sidestepped the issue); *Northern Distribution Union, Inc. v. 3 Guys, Ltd.*, [1992] 3 E.R.N.Z. 903, 916-18 (1992) (nonparty union has standing to bring compliance action by language of § 55(2)). For problems involved in achieving access to court when a determined employer is opposed, see *Adams v. Alliance Textiles (N.Z.), Ltd.*, [1992] 1 E.R.N.Z. 982, 986-87 (1991). The union filed the case in its name alone in order to protect the employees' identities. The court, however, required the union to refile the statement of claim with the employees' names.

237. ECA §§ 45, 123(1)(b). In *New Zealand Airline Pilots v. Mt. Cook*, [1992] 3 E.R.N.Z. 355 (1992), the court found that the authorized union had standing based on mutuality of interest with its members in bringing claims seeking declaratory and injunctive relief and a compliance order, but not to bring a claim for a penalty under § 53(1)(a). *Id.* at 405-07.

238. ECA § 123(3). In *Prendergast v. Associated Stevedores Ltd.*, [1991] 1 E.R.N.Z. 737 (1991), the employer actively opposed the union's presence as plaintiff because it was not a party to the employment contract and thus could not be affected by the alleged violation. In that case, Judge Travis sidestepped this issue by allowing the union to be made a party as a person entitled to be heard pursuant to § 90(2). *Id.* at 742. In *New Zealand Air Line Pilots Ass'n v. Air New Zealand, Ltd.*, [1991] 1 E.R.N.Z. 880, 884-88 (1991), the employer argued that, because the employees were on individual contracts, no resolution of the controversy would affect the union. The court reasoned that there was a chain of contracts between the employer and employees and between the employees and union. This meant that the union was affected to some degree. In the end, the court allowed the union standing even though it was not a party to the contract in the case. *Id.*

239. ECA §§ 12, 59(3).

violated, thus giving them standing to sue in their own right. In one case, they argued that the employer's unilateral change in working conditions prejudiced the union by making its members lose confidence in it.²⁴⁰ In reply, the employer argued that standing should be denied:

A breach which recognises prejudice to the union, where its members are adversely affected by reason of the union loss of bargaining strength or credibility with its membership, if it is unable to enforce compliance, is no longer relevant under the new Act, which abolishes compulsory unionism and the exclusive negotiating rights of unions. No sufficient prejudicial effect has been alleged.²⁴¹

In that case, *Service Workers Union of Aotearoa, Inc. v. Air New Zealand*, the court sidestepped this issue and that of the plaintiff employee who did not sign a specific authorization for the union to bring the case.²⁴² Thus, by refusing to face the issue of standing, the court and tribunal allowed the union to bring the case in the union's name. Despite the luck of some union-plaintiffs, even a case involving collective rights or one to protect workers who feared reprisals, might not give a union standing to be a party.²⁴³

Events have shown that party status has limited value. All unions, and not just nonparty unions, suffer severe disabilities in trying to bring suit. Every time there is a violation of the contract, the union must find signatories to the contract who are willing to come forward as plaintiffs in order to bring suit. The union also must secure authorization specific to the suit and then must prove it has that specific bona fide authorization as a threshold issue. Finally, employees must testify as to their damages or interest in receiving a remedy in order to prevail.

Thus, if the union has party status and can join as a party, as opposed to being merely the plaintiffs' representative, it still needs

240. *Service Workers Union of Aotearoa, Inc. v. Air New Zealand, Ltd.*, [1991] 3 E.R.N.Z. 503, 508 (1991); *but see Northern Distribution Union, Inc. v. 3 Guys, Ltd.*, [1992] 3 E.R.N.Z. 903, 919-20 (1992). The court appeared willing to accept that a union could claim standing for a compliance suit for breach of a contract, particularly when in negotiations for a successor agreement. The negotiations gave the union both an interest in the proceeding and standing.

241. *Air New Zealand*, [1991] 3 E.R.N.Z. at 508 (1991).

242. *Id.* at 512-13.

243. In this case, 32 employees joined as plaintiffs when the union refiled. *Adams v. Alliance Textiles, Ltd.*, [1992] 1 E.R.N.Z. 982, 986-87 (1991).

employees to be parties and to give it authorization. Otherwise, the union risks achieving only a pyrrhic victory in which it nominally prevails but receives no relief because only employees who have joined the lawsuit can secure a remedy.

The union's first problem of finding employees willing to join the suit is not easy to overcome. Although employees risk being denied a remedy by failing to join as a plaintiff, joining may not always appear desirable to them. By becoming parties, employees could be put at risk, particularly if the union loses. A loss may then weaken employees' attachment to the union. In *Alliance*, for example, the employer told the losing employee plaintiffs that it would seek costs from them.

[O]nce they were individually named, and they lost, the employer told them that they were going to seek costs of \$NZ100,000 [\$59,000] and each one of those workers would be individually liable to pay their personal share which would be somewhere in the region of \$NZ3,000 [\$1,770], which is a hell of a lot of money to a worker who's earning \$NZ18,000 [\$10,620] gross a year. And that the employer would deduct the money out of their pay packets, because the employer was the pay master

So the whole thing was an absolute disaster. After that people just walked away in droves from the union. The union lost a hell of lot of credibility through losing the case.²⁴⁴

Even when fear of being assessed costs was not involved, employees may be reluctant to reveal themselves, even as subpoenaed witnesses, for fear of retaliation.

Cases involving large numbers of injured workers present severe logistical problems. In *Paul v. New Zealand Society for the Intellectually Handicapped, Inc.*,²⁴⁵ for example, the union had to collect and submit authorizations from the 3500 workers employed there before it could represent them in the lawsuit. The workers' union memberships were irrelevant to this effort. Nor could the union argue that it was highly unlikely that the workers would not want representation in a situation where they had suffered clear detriment. In the end, despite great diligence, the union could

244. Interview with Robyn Haultain, *supra* note 69.

245. *Paul v. N.Z. Soc'y for the Intellectually Handicapped, Inc.*, [1992] 1 E.R.N.Z. 65 (1992).

gather only 1040 authorizations by the court's deadline.²⁴⁶ In addition to the problems of securing most authorizations, gathering them for trial means the effort only can be made at the very time the union is busy with preparation. Meanwhile, the employer is free to focus on its trial preparations.

If this is not a sufficient burden, the judicial bodies have interpreted the law to make securing authorizations, even of willing employees, more onerous. The Employment Tribunal has been especially zealous in creating new requirements and additional burdens on unions trying to protect the rights of injured workers. Unions have been required to submit fresh authorizations. Even those given as little as nine months earlier were deemed too stale to support a union's request for copies of its members' IECs which are necessary to prosecute a court case.²⁴⁷

Unions could not try to anticipate all future needs by getting general authorizations to cover any eventuality. The adjudicators demanded that they be specific. Authorizations that stated that the union was to act as the employees' "bargaining agent, and in any other matter relating to our employment or employment contract, including access to all employment contracts between us and our employer" were held to be too broad.²⁴⁸ In *Society for the Intellectually Handicapped, Inc.*, the court wanted the authorizations to state the name of the attorney.²⁴⁹ Such a requirement made it impossible to use a general authorization or even any authorization signed before trial was imminent. In another case, the union presented general authorizations from

246. *Id.* at 69-70. The authorizations permitted the union's attorney to represent the workers. The court's language suggests that it wanted the authorizations to state the name of the attorney, thus making it difficult, if not impossible, to gather them at any time before trial. *Id.*

247. *National Distribution Union, Inc. v. Foodstuffs (Auckland), Ltd.*, [1994] 1 E.R.N.Z. 653, 660-63 (1994); *New Zealand Baking Employees Union v. Foodtown Supermarkets, Ltd.*, [1992] 1 E.R.N.Z. 266, 272 (Empl. Trib. 1992). In this case, however, some employees had specifically withdrawn those parts of their authorizations given for the purpose of going to trial. *Id.* at 272.

When the ECA was enacted, some suggested that the ECA impose these very requirements. Bill Manning, *Rules Set for Bargaining Agents*, NAT'L BUS. REV., May 21, 1991, at 9.

248. *Foodtown Supermarkets, Ltd.*, [1992] 1 E.R.N.Z. at 270 (1992). According to the mediator, section 19(6) permitted the employees to ask for their own contracts if they wanted them. *Id.*

249. [1992] 1 E.R.N.Z. 65, 68-70 (1992).

members along with its rules, which said that financial membership allowed the union's national executive to represent "financial members in all negotiation and proceedings under the relevant provisions of the Act" as evidence of its authority to bring the suit.²⁵⁰ The Tribunal held that ECA sections 59(3) and 90(1)(b) created a "positive duty" to present specific authorities for specific litigation.²⁵¹

Thus, unions could try cases only if they exerted enormous and continuous efforts. If an authorization was worded too broadly with the intent of giving the union power to do any necessary act, a more specific authorization was required. By the time a union could anticipate and define every act it would need to perform, the authorization would be too stale.

By September 1992, the court sent an ambiguous signal that suggested it thought these requirements had gone too far when it stated:

We wish to make it clear at once, . . . that there is nothing to prevent an employer or employee signing a perfectly general authority extending to future as well as to pending or imminent action including litigation, but if the authority is to have this effect, it must be plain from its terms that this was the intention of the employer or employee signing the authority.²⁵²

This statement was, however, dictum and thus not binding. In addition, if the devil is in the details, then much depends on the detail of how an employee's intent was to be established. Other cases suggest this is yet another difficult burden to meet.

A union cannot bring a case until it proves that it has bona fide authorization.²⁵³ In *Alliance*, the court appeared ready to

250. *Association of Salaried Medical Specialists v. State Serv. Comm'n*, [1992] 2 E.R.N.Z. 625, 626 (Empl. Trib. 1992).

251. *Id.*

252. *Foodtown Supermarkets, Ltd.*, [1992] 3 E.R.N.Z. at 313 (1992). The court suggested that it would still require an authorization's validity to depend on the events contemplated by the principal at the time the employees signed the authorizations. *Id.* at 307.

253. ECA § 59(3) states: "Any person purporting to represent any employee or employer shall establish that person's authority for that representation." On July 11, 1991, less than one month after the ECA went into effect, the court issued the first judicial interpretation of the ECA in *Grant v. Superstrike Bowling Ctrs., Ltd.*, [1992] 1 E.R.N.Z. 727 (1991). The second paragraph of the decision made clear how much had changed. Judge Finnigan noted there that the applicant had properly authorized the New Zealand Equity and Entertainment Union to represent her *in this proceeding*. *Id.* at 728; see also *Northern Local Gov't Officers Union, Inc. v. Auckland City*, [1992] 1 E.R.N.Z. 1109, 1114-

permit the union to prove this through signed statements without having to call witnesses. As the case unfolded, however, it was unclear whether this would have satisfied the court.²⁵⁴ *Alliance* and later cases suggest that unions cannot avoid the requirement of proving authorization. Because no one can be made a plaintiff without consent and because the union was not a party, unions must present competent evidence that they are authorized to bring the case on the employee's behalf.

To sum up, the court's holdings have been, at best, erratic and unpredictable. In some instances, it is clear from reading the cases that the court is willing to ignore fundamental evidentiary issues with respect to authorizations, even while imposing other requirements stringently. It will not allow the union's status as authorized representative to be proven through the attorney's or union's testimony. This comports with general rules of agency, that agency cannot be proven through the agent's words. On the other hand, as a reading of the cases cited in this section show, the court is willing to accept as proof of the representative's status, authorizations that workers have signed, even when fundamental evidentiary requirements are not met. First, whether oral or written, the authorizations would be hearsay for this purpose. Second, if authorizations constitute jurisdictional evidence, they must be authenticated. Were any employer to refuse to waive these evidentiary objections, the court would be hard put to overrule the objection. Although the court has not explained its willingness to wink at these basic requirements, it is possible that the prospect of having every worker who has signed or witnessed an authorization undergo cross examination and impeachment would be more than the court could bear.

On the other hand, the court has reinjected this problem by requiring named plaintiffs to testify or face having the court dismiss their cases.²⁵⁵ In addition, the court has limited remedies to those who come forward to participate in the case. This means that each employee who becomes a party or whose case was dependent on proper authorization potentially must testify or risk

15 (1991) (setting out the terms of the authority in the opinion and noting that the contract was signed by 394 out of 910 employees represented by the union in negotiations).

254. *Adams v. Alliance Textiles, Ltd.*, [1992] 1 E.R.N.Z. 982, 989 (1991); see also *Ward v. Christchurch Transp.*, [1992] 1 E.R.N.Z. 303, 308 (1992).

255. See *Alliance*, [1992] 1 E.R.N.Z. at 988-89 (1991).

dismissal of the case. Should an employer decide to challenge an authorization on factual or evidentiary grounds, there would be no way to evade these issues.

These problems are not really of the court's creation. The ECA was written to include the authorization requirements, and the court must apply that law. Employees can easily revoke their authorizations. Therefore, the only way to be certain that any authorization is valid and unrevoked is to require that these elements be proved before the case can proceed. What this also means is that workers affected by the litigation must be actively involved with it. Courts would be remiss to allow cases to proceed without these workers' involvement. Although many judges have been willing to evade problems of authorization, just as many have not. The latter are the ones who are facing the unpleasant realities of the infelicitous drafting of the ECA. They realize that just because a union comes to court with a membership list does not mean that the union actually represents anyone in the court proceeding. The problem of fraud or authorizations which were not what they purported to be was made all too clear in *N.Z. Dairy Workers Union v. Hautapu Whey Transport*. The union appeared as sole plaintiff and called no employees.²⁵⁶ The judge adjourned the proceedings for two weeks and wrote the employees to invite them to participate in the case.²⁵⁷ As it turned out, the workers were technically members of the union but had not authorized the union to bring the case. The workers then engaged an attorney to represent them at the hearing, and the judge made that attorney a party.²⁵⁸

In most cases, we can assume that unions are authorized to represent those they claim to. For these unions, not only can finding, preparing and presenting all these witnesses be an enormous hardship, the requirements create other pitfalls. A union fails to bear the costs and to secure employee witnesses at the risk of losing the case of each such plaintiff or witness. Moreover, the requirements demand more than merely presenting witnesses. A union bears the burden of proof on these threshold matters. If, as a prerequisite to suit, New Zealand unions must

256. *N.Z. Dairy Workers Union, Inc. v. Hautapu Whey Transp.*, [1994] 2 E.R.N.Z. 549, 551 (1994).

257. *Id.*

258. *Id.*

produce evidence to prove agency status, then this is an issue which can be lost and which, if lost, can cause the entire case, however meritorious, to be lost. The issue of authorization is not technical but jurisdictional and nonwaivable.²⁵⁹

All this, of course, increases a union's costs of trying cases, particularly one tried out of town. Robyn Haultain described the witness costs involved in the *Alliance* case:

The case cost us \$NZ60,000 [\$35,400] to run in hotel bills and feeding these workers and flying them up from Dunedin at short notice. It cost \$NZ60,000 [\$35,400] in travel, accommodation and the food I work on a salary so if I hadn't been doing it, I would have been doing something else. You don't count my salary into it, but I had to be accommodated down in Christchurch all the time. And that also includes, that would include some of my preparation costs, my travel costs flying down to Timaru and Dunedin to brief people's evidence or to prepare their affidavits.²⁶⁰

As long as unions have finite funds, they can try fewer cases under these circumstances. Each trial risks depleting their resources and increasing the chance they will be unable to protect other injured individuals.²⁶¹

Although we may think of procedural requirements as merely a technical exercise or an exaltation of form over substance, what is actually involved is choosing winners and losers. It is, therefore, important in imposing such requirements to consider how great a burden they create and how useful they are to the ends of justice. No evidence exists to suggest that Parliament considered these issues in drafting the ECA or that courts have considered these issues in interpreting it. All the requirements, however, operate

259. *Paul v. N.Z. Soc'y for the Intellectually Handicapped, Inc.*, [1992] 1 E.R.N.Z. 65, 69 (1991).

260. Interview with Robyn Haultain, *supra* note 69. The court refused to hold the hearing at a location convenient to the witnesses, resulting in unnecessary cost increases.

I asked for the hearing to be heard in Oamaru, which is a place in-between Timaru and Dunedin where we could have driven people backwards and forwards each day. But Judge Goddard said that he wasn't sitting in some crummy old district court chamber in Oamaru, and that if he had to sit on a week-long hearing that Christchurch was as far south as he was going. So, yes, so we had to fly people up.

Id.

261. In addition to these increased demands, unions also face greater uncertainty as to sources of revenues and lost revenues. Wilson, *supra* note 234, at 283. The steep decline in membership discussed above translates into less revenue.

one way: to make it very hard for workers and unions to prevail at trial. When the court procedures are placed in context with other aspects of the ECA, it is clearly that plaintiffs will have severely limited relief and many injuries will go without redress.

Take for example, courts' new demand that employees must be willing to come forward. This means that employees who are afraid to reveal themselves may forego a remedy. For example, in the case of an employment contract obtained by duress, employees may be aware that the onerous conditions of the new contract only can be set aside if the employees join the suit. Employees who are already feeling coerced are apt to be extremely reluctant case to reveal themselves. In addition to this natural reluctance, the union will have little ability in such a case to gain access to the workplace. Intimidated employees need to feel they have a protector, and employees in this situation will not have such assurances.

The difficulty from the union point of view is that individual employees do not wish to reveal their opposition to an aggressive employer, particularly during times of high unemployment. The difficulty for the Tribunal or the Court is that there is no evidence either way. On the face of the *Alliance* case, the workers may have been intimidated, or they may simply have been happy with the collective contract.²⁶²

Thus, the ECA's requirements make it more likely that the normal situation will be an employer's continuing to enjoy the fruits of a serious violation.

The procedural problems also mean that the ECA permits, and even encourages, inconsistent results depending on whether and which employees become involved in a lawsuit. In *United Food Workers v. Talley*, for example, the court found that the employer had secured the contract through duress.²⁶³ The court, however, would only set the contract aside for the eight employees who had come forward.²⁶⁴ The other 306 employees who had received the same treatment had no remedy and were left under

262. Grills, *supra* note 184, at 90. A secret ballot would permit employees to express their preferences, free from employer knowledge. In the United States, some advocate secret ballot elections so employees are protected from union pressure as well. See Estreicher, *supra* note 106, at 41.

263. [1992] 3 E.R.N.Z. at 456 (1992).

264. *Id.* at 457.

the coerced contract terms.²⁶⁵ This result although a loss on its face, only can be regarded as a victory for the employer and a serious problem for the rest of society.

Such a result, however, is not extraordinary or unusual under the ECA. The ECA establishes a regime that refuses to accept that the employment relationship is largely and inescapably collectivized. It may be that ECA ideology cannot, and likely does not want to, prevent the natural consequences of giving relief only to those who testify and/or become party plaintiffs, that is, that lawsuits will establish fundamental inconsistencies in workplace terms. Although this result occasionally favors employers who will thus avoid paying money to a large group of workers, in many other instances, employers will chafe at the administrative and personnel problems this result creates. Many workplace conditions are similar to public goods, which cannot be set for one employee only.²⁶⁶ Indeed, many employers have expressed concern that the ECA promotes inconsistent workplace terms.²⁶⁷

Employers and employees are not the only parties negatively affected by inconsistencies connected with lawsuits. The legal system, too, suffers when it is unable to foster its goals of efficiency and integrity. Individualization of cases means having to relitigate the same issue.²⁶⁸ One way to overcome this problem

265. *Id.* at 456-58. In *Alliance*, the Court made it harder to try the case by refusing to find duress from strong evidence of threats, lockouts, and other actions and opted instead for direct testimony from the employees that they felt coerced. For further discussion of this issue, see Dannin, *Bargaining*, *supra* note 5.

266. EDWARDS, *supra* note 41, at 60-61; Gottesman, *supra* note 6, at 77; Howard Wial, Rethinking the Microeconomic Foundations of Worker Representation and Its Legal Regulation: From Asset-Specificity to Collective Goods, Address delivered at the Industrial Relations Research Association (Jan. 1995). On the other hand, as Finkin points out, even in a unionized workplace, unions often bargain on a minority basis, resulting in different terms and conditions. Finkin, *supra* note 6, at 210-11.

267. EDWARDS, *supra* note 41, at 64-65. Before enactment of the ECA, however, employers saw different workplace conditions emerge from bargaining, not court action. Some believed the ECA created "powerful incentives for employees to avoid a collective employment contract and instead opt for identical individual employment contracts." Chris Rennie, *Union View Hard to Ignore*, NAT'L BUS. REV., Feb. 28, 1991, at 2. Employers worried that this would allow individual workers who occupied a critical position within the firm to hold the employer's need for administrative certainty and uniformity hostage to their demands. Patricia Herbert, *Why Employers Fear the Birch Bill*, DOMINION, Mar. 21, 1991, at 12. This was an exaggerated fear because, if as few as two employees agree to a collective employment contract, then those terms override any inconsistent terms in individual contracts. ECA § 19(2).

268. The *Talley* court said, as to cases involving the interpretation "of many identical individual employment contracts, or whether particular conduct constitutes a breach of

and to make comprehensive, consistent, economical, and effective action possible would be to permit class actions. Failing this, there would have to be employers ready to concede defeat after losing in an exemplar case.

The court, however, has foreclosed class actions in important circumstances, such as cases involving contracts that were obtained through harsh and oppressive means by finding that Section 57 of the ECA expressly bars representative proceedings, and by too easily finding that courts have found potential class members' interests too diverse to find commonality.²⁶⁹ Furthermore, the problem of obtaining authorizations also plagues class actions. A union's inability to procure authorizations and explicit employee support for litigation, may be evidence that a class action is inappropriate.²⁷⁰ Unless an employee's ability to rescind the union's authority for representation is limited, class actions may not be feasible. Such a complex lawsuit cannot be prosecuted if employees can withdraw or limit authorization at will and at any point.²⁷¹ Thus, class actions may not be available in cases brought under the ECA as a result of a mixture of legal and practical impediments.²⁷² It is also unlikely that employers will

such contracts, and the remedies sought are either declaratory or for a compliance order or for a permanent injunction, then it would seem quite wrong that the Court should, by refusing to treat the action as representative, allow the same issue to be litigated over and over again with the same or different defenses to it being successively raised by the same defendant." *United Food Workers*, [1992] 3 E.R.N.Z. at 430 (1992). The court suggested it might allow a union to use ECA § 123 to avoid this problem, even if not all employees affected gave authorizations. *Id.*

269. *Id.* at 430. In *Northern Local Government Officers Union, Inc. v. Auckland City*, [1992] 1 E.R.N.Z. 1109 (1991), the court reasoned that a representative or class action would be an appropriate way to proceed in a suit for injunctive and declaratory relief and for a compliance order in a breach of contract case. It concluded, however, that only those employees who had given the union an authorization to try the case would be treated as parties. *Id.* at 1114-15. It is difficult to see how this fine line-drawing would permit them to overcome the problems which led to Federal Rule Civil Procedure 23(b)(1)(A), (B).

270. *United Food Workers*, [1992] 3 E.R.N.Z. at 431 (1992).

271. *Cf. Ward v. Christchurch Transp.*, [1992] 1 E.R.N.Z. 303, 306-08 (1992).

272. *Grills, supra* note 184, at 90. Similar problems may bedevil injunction cases. In *Hyndman v. Air New Zealand, Ltd.*, [1992] 1 E.R.N.Z. 820, 826-27 (1991), the employer argued that an injunction case could not be brought as a representative matter. *Cf. FED. R. Civ. P. 23(b)(1)*. In this case, two employees sought to represent 157 fellow employees. The judge allowed this, based on an analogy to requirements under High Court rules, although it was unclear whether they applied to cases brought under the ECA. *Air New Zealand, Ltd.*, [1992] 1 E.R.N.Z. at 827 (1991). In this case, as well, the employer argued that the union lacked standing to sue because it was not a party to the relevant agreement.

readily concede defeat after a single exemplar case is lost. As a consequence there may be no alternative to multiple trials on the same or similar issue and crowded court dockets.

IV. DISCUSSION

This Article began by juxtaposing the two models for ordering labor relations: the Wagner and the ECA models. Proponents of the ECA and LMC base their demands for change on the claim that these are new systems designed to meet the needs of a radically changed economy. This claim ignores all but the most recent history of labor relations. This is not the first time that these two models have been in conflict. The NLRA was preceded by the shortlived section 7(a) of the National Industrial Recovery Act.²⁷³ This act had important parallels to the ECA. Its inadequacies were constantly in the minds of the congressional committee when it held hearings for the NLRA. A few years of experience under the regime section 7(a) established, made it easy to recognize that its premises were unrealistic and that it did not provide a suitable means for ordering labor relations.²⁷⁴

The tenor of the debate and the arguments then made closely resemble today's discussion concerning the ECA/LMC model versus the NLRA model. 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."²⁷⁵ On the other hand, as one witness testified sixty years ago:

True collective bargaining has certain essential qualities. It requires certain conditions to be met. They are: (1) Freely chosen representatives are to be recognized and dealt with for the purpose of coming to an agreement; (2) representatives of workers are to be chosen free from company domination; (3) no means may be used to undermine the worker's organization; and (4) agreements entered into are to be respected. . . .

The judge decided to defer the question during the proceeding for interim injunction. *Id.* at 827-28.

273. At the time of the NLRA enactment, approximately 3 million workers were organized in company unions and 4.5 million in autonomous unions. Barenberg, *supra* note 18, at 1386.

274. *Id.* at 1401-03.

275. Brody, *supra* note 7, at 37.

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 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.²⁷⁶

The passage of sixty years can obscure the relevance of this debate. First experience with the ECA is instructive for those in the United States who now are considering promoting nonmajority unions, enhanced LMC, and other changes as labor law reform.²⁷⁷ Each of these proposals is likely to suffer from the very weaknesses that have rendered the ECA's system vulnerable to abuse and incapable of fostering bargaining and the democratization of the workplace. The value of studying the ECA is twofold. First, it exposes its structural and distributional weaknesses. Second, it reinforces the insight that the way law interacts with society must be taken into consideration in crafting a labor law. Pure theory will never lead to satisfactory results. Those who crafted the NLRA had the benefit of seeing theory crumble when placed into service.

The ECA is a new reminder of the weaknesses of pure theory untempered by experience. As a result, we can benefit now from the lessons it makes available. Allowing authorizations to be revocable without limits establishes a preference for freedom of choice that admits no room for stability.²⁷⁸ Requiring authorizations that are fresh and specific also defeats stability and the ability to provide effective representation. The ECA thus demonstrates that labor law must provide some optimal level of

276. 1 NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 147 (1949) (testimony of Dr. Francis J. Haas).

277. For a discussion of these proposals, see Estreicher, *supra* note 106, at 43.

278. The NLRA resolved this problem through compromises such as the doctrine of contract bar. Thus, when a collective bargaining agreement is in place, the union's authority to represent the bargaining unit is presumed. At either the agreement's expiration or, at a minimum, every three years, employees may vote to replace their representative. See *Appalachian Shale Products*, 121 N.L.R.B. 1160 (1958); see also *St. Mary's Hospital*, 317 N.L.R.B. No. 9 (Apr. 28, 1995). Contract bar and its allied doctrines represent a counterweight to volatile change and implicitly embody a view that the exercise of § 7 rights necessitates an ability to rely on the continuance of the relationship.

stability to promote the interests of employers, employees, and unions. Stability permits employers to plan for the future and promotes peace in the workplace. It also enables unions to be the means for empowering workers so they can be full partners in codetermining workplace conditions. That optimal level of stability only can be achieved if the law protects the status of the bargaining representative, provides regular processes for achieving that status, and fosters an acknowledged and a clearly defined status for the representative. Although one side may rejoice that it has prevailed under a chaotic system, that victory is likely to be unstable in turn. Fundamental components of society should not function chaotically. Chaos will exist unless workers can designate a representative with the power to co-determine workplace conditions. This important insight that the Wagner Act expresses is as true today as it was then.

A second important insight is that legislation may have a negative impact on unions, even if the legislation is not intentionally anti-union. Nothing in the ECA seems anti-union in the commonly accepted sense of the concept; nonetheless, it has been destructive to unions and collectivity. The reason it has had this effect is that it fails to appreciate and support the value of collectivity for workers. Furthermore, it fails to consider the context in which the law would operate. This latter problem meant that it tried to treat as like things that are unlike. As a consequence, the ECA shapes and restricts power relationships, and these reconfigured power relationships then act upon unions.²⁷⁹

These tendencies come together under the ECA in the dissimilar ways that the law applied to workers and employers. The ECA accepted corporations as so natural and unassailable a feature of modern society that its proponents failed to notice that corporations are artificial creatures, wholly dependent upon law to sustain their collective existence.²⁸⁰ Although it did not see this "mote in the eye" of corporations, the ECA certainly took notice in the case of unions. All legislated supports for collectivity were taken from them. ECA supporters then used unions' failure to thrive under the new conditions as evidence that they were

279. Atleson, *supra* note 82, at 473 n.30.

280. Electricity Corp., *supra* note 20.

unnatural and unnecessary.²⁸¹ It takes little thought to realize that no corporation could survive a similar test.

In a sense, the ECA regime has subjected unions to the same impossible standards that women faced during the Salem witch trials. If the accused women could swim when thrown into the pond, this constituted unassailable proof they were witches to be burned at the stake. If they drowned, they were not witches and could take comfort knowing their immortal souls were not in peril. At the same time, there were others who, by virtue of the structures of the community, would never be subjected to these unwinnable tests and who could use the witches' fate to prove the illegitimacy of those who failed and re-affirm the community's need for their services. So, too, ECA proponents ignored the inconvenient realities of the law's operation as they used its impact to further their goals.

The ECA also ignores key differences in purposes and roles that different institutions fill in society, demanding that all be equally exposed to market forces. The campaign for the ECA has promoted materialism and acquisitiveness as yardsticks which may be used to measure all success or failure. Institutions not motivated by these goods cannot fare well in an ECA regime. Thus, a veneer of legislative equality and ideologically driven agendas hides the ECA's inherent and pervasive inequality and incompatibility with the needs of the workplace and society to the extent they are based in other values. This veneer also hides the fact that the ECA's drafting bolsters the employer's position in all but the most unusual situations.

The drafters' adoption of ideology as the lodestar for constructing the legislation allowed them to avoid the difficult procedural issues that good drafting would have resolved. The drafters refused to create a method for making rights meaningful, such as providing adequate protections or providing a method for ascertaining rights.²⁸² Instead, they justified these inadequacies by claiming that the market was the appropriate way to resolve all disputes and that using other methods of resolution would have disastrous consequences. "By making the result seem necessary, unavoidable, rather than chosen, [they attempted] to convert what

281. *Id.*

282. ECA § 3.

is tragically chosen into what is merely a fatal misfortune."²⁸³ This was an abdication of responsibility, which ultimately only shifted the job of making the ECA function to the courts. When disputes came to the Employment Court, the Judges became accountable for resolving any ambiguity or lacunae. This quasi-religious belief in the market assumes that the market "exists independent of legal regulation and public policy."²⁸⁴ Thus, ideology provided its drafters with ready excuses for foisting a highly flawed law on New Zealand.

The ECA experiment thus teaches that ideological purity as a goal is a poor tool in drafting legislation. Although the ECA's proponents saw the act as a way to promote their goals of freedom, self-actualization, and productivity, its operation demonstrates that these goals are not fully compatible in the current ECA design. Its drafters abdicated the responsibility of making hard decisions where the espoused goals were in conflict, preferring to leave these decisions to the market forces. Substantial evidence exists that the ECA has not achieved even the goals its proponents advocated as a result of their abdication of responsibility. This is especially true when there is no restriction on an employer's achieving its productivity goals through wage cutting and where the union is marginalized and cannot help the employees collectivize to take an active role in the workplace.²⁸⁵

On the other hand, ECA proponents have been able to achieve their goal of marginalizing unions. A union officer observed that some employers and employees have come to regard unions as

283. GUIDO CALABRESI & PHILIP BOBBI, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF SCARCE RESOURCES 21 (1978).

284. Atleson, *supra* note 82, at 484. The ECA identifies both its end and its means to the end as freedom of contract and of the market. The unreflective conflation of means and ends itself may be a problem in the process of legislating. Cf. RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION 280, 282 (1986).

285. Wilson, *supra* note 234, at 282. That this should be the case is not surprising if one looks at the campaign for the ECA. Many of the NZBR leaders had argued for the need to provide new job entrants with "training wages." See Dannin, *Labor Law Reform*, *supra* note 4, at 18 n.82. Penelope Brook, a leading ECA proponent, condemned the pre-ECA system for having "little room to adjust negotiated awards downwards." Brook, *supra* note 25, at 187, 198-99, 201-03; Brook also argued that the ECA would induce employers to raise their workforce's skill levels. *Id.* at 197.

outside forces whose role is to advise workers on their legal rights and obligations at the time of negotiation or during disciplinary proceedings but which otherwise have no role to play in the workplace. In some places this "outside influence" is regarded positively, but is still nonetheless seen as coming from "outside". Very few companies see themselves as being in a long-term, strategic partnership with their employees and their union.²⁸⁶

New Zealand's treatment of authorizations to bargain and of unions thus begs the question whether a society is better or worse off when workers are deprived of a meaningful collective voice.²⁸⁷ Issues affecting the existence of unions and their ability to serve their members bear directly on this question.

The ECA did not intend its treatment of authorizations to represent to be an answer to that question. Nonetheless, it accorded unions so little value and created so many hurdles to union organization and effective action that there is no doubt what the ECA's answer is. Joris de Bres of the PSA observed:

I think the things that essentially at the end of the day hit us most and that we didn't predict are the removal of any reference to unions, any rights for unions, the total premise of individualism and then the critically complex procedures to recollectivise as individuals without any assistance from the law.

In other words, even in the area of getting authorizations, getting negotiations, being able to negotiate and initiate industrial action while a contract is still in force and for the contract to continue after its expiry date. Those are the things we thought would stay and they haven't. So at the end of the day the key things for us are a major difficulty in getting an effective relationship between the employer and the union on an enterprise basis, because any bit of the union work, if you like, any group of workers can opt out of that process.²⁸⁸

286. Wilson, *supra* note 234, at 281-82. A similar phenomenon occurred in the United States. A large number of nonunion workers say they will not join a union because of company pressures. Atleson, *supra* note 82, at 477. Lowell Turner observed a similar dynamic. In a period of work reorganization, either an employee's representative must be integrated into managerial decision-making or must be marginalized. LOWELL TURNER, *DEMOCRACY AT WORK: CHANGING WORLD MARKETS AND THE FUTURE OF LABOR UNIONS* 125 (1991).

287. Estreicher, *Labor Law Reform*, *supra* note 24, at 30.

288. Interview with Joris de Bres, *supra* note 59.

Thus, although the ECA began from a premise of equality, it created imbalance and inequality. Its explicit lack of structure created a route that inevitably led to drastically altered power relationships.

Manuka Henare has answered the question of what values society should foster by concluding that the ECA's functional and social values, as embodiments of neo-utilitarianism, are incompatible with Maori metaphysical and ethical principles:

It would not surprise me if a Maori claim will soon be lodged with the Waitangi Tribunal against the Crown. Articles 2 and 4 of Te Tiriti o Waitangi [The Waitangi Treaty] guarantee that Maori can exercise their tino rangatiratanga [sovereignty] over their lives and work, and that ritenga Maori, customary beliefs and practices, cannot be upheld in the employment context would be an interesting test of the ethics and values embodied in the ECA.²⁸⁹

The ECA's rejection of community for individual ends has not brought about the productive society it envisioned as the necessary accompaniment of a system fully open to market forces. The ECA may, in the long term, actually destroy New Zealand's ability to be a competitive modern society because its enterprise agreements make it difficult to promote important social ends, such as industry training. A single employer cannot afford to risk investing in training for fear that its employees then will be more marketable and leave.²⁹⁰ The loss of negotiating on a broader scale than the single enterprise is leading to a gradual loss of skills. The number of New Zealand enterprises failing to address training, quality improvement, or other workplace reforms grew from 1992 to 1993. In 1993, fifty-one percent of enterprises employing forty-eight percent of workers fell into this category, sharply up from forty-one percent of enterprises and thirty-three percent of employees the year before.²⁹¹ In 1993, only twenty-four percent of enterprises employing twenty-nine percent of employees had met

289. Manuka Henare, *Human Labour as a Commodity—A Maori Ethical Response*, in *LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994*, *supra* note 78, at 214, 220.

290. High turnover, or the risk of it, inhibits employer training and tends to lead to an undertrained workforce. Paul Osterman, *Pressures and Prospects for Employment Security in the United States*, in *EMPLOYMENT SECURITY*, *supra* note 3, at 228, 233.

291. Richard Whatman et al., *Labour Market Adjustment Under the Employment Contracts Act*, 19 N.Z. J. INDUS. REL. 53, 70 (1994).

the gap by increasing provisions promoting training.²⁹² Enterprise and individual bargaining have encouraged employers to use short term methods to improve their positions, such as wage cutting.

Many ECA proponents argued for the need to provide new job entrants with "training wages."²⁹³ The phrasing suggests that those who would receive these low wages would then move on to jobs offering living wages. Experience has shown, however, that there are groups of people who will never move away from those unskilled jobs.²⁹⁴ A system that permits or even supports unilateral employer wage setting means that members of those groups will be unable to find work that provides sufficient means of support and thus ultimately leaves them on the fringes of society. There is an important practical and moral question here: whether a society can and wishes to condemn a portion of itself to a life of poverty.

There is little that is positive in the ECA story. One potentially optimistic note for unions is that, where unions have hung on, the ECA resolves once and for all the question of unions as outsiders. The ECA has the potential to force workers to develop a heightened consciousness of the value of unions as their protectors; whereas, under the prior system, the award system protected workers from any change in their wages whether or not they were members of the union. In other words, the ECA removed incentives to be a free rider.²⁹⁵ Furthermore, the ECA removed any arguments that unions were "third parties." After the ECA, any union in the workplace existed because workers had freely chosen the union, often at great cost. Thus, the ECA helped move the union position as representative to a much higher moral ground.

V. CONCLUSION

For better or worse, the ECA, as it currently operates, is likely to generate cynicism as it fails to fulfill its promise of

292. *Id.* at 70.

293. See Dannin, *Labor Law Reform*, *supra* note 4.

294. Brian Easton, *The Maori in the Labour Force*, in *LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND 1994*, *supra* note 78, at 206, 211-12.

295. Patricia Herbert, *Workers Stick Close to Union's Petticoats*, *DOMINION*, June 19, 1991, at 12.

freedom to employees. A similarly unkept promise in NIRA section 7(a), however, caused such unrest and pressure that the legislature eventually was forced to enact the NLRA.²⁹⁶ Illusory rights break faith with the public's sense of law as a moral force.²⁹⁷ On all important standards for measurement, the ECA has been a failure.²⁹⁸ Its failures, however, enable us to see what changes are needed to provide true collective bargaining for New Zealand workers. Just as the failure of NIRA section 7(a) helped the NLRA's drafters see those areas requiring attention and protection, so, too, the ECA's shortcomings provide us with new information as to the processes of labor law reform.

296. Barenberg, *supra* note 18, at 1437.

297. EDWARDS, *supra* note 41, at 103-04.

298. It also appears to have failed in terms of its stated economic goals. For a discussion of these goals, see Dannin, *A Case Study*, *supra* note 4.