SWEEPING THE SHOP FLOOR

A NEW LABOR MODEL FOR AMERICA

A PUBLICATION OF THE EVERGREEN FREEDOM FOUNDATION

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The Freedom Foundation envisions a day when opportunity, responsible self-governance and free markets flourish in America because its citizens understand and cherish the principles from which freedom is derived.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

This report proposes a new model for labor relations based on the individual right to freedom of association. The authors review the history and development of the American labor movement, discuss the problems associated with the coercive, collective model, and look to New Zealand as an example of worker-oriented labor reforms. While this new model will face significant political opposition, it holds the promise of greater freedom and prosperity for workers, employers, and consumers alike.

The Earliest Trade Unions

Organized labor today hardly resembles its origins in "trade unionism, pure and simple." That phrase was coined by Samuel Gompers, founder and first president of the American Federation of Labor (AFL), the longest-standing labor federation in America. Gompers believed labor unions should negotiate directly with employers, winning concessions for workers on workplace issues like wages and benefits. Steering clear of politics and socialism, the American labor movement grew successfully throughout the latter part of the 19th Century and into the early 20th Century.

The Industrial Labor Model

The 1929 Wall Street crash had a profound effect on labor unions. The Great Depression created an extremely competitive job market, causing unions to lose bargaining power. Labor leaders feared that a high rate of unemployment would leave unions unable to maintain the concessions they had already won.

In 1935, the National Labor Relations Act (NLRA) was passed as part of Franklin D. Roosevelt's New Deal. It is undoubtedly the most important piece of labor legislation in U.S. history, continuing to control most private-sector labor relations.

The Act gave employees legal power to organize and strike, and made "unfair labor practices" a new category of illegal activity. Yet originally, these unfair labor practices were established for employers, not for unions. The Act also granted unions *exclusive* bargaining rights. This means that if a majority of workers vote to unionize, all workers in that "bargaining unit" must be represented by that union and only that union.

The NLRA paved the way for a dramatic increase in labor organizing during and shortly after World War II. The war created industries perfectly suited for union membership: automobile, steel, clothing, textile, and rubber industries all gained exclusive bargaining rights.

In 1953, union membership peaked at 35.7 percent. Since then, they have experienced a consistent decline in membership as the manufacturing industry gave way to the age of technology and entrepreneurship. In 1983, their membership was at 20.1 percent of all workers. By 2008, it had dropped to 12.44 percent.

The NLRA embraced economic ideas popular in the 1930s, is hardly applicable to today's global markets and high technology. Unions cannot flourish in dynamic, entrepreneurial economies under this type of outmoded legislation.

The Growth of Public-Sector Unions

Unions have been playing defense in response to market changes. Their primary response to their own waning relevance in the private sector has been to support government job creation and public-sector unionization. Unions target public sector employees with great success. Unions currently represent 35.9 percent of government workers in the U.S., compared to 7.5 percent of non-government workers. Unlike the private-sector, the public-sector operates according to a set of rules that does not include competition, efficiency, or scarcity.

Meanwhile, unions have also become a powerful political force. Large unions and union federations such as the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the Service Employees International Union (SEIU), and the National Education Association (NEA) routinely form cooperative relationships with pro-labor politicians. This allows them to maintain substantial power and influence over legislation.

The Economic Impact of Public Sector Unions and Collective Bargaining

These large public-sector unions have a profound effect on the economy. Essentially, unions are labor cartels. By definition, a cartel works by restricting the supply of what it produces so that consumers must pay higher prices for it.

But a cartel can charge higher prices only as long as it maintains a monopoly. If a competitor allows consumers to buy elsewhere, the cartel must cut its prices or its participants will go out of business. Competition in the private sector has caused the union cartel to break down. Jobs are lost more rapidly or expand more slowly in unionized firms than they do in non-unionized businesses.

However, operating the same way in the government as they do in the private sector, union cartels remain intact. By raising costs unions force the government to hire fewer workers and provide fewer services for the same cost. Or government simply meets the higher costs by raising taxes.

Public-sector union cartels advance themselves and their members at the expense of the rest of society. When public-sector unions win higher pay or more benefits, either services decline or taxes increase (or both).

The Social Impact of Public Sector Unions and Collective Bargaining

Unions have not only faced a dramatic decline in membership in the past few decades; their public approval ratings have dropped dramatically as well. According to a recent Gallup poll, the public's approval of unions dropped from 59 percent in 2008 to 48 percent in 2009.

There are several likely causes for this shift in public opinion. Prior to the poll, there were examples of union intimidation and violence against citizens

protesting health care reform at local town hall meetings. Unions such as the United Auto Workers have come under criticism for their roles in company bankruptcies. Union advocacy of labor legislation that undermines employee freedom have also played a role in changing public opinion, particularly the "Employee Free Choice Act" that would deny workers the right to a secret ballot vote on union representation and would give an arbitrator the power to impose new contracts.

In the public-sector, where unions are enjoying considerable growth, they have become primarily political organizations that use union dues for causes other than workplace representation. In many cases, union dues support lobbying on social issues according to the preferences of union leaders, but do nothing to benefit employees. Further, federal laws that require a worker to join a union as a condition of employment violate the individual worker's freedom of association—a constitutional right.

Citizens should consider the effects of increased public-sector union influence on the size and cost of government. In the private-sector, America is moving towards an almost union-free society. As employers and employees seek new ways to relate to each other in this age of globalization and technology, the nation's labor laws need to catch up.

The New Zealand Experiment

In the 20th Century, New Zealand experienced several decades of poor economic conditions, which climaxed in the 1970s and 1980s, when the nation almost went bankrupt. The New Zealand Employment Contracts Act (ECA) of 1991 revolutionized labor relations in a country that had long had a high rate of union representation. The country's brief experiment with a system of employer-employee relations based on freedom of association provides a model for policymakers.

There were six parts to the Employment Contracts Act of 1991, including provisions that granted freedom for employees to choose whether to join a union, allowed them to bargain on their own behalf or to choose their own representatives, and removed a union's exclusive bargaining rights over a workplace.

This allowed workers to pursue not only their preferred place of employment, but also the optimal terms of employment based on their unique skills, talents, needs, and preferences. This new way of doing business changed workplace attitudes, replacing compulsory unionism with free associations and contracts with people. It gave employers more flexibility to provide incentives and bonuses. Unions suddenly had to compete with other bargaining agents for members, making them much more responsive to individual members.

A New Way to View Labor Relations

The Employment Contracts Act of New Zealand offers a new model of labor relations for America. Voluntary representation in the United States would make each worker responsible for his or her own destiny. Achieving this requires dismantling obstacles in existing law and replacing them with government neutrality that allows workers to make their own choices about union representation and contract negotiations. Employees not in favor of union representation would be free to negotiate on their own. Individuals would have freedom to negotiate wages, benefits, and working conditions with prospective employers, without a mandated third-party intervention.

Directly transferring the New Zealand model to America is unrealistic given the two nation's different economic and political conditions. In America's federalist system, incremental changes at the state level are likely the best way to move forward toward a model of American labor relations based on the concepts found successful in New Zealand.

Incremental Options for a Federalist System of Government

What would such reforms practically look like in America? Moving from compulsory unionism to voluntary representation will require a series of incremental reforms. Some reforms have already been implemented in various states. All move in the direction of worker freedom, but it is important to understand that many of these proposals are only partial solutions to the problem of compulsory unionism.

The ultimate goal of this study is to find ways in which we can move away from compulsory unionism and empower individuals to make their

own choices regarding representation. Such freedom requires legislation that frees workers by allowing voluntary representation. These reforms are steps towards that ultimate goal.

Obstacles to Reform in the U.S.

In order to produce change in current U.S. labor relations, both political and legislative obstacles will need to be overcome.

The National Labor Relations Act (NRLA) governs the bargaining rights of most private-sector employees. The NLRA makes it difficult for individual states to regulate or reform private-sector labor relations. This means that reforms for private-sector collective bargaining must be made at the federal level. States cannot experiment. A proposal that modifies the exclusive bargaining status for unions may be difficult to enact due to strong union resistance.

Employees who work for state and local governments, on the other hand, are governed by the collective bargaining laws of each state. States vary greatly in how they recognize and regulate public-sector unions. State-by-state reform must be tailored to specific state law regimes. Proposals that weaken organized labor's monopoly status are sure to encounter legal challenges.

In addition to the legislative obstacles, there are political realities. Union workers are entitled to a refund of any union expenditures that go toward political causes if the worker objects, but organized labor still maintains a largely secure source of funding to elect labor-friendly candidates and defeat anti-labor legislation.

Public-sector unions maintain political power through a three-pronged strategy: help elect friendly politicians; promote policies to maintain and expand union power and influence; and lobby officials to implement the policies.

This study uses the examples of two states—Colorado and Washington—to illustrate how a states could proceed in adopting a labor-relations system based on freedom of association.

Opportunities for Workplace Freedom

It is past time for America to change the way we conduct labor relations. Continuing the status quo with the occasional tinkering has for too long sacrificed the freedom and opportunity of American workers. These consequences are highlighted in this study: increasing public-sector union political power, forced union membership that fails to represent workers' best interests, and public policy controlled by the special interests of powerful union monopolies.

Moving toward a labor model based on freedom of association is daunting and comes with risks. Yet we have much to hope for by way of reform. Our system of government allows for balanced, incremental changes and state experimentation. The model recommended in this paper is based on a method previously tested and proven successful at producing greater freedom and prosperity for workers, employers, and consumers.

INTRODUCTION

Casting a Vision for Worker Freedom

Michael Reitz

The 21st Century is the Age of the Worker. Globalization, creativity, and technology have all contributed to flexible, unique working relationships. Gone are the days when the value of a worker's labor is restricted by geography or local industry. Today's workers are highly-educated, specialized, professional, and mobile.

With this shift toward worker self-reliance, combined with seismic industrial changes and an increase in federal and state employment regulations, institutions that were first designed to assist workers have long been losing relevance. For many years, unions performed functions considered valuable by their members, but are now commonly viewed as bad for the economy, opposed to reform, and only interested in preserving their monopolistic advantages. The National Education Association vehemently opposes policies that would improve the quality of educators or give students the freedom to choose alternate educational providers. The United Auto Workers bears a large share of blame for driving the American automobile industry into bankruptcy with its high demands and unsustainable contracts. Unions that represent state and municipal workers annually increase the size and scope of government.

For decades, organized labor has hemorrhaged members. Unionization rates were as high as 35 percent of all workers in the 1950s, but today union members are a mere 12 percent of all workers, and less than 8 percent of private sector workers. Unionization rates among young workers entering

the workforce are even lower. The decline in union membership has been accompanied by a sharp drop in public approval. According to Gallup, for the first time since the 1930s fewer than half of all Americans now view labor unions favorably, and a majority believe unions actually hurt the U.S. economy.

But while unions are losing market share, they have retained significant power—political, legislative, and industrial. Millions of American workers are trapped in a decades-old system based on a collectivist approach to employment. Unions possess significant advantages that shield them from market forces and reduce their obligation to work in the best interests of individual employees.

For example, unions seek to represent entire classes of employees and enjoy "exclusive representation" status—a monopoly that prevents workers from representing themselves or seeking another representative. While unions are chosen through a democratic process, it is exceedingly difficult for workers to remove the union. And once a union is designated as the bargaining representative, that status has no expiration date. The union isn't brought back for reelection or reauthorization. Workers in twenty-eight states are each forced to annually pay hundreds of dollars for union representation whether or not they wish to be associated with the union, and workers across the country are forced to accept the terms of employment bargained collectively through their union. And rigid union work rules and pay scales undermine workers' incentives for individual excellence and innovation.

These legal mechanisms have propped up organized labor and prevented even greater erosion of its members. Unions then convert the billions of dollars they received in forced dues into political power, electing pro-labor politicians who cheerfully reward their campaign supporters with new legislative favors.

The U.S. labor law system based on this collective, adversarial approach to workplace bargaining has outlived its utility. Legal mandates for workers to be bound to union benefactors regardless of their need or desire fly in the face of American ideals of individual responsibility and opportunity.

A healthy national economy depends on an environment conducive to

job creation. In the modern global marketplace, this means government's involvement must be minimal, allowing for a labor model that is flexible, offers maximum individual opportunity, and allows for voluntary workplace representation. Yet governments at all levels today are significantly involved in employer-employee workplace matters, well beyond the boundaries of compensation. This pattern of over-regulation hobbles a thriving, free marketplace—and thus the overall economy and the government tax revenues it produces.

The authors of this paper propose a model of labor relations premised on freedom of association. We review the history and development of the American labor movement, discuss the problems associated with the coercive, collective model, and look to New Zealand for an example of marketplace-oriented labor reforms. Moving government from its current significant involvement in labor relations to a position of neutrality necessarily involves significant legal and political hurdles, which are discussed here in detail.

ONE

Origins of the Industrial-Age Labor Model
History Shapes the Future in Labor Policies[1]

Rachel Culbertson

The early pro-worker unions of America were considered to be of great worth to their members. They protected employees' opportunity for advancement by ensuring their value in a newly industrialized society, where many factory workers sought protection from working arrangements they considered exploitative. However, today, the general population of unionized workers find themselves exploited not by their *employers*, but by the very unions who claim to represent them.

While union advocates may criticize such an assessment as unfair, a brief review of our nation's history of labor relations bears it out.

"Trade unionism, pure and simple" – the Philosophy of the First Organizers

The Industrial Revolution at the turn of 18th Century brought with it myriad social and economic problems, changing society's way of life more than any other period in history. English economist Thomas Malthus was proved wrong. With the beginnings of the railroad, steel, and agricultural industries came great decline in periodic famine and the creation of millions of jobs. The rural poor moved to industrial centers where they worked for wages for the first time, many of whom had never experienced working arrangements before. Wages were low, even though they were better than what the workers had known in the countryside. With such prolific job creation came the dawn of a new culture.[2]

The boom of the Technical Revolution after the American Civil War drastically changed the climate of labor relations. Before that time, most of the United States was made up of small proprietors employing a small number of laborers, who often had the opportunity to grow in experience and eventually establish small enterprises of their own.

Now, factory workers saw escaping their class as impossible, so in order to gain leverage in bargaining with their employers for better wages and working conditions, they would have to band together. The first real collective of labor unions, the National Labor Union, was founded in 1866. For the next 20 years, many young labor federations, like the Knights of Labor, would come and go. Many struggled to gain a foothold because of their aggressive involvement in political issues rather than focusing on economic issues affecting the workplace.

It was the American Federation of Labor that would eventually find lasting success. It was founded in 1886, with Samuel Gompers serving until 1894 as its first president. Gompers was a strong leader whose labor philosophy would set the precedent for the growth of the labor movement in the coming years. His idea of "trade unionism, pure and simple" renounced labor's identification with any political party, and instead sought to keep unionism out of partisan politics and focus completely on negotiating directly with employers to win concessions from those employers.

In spite of early labor's rejection of "socialism" it is important to address its philosophy's relationship to 19th Century Marxism. While Gompers believed in leaving politics out of labor relations, his views did much to shape the economic nature of labor unions. He subscribed to Marx's view of history's continual opposing relationship between "capital" and "labor", and that capitalists would eventually seek to raise profits by lowering wages. The workers in a capitalistic society would then be reduced to slavery. His goal, then, was to focus on the redistribution of income from capitalists to workers.[3]

This may lead one to question whether or not the original labor model ever truly left room for unions and the free market to co-exist, an observation also made by Ludwig Von Mises in his work *Socialism: an Economic and Sociological Analysis*. Here Von Mises suggests that the trade union's great-

est weapon, the strike, is in effect "an act of coercion." By using the strike, unions can only impose violence or duress against the strike-breaker in order to succeed.[4]

Interestingly, shortly after Karl Marx's *Das Kapital* was published Great Britain created the limited liability stock corporation, which allowed employee ownership of stock options, changing the "natural" opposition of capital versus labor. Another factor that has debunked Marx's theory—and causes the old union order to lose relevancy in today's market—is the growth of entrepreneurship, which has been recognized by economists as playing a central role in the rise of productivity and wage growth.[5] Increasing productivity, in turn, leads to rising wages. In addition, Von Mises also asserted that the rising wages during the late 20th Century were not victories achieved by labor unions, but instead were the result of an evolving industry that had to "transform its working conditions to suit the better quality of labour."[6]

Labor's Rough Beginnings

Between the formation of the AFL and the Great Depression, labor unions experienced growth in spite of legislation that greatly restricted their power. By 1920, trade unions had 5.1 million members, 80% of those belonging to the AFL. The post-war depression of 1921 to 1922 created an excessively competitive job market, and from 1920 to 1929, union membership dropped down to 3.5 million.[7]

Before 1842 unions were not legally recognized, and many attempting to create a unionized workplace were treated with suspicion. In the 1842 case of *Commonwealth v. John Hunt*, however, the Massachusetts Supreme Judicial Court ruled that unions were a legal organization and had the right to strike. Even still, workers' employment was subject to the discretion of their employers.[8]

The lack of bargaining power that unions faced during this time was coupled with employers' tactics to impede union organization by either moving away from places that were heavily unionized or by forcing their employees to sign "yellow-dog" contracts stating they would not join any unions in the future. They also created their own employee health and welfare benefits

programs, which further discouraged employees from organizing.

The Clayton Act, passed in 1914, was the first piece of federal legislation designed to protect organized labor. It declared that "the labor of a human being is not commodity or article of commerce," and that nothing found in the federal anti-trust laws was allowed to forbid the existence and operation of unions. It declared that labor unions could no longer be considered illegal conspiracies.[9]

In the early part of the 20th Century, a series of labor laws was passed. One of the most notable was the Railway Labor Act, passed in 1926, which was the first piece of legislation that required employers to bargain collectively. It was originally applied to interstate railroads, but was amended in 1936 to include airlines also involved in interstate commerce.

In 1932 Congress passed the Norris La-Guardia Anti-Injunction Act. It made "yellow-dog" contracts illegal and gave unions the right to strike; both regulations that would protect unions during a major economic crisis. The act also prevented federal courts from granting injunctions against union activities such as joining or organizing a union, striking, publicizing labor disputes, or providing legal representation to those participating in a dispute. While this Act would allow workers to negotiate for a better life and prevent them from being further fleeced by unscrupulous employers, the anti-injunction provisions created new problems when it limited enforcement against strike violence.

A National Crisis and a New Deal

The crash of the market and the start of the Great Depression gave the labor movement obvious reason for concern. An extremely competitive job market would cause unions to lose bargaining power. Labor leaders' chief concern was that a high rate of unemployment would leave unions unable to keep the concessions they had won when the labor market was not so competitive.[10]

The passage of the National Industrial Recovery Act (NIRA) in 1933 was not only one of the most dramatic acts of the First New Deal,[11] but would also set the stage for the passage of the National Labor Relations Act

two years later. As far as labor relations were concerned, the NIRA granted employees the right to organize and bargain collectively through "representatives of their own choosing." This allowed unions to quickly and successfully organize in many industries, causing membership in the AFL to rise back up to robust numbers.

Another well-known provision of the NIRA was the creation of codes for the "rules of fair competition" (i.e., price fixing), which was initially met with great enthusiasm but later fell apart when cartel members began lowering their prices to gain additional customers. Interestingly, the law also protected employees from "restraint, or coercion of employers of labor, or their agents" in the process of collective bargaining.[12]

The National Labor Relations Act (NLRA) is undoubtedly the most important piece of labor legislation in U.S. history, continuing its authority over labor relations to this day. The NIRA was ruled unconstitutional by the U.S. Supreme Court in 1935, but the NLRA reinstituted the labor provisions of the NIRA and made a number of additions.

One objective for conducting good labor relations in the United States is that of promoting free flow of commerce. In creating labor law, specifically the NLRA, one of the government's stated goals was to protect this by: 1) giving and protecting the right of employees to organize and bargain collectively without injury, impairment, or interruption, and promoting this free flow of commerce by removing those sources of industrial strife and unrest and giving equal bargaining power to employers and employees, and 2) eliminating practices by employees to obstruct the flow of commerce through strikes and "other forms of industrial unrest", or through activities that impair the public interest in the free flow of commerce.[13]

The NLRA only partially addressed these two issues. Through its provisions, it sought to address the "inequality of bargaining power between employees who do not possess full freedom of association for actual liberty of contract and employers who are organized in the corporate or other forms of ownership association", and recognized that this inequality "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depression, by depressing wage rates and the purchasing power of

wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."[14]

The Act granted full rights to employees to organize and to strike, and protected these rights through establishing unfair labor practices as a new category of illegal activity. Yet originally, these unfair labor practices were established only for employers, but not for unions. Further, it eliminated company-dominated employee associations. It also set up protections for employers through prohibiting labor organizations from coercing employees into joining a union.

The NLRA established the National Labor Relations Board, made up of 3 members (in 1947 this number was increased to 5), to investigate and provide for hearings over labor disputes, determine the units appropriate for the purposes of collective bargaining, and to direct union elections.

The most important provision of the NLRA is its granting of exclusive bargaining rights to labor unions for the workers in an entire bargaining unit, as outlined in Section 9 [§ 159] of the Act: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[15]

The NLRA currently allows unions to negotiate contracts that require workers to pay dues for the purposes of collective bargaining as a condition of employment. One union is granted bargaining rights for an entire workplace, once it has been certified by an election where it receives a majority of votes from employees. The union now negotiates employment contracts with employers, and every worker in that bargaining unit is mandated to pay union dues. Therefore, workers in that unit are no longer able to negotiate with their employers individually for wages, working conditions, and benefits.

Ironically, the NLRA contains some provisions similar to components of the NIRA that were deemed unconstitutional. Stan Greer of the National Institute for Labor Relations Research makes the keen observation that busi-

nesses' prohibition from providing goods and services under anything other than the terms of the NRA were very similar to the NLRA's prevention of employees from independently negotiating their contracts (pay, benefits, and working conditions) with their employer.[16]

It is interesting to note that the 1937 *Jones and Laughlin* case, which challenged the constitutionality of the NLRA, resulted in a Court ruling that deemed a union's exclusive bargaining rights were indeed "compatible" with an individual's bargaining rights and therefore the NLRA was "no unconstitutional delegation." Yet in another case challenging the Act in 1944, the Court changed its tune, declaring that exclusive representation snuffed out an individual's bargaining rights. Still, the Court decided that the question of the NLRA's constitutionality had already been decided in the *Jones and Laughlin* case, and would not be revisited.[17]

Some suggest that the NLRA may have been able to gain traction simply because of the Keynesian theory of macroeconomics, which held that the Depression had been caused by insufficient demand—that is, purchasing power had been unable to keep up with industrial productive capacity. Therefore, in order for economic recovery to take place, wages would need to be raised and work hours lowered. The policies of collective bargaining established through the NLRA could accomplish this only if markets continued to expand and productivity increased.[18]

The NLRA embraced the economic philosophy popular for the 1930s, but hardly applicable to today's global market. In this type of labor transaction, only two agents are involved in the economic spectrum: management as the agent of capital, and labor as the agent of individual workers. According to James Sherk and Tim Kane of the Heritage Foundation, this "assumes monopoly power for employers, lifetime employment for workers, and non-unique labor." The union will prosper only in the cases where all three of these conditions exist. The unions cannot, under this type of legislation, flourish when the economy is dynamic and entrepreneurship is a contributing factor.[19]

The Golden Age of Union Membership – Post World War II

The NLRA gave birth to the "glory days" of the 20th-century labor movement and proved to be highly successful during and shortly after World War

II. The war created industries perfectly suited for union membership and growth: automobile, steel, clothing, textile, and rubber industries all gained exclusive bargaining rights. The War Labor Board (WLB) was also a key player in union growth during these days as it encouraged bargaining. From 1940 to1945, union membership in non-agricultural industries grew from 26.9 to 35.5 percent, with the number of union members growing from 8,717,000 to 14,322,000.[20]

At the same time, unions' political power began to expand. Forced dues from workers allowed union officials to gain influence both in Congress and in state legislatures. With the NLRA firmly in place, federal government could now play an active role in shaping industrial relations.

When the WLB's wage and other regulatory controls were lifted with the end of World War II, labor relations were left unsettled as employer/union relationships adjusted to a peacetime economy. In late 1945 and early 1946, unions strengthened their leverage in gaining higher wages through strikes, something most powerfully illustrated in the United Auto Workers' strike against the General Motors Corps. This four-month standoff was unique in that the UAW was the first union to demand an increase in wages without increasing prices, and was the largest strike up to that time.[21] This provided the platform for other unions to win contracts with automatic pay increases based on the cost of living rather than the prices of the products or services they provided. Meanwhile, American manufacturers, facing little, if any, global competition following the overseas devastation of World War II, found it less costly to give in to union demands than to risk disruptive strikes.

These controversial strikes proved unpopular with the public and led to an amendment of the NLRA by Congress, through passage of the Taft-Hartley Act. Enacted in 1947, the Act:

- gave procedures for delaying or averting "national emergency" strikes;
- excluded supervisory employees from coverage by the NLRA;
- banned closed-shop union hiring halls that discriminated against non-union members;

- allowed for "union shops" which required workers to pay for union repr sentation;
- It maintained the workers' right to organize, strike, and collectively bargain, but added a list of unfair labor practices on the part of unions:
  - restraint or coercion of workers exercising their rights to bargain through representatives of their choosing,
  - coercion of employers in their choice of representative for meetings/ discussions with unions,
  - allowed for lawsuits against unions for violations of their contracts, and suits for economic losses during strikes, and
  - a 60-day no-strike and no-lockout notice period for anyone wanting to cancel an existing collective bargaining agreement.

In addition, Section "14b" of the Taft-Hartley Act allowed states to pass right-to-work laws in order to protect workers from paying dues as a condition of employment.[22]

The GM-UAW agreement of 1948 served as a labor relations model for many industries to follow. It consisted of a two-year agreement that gave cost-of-living and annual improvement-factor wage increases; outlined grievance and arbitration procedures; and provided fringe benefits such as health, pension, and other types of insurance.[23] This type of agreement grew and spread over the years, and by 1953, union membership was at its peak in representing 35.7 percent of the work force.[24]

Unions in Decline

After 1953, unions began to experience a consistent and dramatic decline in membership. There are several factors responsible for this decline.

Princeton economist Henry Farber estimates that around 40 percent of the decline in unionization from the mid-1950s to 1978 can be accounted for through structural changes in the economy, including shifts in employment from the north to the south, from blue to white collar occupations, and from manufacturing to the service sector.[25] Further findings from Farber and Harvard Professor of Sociology Bruce Western conclude that the decline in the unionization rate can be attributed "almost entirely to declin-

ing employment in union workplaces and rapid employment growth in non-union firms."[26]

Both of these factors have dramatically affected organized labor's waning numbers. While there has been a great shift in structure from manufacturing to services, such as information technology, the U.S. Bureau of Labor Statistics has shown that, from 1972 to 2002, workers became increasingly unreceptive to unionism, even within manufacturing.[27] The numbers alone tell the story of union decline. The government started tracking union membership in 1983, when union membership was at 20.1 percent of all workers. In 2008, this percentage stood at 12.44 percent.

In his book "Twilight of the Old Unionism", labor scholar Leo Troy suggests that Austrian economist Joseph Schumpeter's theory of Creative Destruction accounts for unionism's irreversible downturn:

> [T]he fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates … the opening up of new markets, foreign or domestic, and the organizational development from the craft shop and factory to such concerns as U.S. Steel illustrate the same process of industrial mutation … that instantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in …

Troy argues that the Old Unionism must adapt to changes in the market, namely: the markets and competition, employment, growth of technology, and production methods. Yet because this old form of unionism is a monopoly, it cannot adapt.[28]

Unions have been playing defense in response to these changes. The creation of more government jobs can allow union membership to flourish in the public sector. Thus, unions began to target their campaign aggressively towards public-sector employees.

The campaign has worked. Public-sector labor unions now represent 35.9 percent of government workers in the U.S., compared to 7.5 percent in private industries.[29] Unlike the private sector, the public sector operates according to a set of rules that does not include competition, efficiency, or scarcity.

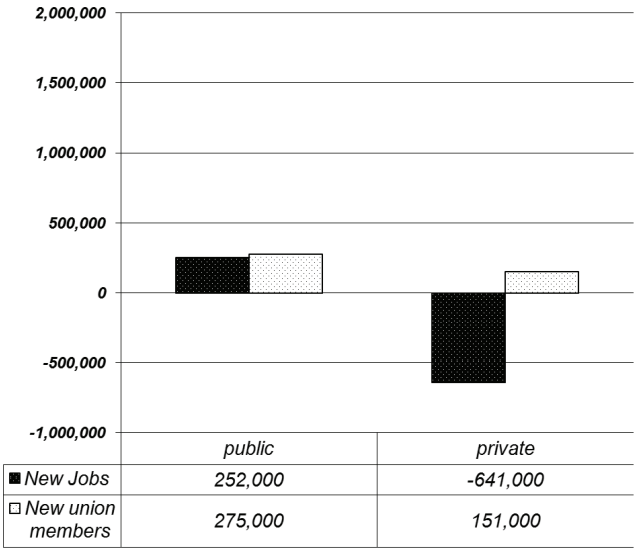
Traditionally, public employees are defined as those who are directly employed by the state. In recent years, however, unions have been able to expand the definition of "public employee" to include independent contrac-

tors who receive part of their compensation from the government, directly or indirectly. Unions representing healthcare workers, like the Service Employees International Union (SEIU), have been able to gain collective bargaining rights for independent health care and day care providers.

The current economic crisis has had little to no effect on union membership for the public sector. Comparing job growth to union membership growth in 2008, 614,000 jobs were lost in the private sector, while 252,000 new government jobs were created. Unions added 151,000 new members in the private sector and 275,000 new members in the public sector.[30]

Unions Become a Political Force

Organized labor has been unable to maintain its stronghold because of market demands. It has sought to reverse its losses by turning its attention



	public	private
New Jobs	252,000	-641,000
New union members	275,000	151,000

to the public sector. By forming cooperative relationships with pro-labor politicians, many unions have been able to regain some of their power and influence legislation in their favor.

Without a doubt, organized labor's deep political involvement traces back to the passage of the NLRA, when the AFL's attitude towards the state permanently changed. Matthew Woll, vice president to George Meany, first president of the combined AFL-CIO, wrote in 1930 that organized labor had "rejected laissez-faire individualism, absolutely, both in economics and in politics … our political program in most respects, is very similar to the political programs of the labor unions of Great Britain and Germany."[31]

In 1962 the political entrenchment of public-sector unionism was confirmed. Prior to this time, the provisions of the National Labor Relations Act did not apply to public-sector workers, who did not have collective bargain-

ing rights and thus no legal sanction to strike. In this time period, many states adopted laws that permitted public-sector workers to negotiate collectively. Then, in 1962, executive order 10988 issued by President Kennedy (who got considerable labor support in his successful 1960 presidential campaign) granted federal employees the rights to collectively bargain. State and local governments followed suit by passing similar measures, and in 1978, the Carter administration adopted the Civil Service Reform Act,[32] which regulated labor legislation and collective bargaining laws for federal employees by requiring federal labor unions to inform members of their democratic rights such as the right to inspect collective bargaining agreements, to speak freely without retaliation, and to participate in union activities and officer elections.[33]

The AFL-CIO was a driving force in politics during the 1960s and 1970s, and continues to be so today. George Meany, president of the AFL and then of the AFL-CIO from 1952 to 1979, took up an entirely different strategy for conducting labor relations. He strongly believed in campaigning for government spending on construction projects (schools, hospitals, public housing), knowing that through such "public investment," unionized workers in the construction and production industries would strongly benefit,[34] thanks in large part to the federal Davis-Bacon prevailing wage law. Davis-Bacon empowers the federal government to require federally funded projects to go to contractors that pay the "prevailing wage" in their locality, as determined by the Secretary of Labor. The "prevailing wage" has generally been set somewhere close to the prevailing *union* wage, which keeps non-union contractors from undercutting union shops' bids on jobs. In 1961 Meany stated in AFL-CIO's *Economic Programs and Policies for the 60s,* that "due to existing overcapacity, the country can't rely on private investment to take up the economic slack … rather the situation calls for public investment in America."[35]

In 1972 the AFL-CIO joined with the Coalition for a Democratic Majority,[36] becoming increasingly more overt in its drive to change legislation. In the mid-1970s, labor promoted the Humphrey-Hawkins Act which would have implemented policies preventing the unemployment rate from rising

above 3 percent. Such radical legislation never passed the Senate floor, but it didn't keep labor from trying. In 1977 the AFL-CIO proposed that Congress spend "3 billion [dollars] annually for five years for federal grants to assist municipalities in the construction or modification of sewage treatment plants", with the implication that it would create over 250,000 jobs.[37]

John Sweeney's ascendancy to the presidency of the AFL-CIO in 1995 meant that the federation's agenda for influencing legislation for the purposes of collective bargaining was all but lost to championing issues wholly unrelated to workplace matters. Many of the cultural and economic platforms that the AFL-CIO and other labor organizations have recently adopted do not even represent the views of their members. For example, in 1995, Joe Velasquez, Director of Community Services for the AFL-CIO headed a campaign that would compel the Boy Scouts of America, a private, volunteer organization with a strong religious element, to allow in homosexuals and atheists.[38]

The NEA Enters the Stage

During the 1960s, another labor union began to gain traction as a strong force of political activism. The National Education Association (NEA), which had been founded in 1857 by a small group of school superintendents, included the membership of both teachers and school administrators and focused mainly on professional development and education issues rather than politics and contract negotiations.[39]

When the NEA was forced to compete with the American Federation of Teachers (AFT) in the 1960s, its leadership took a dramatic turn. For the next two decades the NEA and AFT would continue to vie for political power.[40]

In 1967 NEA's Executive Secretary Sam Lambert declared, "[The] NEA will become a political power second to no other special interest group … NEA will organize this profession from top to bottom into logical operational units that can move swiftly and effectively with power unmatched by any other organized group in the nation."[41]

More than a decade later, NEA Executive Director Terry Herndon stated at the NEA's annual convention that the organization's goal was "to tap the

legal, political and economic powers of the U.S. Congress" and "collect votes to reorder the priorities of the United States of America."[42]

Now, the NEA finds itself to be one of the most politically active unions in the U.S., with their advocacy including high profile stances on issues like abortion, gay rights, parental choice and responsibility, and religious freedom.

The Democratic Party is the primary recipient of the NEA's financial contributions and endorsements. In 1986, the union published a piece called the "NEA Series in Practical Politics", which states:

> The Democratic Party does bestow a considerable amount of power to its larger financial contributors, but the Democrats depend more heavily on the organizational strength of large membership organizations, like NEA, for the 'people power' they bestow. The Democratic Party has traditionally been more receptive to NEA, in part because the Democrats cannot pay for the time and services provided for free by hundreds of Association members.[43]

SEIU's Political Influence

Another union that has most recently gained considerable political momentum is the Service Employees International Union (SEIU). In May 2009, journalist Michelle Malkin chronicled the rise in political power experienced by SEIU,[44] the nation's largest health care and service professionals union. President Andy Stern proudly boasted spending $60.7 million on the Obama campaign alone during the 2008 election cycle. He now takes a seat among policy makers in the White House, making on average weekly trips to engage in discussions surrounding economic recovery and health care reform.

The Obama administration has openly supported SEIU's legislative priorities of creating government health care and passing the Employee Free Choice Act, also known as "Card Check."

SEIU also succeeded in putting many of their top picks into other federal offices, including Labor Secretary Hilda Solis, a long time union advocate;

Health and Human Services Secretary Kathleen Sebelius, partner to SEIU in universal healthcare advocacy and also linked to Kansas' collection of taxpayer money to aid SEIU in gathering information for unionizing home health care workers;[45] and SEIU Secretary-Treasurer Anna Burger, who was appointed to a position on the President's Economic Recovery Advisory Board. In addition, former SEIU chief lobbyist Patrick Gaspard also served as the Obama Campaign's national political director and transition deputy director of personnel.[46]

Conclusion

The examples of the AFL-CIO, NEA, and SEIU leave little doubt that unions have gone from being merely ordinary political participants to political behemoths, effective in shaping the minds of citizens and politicians alike toward increased government regulation in labor relations. Changing legislation is its only hope for survival, which has been so clearly shown by the aggressive political agenda that organized labor has adopted. Changing legislation has little to do with truly representing and working toward the better interests of union members. As so aptly stated by labor scholars James Sherk and Tim Kane, Ph.D., "Rather than striking to redress difficult working conditions, modern unions fight for more government because *they are the government*, drifting ever farther from labor's initial goal of improving the life of working Americans."[47]

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TWO

How Public-Sector Unions Differ from Their Private-Sector Counterparts

James Sherk

What do unions do? The AFL-CIO argues that they can raise their members' wages, but few Americans understand the economic theory explaining how they attempt to do this. The answer? Unions are labor cartels. Cartels work by restricting the supply of what they produce so that consumers must pay higher prices for it. Labor unions are similar to another cartel, the Organization of Petroleum Exporting Countries (OPEC), which attempts to raise the price of oil by cutting oil production. Less oil on the market leads to higher prices, and more profits for the oil-producing nations.

As labor cartels, unions attempt to monopolize the labor supplied to a company or an industry in order to force employers to pay higher wages.[1] In this respect, they function like any other cartel and have the same effects on the economy. Cartels benefit their members in the short run and harm the overall economy.

Union Cartels

Consider how a cartel of producers—instead of workers—would affect the economy. Imagine that General Motors, Ford, and Chrysler jointly agreed to raise the price of the cars they sold by $2,000: Their profits would rise as every American who bought a car paid more. Some Americans would no longer be able to afford a car at the higher price, so the automakers would manufacture and sell fewer vehicles. Then they would need—and hire—fewer workers. The Detroit automakers' stock prices would rise, but the

overall economy would suffer. Federal antitrust laws prohibit cartels and the automakers cannot collude to raise prices.

Now consider how the United Auto Workers (UAW)—the union representing the autoworkers in Detroit—functions. Before the current downturn, the UAW routinely threatened to or actually went on strike unless the Detroit automakers paid what they demanded—until recently, $70 an hour in wages and benefits. Gold-plated UAW health benefits for retirees and active workers added $1,200 to the cost of each vehicle that GM produced in 2007.[2] Other benefits, such as full retirement after 30 years of employment and the recently eliminated UAW jobs bank (which paid full wages and benefits to idle workers) also added to the cost of each car manufactured in Detroit.

Some of these costs come out of profits, and some get passed on to consumers through higher prices. UAW members earn higher wages, but every American who buys a car pays more, 401(k)s lose value as the automakers' stock prices drop, and some Americans can no longer afford to buy a new car. The automakers also hire fewer workers because they now make and sell fewer cars. Unions raise the wages of their members both by forcing consumers to pay more for what they buy or to do without. This costs some workers their jobs. A union cartel has the same harmful effect on the economy as a business cartel. It benefits some workers instead of stock owners. That is why the federal anti-trust laws exempt labor unions; otherwise, anti-monopoly statutes would also prohibit union activity. Union cartels benefit their members at the expense of everyone else.

Union Jobs Disappearing in the Private Sector

A cartel can charge higher prices only as long as it remains a monopoly. If competition allows consumers to buy elsewhere, the cartel must cut its prices or its participants will go out of business.

This happened to the UAW. Non-union workers at Honda and Toyota plants now produce high-quality cars at lower prices than are possible in Detroit with UAW labor costs. As consumers have voted with their dollars, the Detroit automakers have been brought to (and even past) the brink of

bankruptcy. The UAW has now agreed to significant concessions that will eliminate a sizeable portion of the gap between UAW and non-union wages. With competition, the union cartel breaks down, and unions cannot force consumers to pay higher prices or capture higher wages for their members. If unions try to keep charging above-market wages in a competitive market, their firms will lose customers and start shedding jobs.

The union cartel has broken down in the private sector because of competition. Jobs contract more rapidly or expand more slowly in unionized firms than they do in non-unionized businesses.[3] Overall, including new companies starting up and existing companies that expand, non-union jobs grow by roughly 3 percent each year, while 3 percent of union jobs disappear.[4] Union jobs have shrunk especially quickly in industries where unions win the highest relative wages.[5] Over the long term, unionized jobs disappear. Between 1977 and 2008 the proportion of employees working under collective bargaining agreements in the private sector fell from 23 percent to 8 percent.[6]

Government Employee Unions Remain Strong

The union cartel, however, remains intact in the public sector. Among government employees, union coverage has remained around 40 percent over the last 30 years.[7] This may appear unusual because unions serve no inherent purpose within government (federal, state, or local). Congress passed laws promoting collective bargaining in the private sector out of concerns that profit-motivated employers would exploit their workers to increase their earnings. But government earns no profits and public sector managers have little incentive to push down their workers' wages. Unions have no natural theoretical role in a government workplace.

However, after the passage of laws promoting public-sector collective bargaining in the 1960s and 1970s, union membership increased rapidly among government employees, rising to 2 in 5 by the late-1970s.[8] Unlike in the private sector, competition has not undermined public-sector unions since then because government faces no competition.

Except in extreme cases such as the city of Vallejo, California, govern-

ments do not go bankrupt. If union-negotiated compensation increases raise the cost of providing public services, the taxpayers must pay higher taxes. They cannot buy lower cost public services from a competing jurisdiction. Taxpayers in New York can only pay taxes to and receive police protection from Texas by physically moving to Texas, which carries considerable costs. Consequently, unions have greater ability to raise wages without costing workers their jobs in government than in the private sector.

However, union cartels operate in the same way in government as they do in the private sector and have the same harmful effects. By raising costs unions force government to hire fewer workers and provide fewer services for the same cost. Alternatively, government can meet the higher costs by raising taxes. Public-sector unions benefit their members at the expense of everyone else.

Campaigning for More Government

Public-sector unions want government to make the second choice—raise taxes. Unlike in the private sector, where higher union pay necessarily raises costs and costs jobs, the public-sector union cartel can win higher pay and more employment if government spending increases. Higher taxes that fund more spending allow both government pay and employment to rise together.

Consequently public-sector unions are very active politically. They lobby for government spending increases and against tax reductions.[9] Public-sector unions use their members' mandatory dues to campaign for sympathetic politicians, and constitute a powerful interest group fighting for more government. In one prominent recent example, government employee unions in California spent heavily in a successful effort to defeat Proposition 76, a state constitutional amendment that would have limited annual increases in state spending and allowed the governor to cut spending during fiscal emergencies. If voters can be persuaded to support a larger government, then unions can raise earnings without risking their jobs.

Public-sector unions also face much less resistance from management than do their private-sector counterparts. Business owners earn the profits from

successful enterprises and resist paying above-market wages. However, public-sector managers have little incentive to reduce costs because they do not benefit from the residual profits. They have no personal stake in spending tax dollars wisely. In many cases, government bureaucrats want their budgets expanded and work with the unions to accomplish their shared goals.[10]

Government employee unions' political activism pays off. The evidence shows that they succeed in expanding both the demand for government services and their members' pay. In the private sector, unions raise wages as they decrease employment in the companies they organize. In government, unionized government agencies gain both higher earnings and higher employment than non-unionized ones.[11] Union political campaigns raise the demand for government services in the electorate, allowing unions to win both greater pay and more unionized government jobs.

However, studies show that unionized cities cut non-union municipal jobs. Municipal leaders respond to the higher cost of union labor and the greater number of union workers they hire by cutting back on employment in unorganized departments.[12] The earnings gains for union members come, in part, at the expense of non-union public-sector workers' jobs.

Conclusion

Unions are labor cartels, and like all cartels they operate by restricting the supply of what they produce—labor—in order to charge a higher price for it. As long as a cartel does not face competition it can increase its members' earnings at the expense of higher prices and less employment for the rest of society. Because of deregulation and free trade, however, the private-sector economy has become significantly more competitive over the past generation. As this has happened unionized companies have proven unable to compete, and union membership has fallen sharply.

Governments, however, face little competition and rarely go bankrupt. Higher costs in government get passed onto taxpayers who can only avoid them by physically moving to another city or state. Consequently, the union cartel remains intact in the public sector. Additionally, government employees unions have an option unavailable to their private-sector counterparts:

increasing the demand for government through political activism. Public-sector unions spend heavily to elect candidates who support bigger government. When they succeed—as they often do—both the pay of and the number of unionized government workers increase. Government unions fight to expand the government to benefit their members.

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THREE

Fiscal Impacts of Public-Sector Unions
How Unions Perpetuate Influence at the Expense of Taxpayers and Workers

James Sherk

Like unions in the private sector, government employee unions are cartels. They attempt to reduce the supply of what they provide—public services—to drive up its price, at the expense of the consumer—in this case the taxpayer. Unlike private-sector unions, however, public-sector unions can also influence the demand for their services through the political process. By spending their members' dues to elect sympathetic politicians who want to expand the size of government, public sector unions can achieve both higher compensation and more employment for their members.

Unsurprisingly then, unions are heavily involved in the political process. In the 2008 election cycle public-sector unions directly contributed $128 million to candidates for state office.[1] Public-sector unions spent millions more electing candidates to local governments and on their own campaigning efforts independent of the candidates' campaigns. With this aggressive political activism comes significant political influence. What does this mean for ordinary taxpayers?

When government employee unions win, taxpayers lose. The higher—in some cases obscenely higher—compensation of unionized government workers comes out of their tax dollars. Consequently, inflated pay for unionized government workers means either higher taxes, increased government borrowing, or cutbacks in the services provided by non-unionized departments. In the latter case even if tax bills stay the same, the taxpayers receive

less value for their money. They receive more services performed by unionized departments and fewer services from nonunion departments instead of the optimal mix of public services they desire from their government.

How successfully do government employee unions benefit their members at the taxpayers' expense? In some cases, fantastically. In the city of Vallejo, California, the average police officer earned $191,060 in compensation in the 2008-09 fiscal year, with their salary making up $121,518 of that figure and the rest coming as pension, health, and other benefits. That year the average firefighter in Vallejo earned a salary of $133,112 and total compensation of $193,174.[2] Obviously these unionized employees enjoyed their high compensation, but these excessive labor costs forced Vallejo into bankruptcy. In New York City the average city employee earned $106,743 a year in 2008, with benefits comprising 35 percent of that total compensation.[3] The city's taxpayers fund this with a top marginal tax rate of 47%.[4]

Government Employment Steady Through Recession

Moving beyond individual examples to national data shows that government employee unions have successfully advanced their interests at the expense of taxpayers—though not usually by as much as in Vallejo, California.

Over 7 million workers in the private sector have lost their jobs since the current recession started in December 2007—a 6.1 percentage point decrease.[5] Unemployment has risen steadily and now approaches 10 percent. Millions of private-sector workers wake up each day knowing that they might lose their job. State and local government tax revenues have fallen as now-unemployed workers have no incomes to tax. The resulting budget shortfalls mean state and local governments must either reduce spending or raise taxes on the workers who still have jobs.

Less spending would mean either layoffs or less pay for public sector workers, so government employee unions have lobbied vigorously against any spending cuts affecting their members' departments. They have been largely successful. Government employees have not shared the increased risk of unemployment that private-sector workers have endured.

Figure 1 *- Percent Change in Employment in Government and Private Sector Since Start of the Recession*

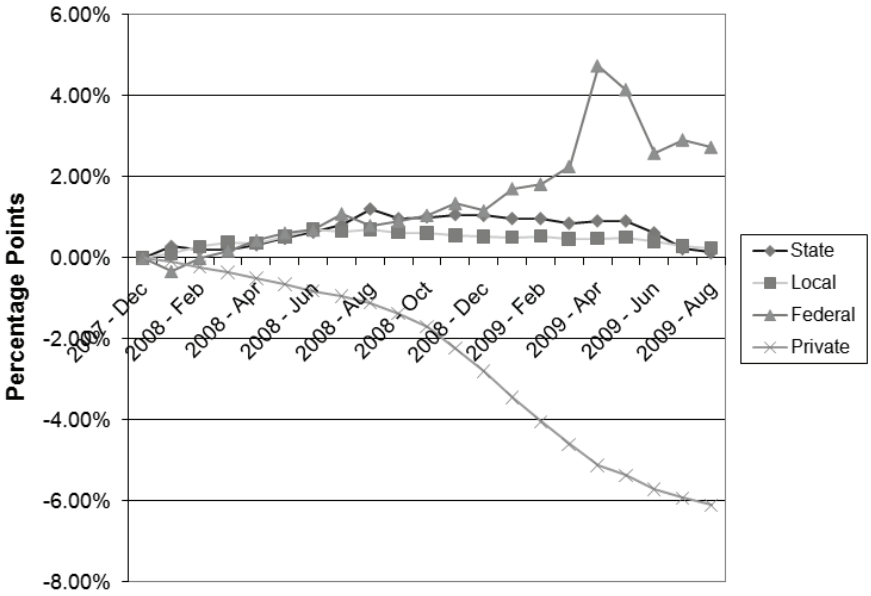

Figure 1 shows the percentage change in employment in the private sector, state governments, local governments, and the federal government since December 2007. While private sector jobs have shrunk by 6.1 percentage points, all three levels of government have expanded employment since the recession began.[6] This has been possible because states have responded to falling tax revenues by raising taxes: 29 states raised tax rates in 2008 and 2009.[7] Government employees have not shared in the pain of the recession. Its burden has fallen almost entirely on workers in the private sector.

Unionized Government Workers Earn More

Public-sector unions also win higher pay for their members, at the expense of taxpayers. Assessing how much public-sector unions raise their members' pay presents analytical challenges because union political activism can also raise the wages of non-union public-sector workers through higher taxes and larger government budgets.[8] Accordingly, comparisons of the pay of union and non-union public-sector workers understate the true costs unions impose on taxpayers.

Nonetheless, the difference in pay between union and non-union government employees are an important lower-bound estimate on costs of public-sector unions to taxpayers. However, simple comparisons of average pay between union and non-union workers will not necessarily reflect the true difference because unionized workers may also have other characteristics that increase earnings, such as more experience or more education, or they may tend to live in high cost-of-living states such as New York.

Economists use regression analysis to control for the effects of other variables that would also increase wages. Tables 1 and 2 show several regression analyses on the hourly wages and union status of state and local government employees, along with various control variables using data from the 2006-2009 March Current Population Survey (CPS). Appendix A contains the technical details of these calculations. The results under the "union" row report the percentage difference in hourly cash pay between a unionized government worker and a comparable non-union employee.[9]

Table 1 ***- Percent Difference in Hourly Pay Between Union and Non-Union State Government Workers***

	Model			
	(1)	(2)	(3)	(4)
Union Difference	5.0%	4.1%	5.3%	11.3%
Statistical Significance			+	***
Controls for:				
State Effects	Yes	Yes	Yes	Yes
Age and Experience	No	Yes	Yes	Yes
Demographic Variables	No	Yes	Yes	Yes
Marital Status	No	Yes	Yes	Yes
Education	No	No	Yes	Yes
Occupation	No	No	No	Yes
N	1822	1822	1822	1822
R-sq	0.079	0.321	0.332	0.377

Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

+ indicates significant at the 10% level
* indicates significant at the 5% level
** indicates significant at the 1% level
*** indicates significant at the 0.1% level

Table 2 *- Percent Difference in Hourly Pay Between Union and Non-Union Local Government Workers*

	Model			
	(1)	(2)	(3)	(4)
Union Difference	17.9%	7.6%	7.5%	12.2%
Statistical Significance	***	***	***	***
Controls for:				
State Effects	Yes	Yes	Yes	Yes
Age and Experience	No	Yes	Yes	Yes
Demographics	No	Yes	Yes	Yes
Marital Status	No	Yes	Yes	Yes
Education	No	No	Yes	Yes
Occupation	No	No	No	Yes
N	2966	2966	2966	2966
R-sq	0.139	0.375	0.380	0.414

Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

* indicates significant at the 5% level
** indicates significant at the 1% level
*** indicates significant at the 0.1% level

The tables show that—under a variety of specifications—unionized workers earn more than comparable non-union workers in the public sector. Model 4 is the preferred specification because it includes all control variables. Tables 1 and 2 show that unionized state government employees earn 11 percent more in hourly pay than comparable non-union employees, after controlling for state effects, demographics, experience, education, marital status, and occupation. Unionized employees in local government earn an even greater premium—12 percent more than comparable non-union workers. Both these estimates are highly statistically significant. The probability that random variation in the data explains these results is less than one-tenth of one percent.

Government Employees Receive Overly Generous Wages and Benefits

Unionized employees earn over 10 percent higher cash wages than comparable non-union workers. However, they raise costs for taxpayers by more than 10 percent because government employees also earn expensive benefits—more so than in the private sector. Public-sector unions often agree to smaller wage increases during contract negotiations in exchange for increases in pension and other retirement benefits. This allows state and local officials to satisfy the unions while balancing their budgets—which depend on annual cash flows. The politicians who agreed to increased retirement benefits will have left office by the time the taxpayers and voters must pay them, decades later. As a result, political pressures cause more of government employees' compensation to come in the form of benefits than in the private sector. Benefits comprise 29.3 percent of the typical private-sector worker's total compensation, but they represent 34.4 of the average state and local government employee's pay.[10]

Unfortunately, relatively little data exist that allow researchers to track benefit costs for individual employees. Data on the aggregate breakdown of wage and benefit costs for government employees comes from surveys of state and local governments, and thus do not include data such as age, education, or other characteristics of individual workers that affect wages. Surveys of individuals that include these data do not report the total amount

spent on employee benefits. While most workers know their cash wages, few workers know or could tell an interviewer exactly how much their employer spent to provide their health benefits or on their pension plan. Individual surveys can report whether employers provide specific benefits, but not the total cost of those benefits.

***Table 3** - Proportion of Workers With Employer Provided Health and Pension Benefits by Sector*

	Private Sector Wage and Salary Workers	State Government Employees	Local Government Employees
Pension Plan:			
No Pension Plan	40.0%	12.5%	11.5%
Pension Plan at Work, But Not Included	10.7%	5.8%	5.6%
Included in Pension Plan at Work	49.3%	81.8%	82.9%
Employer Sponsored Health Benefits:			
No	37.4%	17.9%	18.4%
Yes, Employer Paid Part of the Cost	51.1%	64.0%	58.7%
Yes, Employer Paid All of the Cost	11.5%	18.1%	22.9%

Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

Table 3 shows the proportion of private-sector wage and salary workers, state government employees, and local government employees with health and pension benefits. Government employees are significantly more likely to receive both benefit types than private-sector workers. While less than half of private-sector workers have a pension plan at work, 82 percent of state government and 83 percent of local government workers have employer-provided pension benefits. 37 percent of fulltime private-sector workers do not have any employer-sponsored health coverage while only 18 percent of state and local government workers lack health benefits. Conversely, only 12 percent of private-sector workers have jobs where their employers pay all cost of the premiums for their healthcare. Those figures were much larger for state and local government employees at 18 and 23 percent, respectively.

However, these probabilities do not account for other factors that could affect whether an employee receives benefits, such as education or experience. Regression analysis is necessary to disentangle these effects. Table 4 shows the marginal effects from an ordered probit regression analysis on pension and health benefits. The coefficient shows the increase in probability that employees receive employer-provided pension benefits or that employees' health premiums are fully covered by their employer if they work for a state or local government, conditional on other factors affecting benefits.

Government workers receive more generous health and pension benefits from taxpayers than workers in the private sector do from their employers. State government employees are 28 percent more likely to receive employer provided pensions and 8 percent more likely to pay none of the premiums on their employer-provided health insurance than comparable workers in the private sector. Local government employees are 32 percent more likely to have an employer-provided pension and 13 percent more likely to have their employer—the taxpayers—cover all the cost of their premiums than similar workers in the private sector. All these differences are highly statistically significant.

***Table 4** - Probability Government Workers Will Have Selected Benefits Relative to Private Sector Employees*

Percentage Point Increase in the Probability that a Government Employee will Have:				
An Employer Provided Pension			Employer Pay All the Cost of Health Premiums	
State Government	27.6%		State Government	8.1%
Statistical Significance	***		Statistical Significance	***
Local Government	32.0%		Local Government	13.0%
Statistical Significance	***		Statistical Significance	***
N	32003			32003

* indicates significant at the 5% level
** indicates significant at the 1% level
*** indicates significant at the 0.1% level
Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

State and local government employees receive more generous benefits than they would in the private sector. They have been largely sheltered from the heightened risk of job losses that have occurred in the recession. Union political activities increase taxes and raise the political demand for government services. These campaigns for higher taxes and larger government benefit government employees.

Union Employees Receive More Generous Benefits

While government employees generally receive better benefits than their private-sector counter-parts, unionized workers also earn more generous benefits than non-union workers. Table 5 shows the marginal effects of probit regressions on the benefits provided to state government employees. Table 6 shows the marginal effects from a regression on the benefits provided to local government employees.

Even within government, unionized employees are more likely to receive benefits than non-union employees. After controlling for other factors, unionized state government employees are 8 percent more likely to receive pension benefits and 7 percent more likely to have the taxpayers pay all the premiums for their health coverage than non-union state employees. Unionized local government employees are 12 percent more likely to receive pension benefits and 9 percent more likely to have the taxpayers pay all the premiums for their health coverage than non-union local government employees. All of these effects are highly statistically significant. Unionized government employees receive more generous benefits than their non-union counterparts, with taxpayers picking up the tab.

Consequences for Taxpayers

Unionized government employees receive 10 percent higher pay than their non-union counterparts. They receive more generous benefits than non-union workers, and significantly better benefits than employers can provide in the private sector. In the midst of the worst recession in 30 years, government employees have enjoyed strong job security, even as millions of private-sector workers have lost theirs. Unionized government jobs provide better pay and benefits than most workers who fill them would earn in the private sector. To protect these perks government employee unions campaign strongly for larger government. However, these benefits come at a cost to the taxpayers who fund the government. State and local governments collected $1.3 trillion in taxes in 2008.[11]

Table 5 - Union Membership, Health, and Pension Benefits for State Government Employees

Percentage Point Increase in the Probability that a unionized State Government Employee will Have:	
An Employer Provided Pension	7.6%
Statistical Significance	***
Employer Pay All the Cost of Health Premiums	6.7%
Statistical Significance	***
N	1916

* indicates significant at the 5% level
** indicates significant at the 1% level
*** indicates significant at the 0.1% level
Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

Table 6 - Union Membership, Health, and Pension Benefits for Local Government Employees

Percentage Point Increase in the Probability that a unionized Local Government Employee will Have:	
An Employer Provided Pension	12.2%
Statistical Significance	***
Employer Pay All the Cost of Health Premiums	8.5%
Statistical Significance	***
N	3117

Source: Author's analysis of March 2006 - March 2009 CPS data. Fulltime workers between the ages of 20 and 65. See Technical Appendix for Details

Unions are cartels that benefit their members at the expense of the rest of society. When government employee unions successfully campaign for higher pay or more benefits, taxes must rise or spending on public services provided by non-union workers must fall. Taxpayers should not have these choices forced on them, but should have discretion over what level of collective bargaining is appropriate for government employees.

Endnotes

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4 Includes the federal income tax, New York state income tax, New York City income tax, the Medicare payroll tax, and accounts for the deductibility of state and local taxes from federal tax obligations.

5 Department of Labor, Bureau of Labor Statistics, "The Employment Report," / Haver Analytics.

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FOUR

Are Labor Unions A Good Thing? *And Can They Survive?*

David Denholm

Are labor unions a good thing? It depends on whom you ask and how you define "good." There is a sense that unions increase wages, but economists say that the higher wages of union members ultimately come at the expense of consumers and low-paid workers, not of employers. It is also noted that the workers most likely to benefit from unionism are those who would be better off anyway.

In his 1977 book *The Economics of Trade Unions*, labor economist Albert Rees wrote that unions "benefit most those workers who would in any case be relatively well off, and while some of this gain may be at the expense of the owners of capital, most of it must be at the expense of consumers and the lower-paid workers."[1] Labor economist Morgan Reynolds, in his 1987 book *Making America Poorer: The Cost of Labor Law*, finds that "Labor monopolies are a serious disharmony that keeps production, employment and economic expansion below their potentials here and around the world."[2]

Most of the legal immunities given to labor unions were a result of New Deal legislation. According to UCLA economists Harold L. Cole and Lee E. Ohanian, they came at a steep cost:

We have calculated that New Deal labor and industrial policies, which raised wages and prices 20 percent or more in many industrial sectors, were directly

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Most of the legal immunities given to labor unions were a result of New Deal legislation. According to UCLA economists Harold L. Cole and Lee E. Ohanian, they came at a steep cost:

We have calculated that New Deal labor and industrial policies, which raised wages and prices 20 percent or more in many industrial sectors, were directly responsible for stretching the Depression through the decade of the 1930s. All told, we estimate that these policies kept the economy below the growth rate one would have otherwise expected for an extra seven years. [3]

Unions point to data showing that union members are paid more than non-union workers. In 1983 the union wage differential was about 20 percent, but it has been declining rather steadily and in 2008 was just above 15 percent.[4] A substantial amount of the difference depends on factors like geography, occupation, industry and the size of the employer.

Some supporters of labor unions argue that despite their obvious drawbacks they give a "voice" to the interests of workers. This refers to the interests of workers in public policy rather than workplace issues. That voice is, of course, a political voice. This rationale is based on the mistaken idea that all workers have identical political interests. In fact, the question of the use of union dues for other than workplace representation has been extremely controversial and has repeatedly been the topic of U.S. Supreme Court cases in which the Court has consistently ruled that laws sanctioning "member-

ship" in a labor union as a condition of employment violate the individual worker's constitutionally protected freedom of association.

Whether labor unions are a good thing is more than just a rhetorical question. Our nation's laws are riddled with special privileges and legal immunities for unions. They are truly privileged organizations; yet some see even more pro-union laws in more socialist nations and complain that the United States' labor policies are anti-union. It goes even deeper than this. No matter how pro-union our laws may be, unions in the private sector of our economy have been on the decline for at least the last sixty years. They have declined to the point that they are, or are at least on the verge of becoming economically irrelevant. As a result, labor unions today should be understood as purely *political* organizations.[5]

The Impact of Public Opinion on Unions

Just before Labor Day 2009, the Gallup Poll announced that public approval of labor unions had fallen below the 50 percent mark for the first time since Gallup began tracking the question in 1936. The drop in union approval was dramatic—from 59 percent in 2008 to 48 percent in 2009. Those who disapproved of labor unions increased from 31 percent to 45 percent, while those who were undecided declined from 10 percent to 7 percent.[6]

This is an enormous shift in public opinion to take place in such a relatively short period of time. Determining the cause of this precipitous decline is difficult, but several recent notable incidents come to mind. Just prior to the survey interviews, there were several nationally publicized examples of union intimidation and even violence against citizens protesting health care reform at local town hall meetings. The United Auto Workers came under severe criticism over their role in the bankruptcies of Chrysler and General Motors. Some unions were also criticized in the months leading up to the survey for their advocacy of the perversely named "Employee Free Choice Act," which would deny working Americans the right to a secret-ballot vote on union representation and mandated a federally appointed arbitrator to impose new contracts. And shrinking government revenues at the state and local level resulting from the collapse of the housing bubble and the subsequent eco-

nomic downturn, put public-sector unions at cross-purposes with politicians who were confronted with the need to cut costs or increase taxes.

Yet whatever the cause, it is worth asking: Does public approval of labor unions really matter in the grand scheme of things? Yes, it does, and in a big way. American labor unions are creatures of public policy. Public policy is made by politicians, and politicians are sensitive to public opinion.

Developments in the labor union movement over the last half century also raise the question of which unions the public approves and disapproves. When the federal Wagner Act was enacted in 1935, it excluded all government employees from coverage. As late as the middle 1950's, the AFL-CIO was on record as opposing public-sector collective bargaining.[7] According to the 1974 edition of the Handbook of Labor Statistics, in 1956 there were slightly more than 18 million union members of whom less than 1 million, or about 5 percent, worked for government. Perhaps more importantly, government employee union members constituted only about 5 percent of the entire union movement.[8]

Fast-forward to 2008 and there are approximately 16 million union members, of whom about 8.2 million are on private payrolls and 7.8 million work for government.[9] Due to this shift, which seems destined to continue, more than 48 percent of all union members in America are employed by government, despite the fact that only one in six jobs are with government. In 2008 union density in the private sector of the economy was 7.6 percent while in the public-sector it was 36.8 percent.[10]

So, when the Gallup Poll reports that public approval of labor unions has fallen below 50 percent, and we compare that to the 72 percent approval unions enjoyed in 1936, it becomes clear that this public disapproval falls on public-sector unions.

This may be a more important question than it appears on its surface because, as will be discussed below, the framework of laws giving public-sector unions special privileges and legal immunities rests squarely on private-sector precedents, despite the fact that there are fundamental differences between the two. Before looking at that issue, a brief review of the development of U.S. labor law in the private sector is necessary.

Unions Enjoy Unique Privileges

Few Americans are aware of the exceptional special privileges and legal immunities that organized labor enjoys.

One of the underlying assumptions behind America's earliest labor laws was that workers were powerless in their dealings with employers. This was reflected in statements like the one in the preamble to the Norris-LaGuardia Anti-Injunction Act of 1932, which stated that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[11]

There was also the motivation of trying to prevent disruptive strikes. Therefore, politicians believed that government regulation of labor relations, including the imposition of union recognition, would lead to labor peace. The Wagner Act articulated this assumption:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[12]

This assumption is pure conjecture, but politicians needed it to stretch the Commerce Clause of the Constitution to cover Congress' regulation of labor relations.

Compulsory Membership

No special privilege for labor unions has caused more controversy, or been more misunderstood, than the issue of compulsory union membership. In 1908, the case for voluntary union membership was famously made by Samuel Gompers, the first president of the American Federation of Labor:

"The workers of America adhere to voluntary institutions in preference to compulsory systems which are held to be not only impractical but a menace to their rights, welfare and their liberty."[13]

However, this statement needs to be put into historical context. In 1908 the AFL opposed contracts that forced workers to become union members as a condition of employment because it feared employer-controlled "company unions." The federation also opposed "yellow dog contracts" in which workers voluntarily agreed not to join unions. In 1932 the Norris-LaGuardia Anti-Injunction Act outlawed "yellow dog" contracts, and in 1935 the Wagner Act, the National Labor Relations Act, which was hailed as "Labor's Magna Carta," outlawed company unions. By contrast, Gompers had no quarrel with "closed shop contracts," which require employers to hire only union members. The closed shop, which was sanctioned by the Wagner Act, gave enormous power to unions because it allowed them to decide who would work and who wouldn't.

The Taft-Hartley Act of 1947 introduced two reforms. First, it outlawed the closed shop and replaced it with the "union shop." In a union shop, employees can be hired even if they are not union members as long as they join the union within a specific time period after being employed—usually 30 days—or pay "agency fees" to allegedly cover the costs of representation. The Taft-Hartley Act also permitted states to enact "right to work" laws, which prohibit contracts that require union membership at any time as a condition of employment.

Taft-Hartley had one interesting legal twist regarding compulsory union membership. One section of the law specifically permitted union shop contracts. But another section said an employee could only be fired for not being a union member if he or she failed to pay the dues and fees required of union members. In other words, employees didn't really have to be union members as long as they paid the union *as if* they were members. This would be an important escape hatch for any employee who became subject to internal union discipline for such crimes as crossing a picket line or making statements that held the union in bad repute. At the same time, however, it

enabled unions to continue receiving forced payments from workers, even if in the form of so-called "agency fees."

There is something troubling about one law that forces a person to join an organization in order to keep a job. And there is something incongruous about another law that allows employees to opt out of the organization as long they pay fees to it as though they remained members. The U.S. Supreme Court has wrestled with this injustice, and it has come up with some ingenious excuses for tolerating it. Even though compulsory unionism violates the constitutional right to freedom of association, the Court has discovered a legitimate state interest for allowing it. As the Supreme Court said, the government's "vital policy interest in labor peace and avoiding 'free riders'" is sufficient to justify compulsory unionism, also known as "union security."[14] In other words, workers must be forced to join a union so that the union will be secure, and secure unions lead to labor peace.

In this context, labor peace has nothing to do with preventing violence; instead, it means that unions do not compete with one another for members. When someone is forced to join or support a union it becomes more difficult for another union to raid its members. It's a mystery why this is in the interest of employees or, for that matter, the state. It's also a mystery why avoiding "free riders" is in the state's interest. Of course, union representation may benefit some employees and harm others. And those who are harmed may be a minority. But why should the Supreme Court rule that the minority may be compelled to suffer economic harm at the hands of a union? And how does violating the Constitutional rights of the minority serve the state's interest?

No doubt, there are free-rider employees who will take advantage of union representation and refuse to pay for it. Similarly, there are businesses that benefit from the lobbying activities of the U.S. Chamber of Commerce but refuse to pay dues. And many communities benefit from the activities of independent civic associations. But no one suggests that every town resident be forced join the Rotary or the Red Cross and pay for its benefits.

Moreover, the National Labor Relations Act also mandates that a union that is chosen as a bargaining agent by a majority of employees within a

workplace will be the *exclusive* representative of all the employees. In short, the government is taking on the task of enforcing the terms of a cartel.

Monopoly Bargaining

It is difficult to overstate just how important the idea of union monopoly has been in shaping labor-management relations. University of Chicago law professor Richard A. Epstein took note of the fact that union power didn't really depend on violence or even compulsory unionism, so much as it did on monopoly.

> Whether the field of conflict is education, transportation, or manufacturing, negotiations under collective bargaining often lead to intense and protracted struggles between management and labor. On many occasions there is extraordinary bitterness and division, which frequently lead to recriminations and sometimes to violence. This bitterness is not necessarily endemic to the relationship between employer and employee; rather, it is a function of the legal rules that structure the negotiations between the two parties. Many problems with collective bargaining arise because legislation creates monopoly positions on both sides of the market, a state of affairs exactly the opposite of what a sound law should strive to achieve.
>
> The social consequences of this bargaining system have been largely debilitating.
>
> A system that allows the employee freedom to deal directly with an employer or to join a voluntary union of his own choosing is far superior to a system in which the state selects the "bargaining unit" under the usual set of complex and indeterminate criteria, which always work against the interests of a political minority.[15]

Both unions and employers have their own reasons for rejecting any suggestion that an employee should be free of a union's representation. The unions object that if the terms of a union contract don't apply to all employees, the employer will undercut the union by hiring at less than union rates.

Employers may also object that if a single union isn't the exclusive employee representative, they may have to negotiate with several different unions. But these objections rest on a flawed premise. Both unions and employers accept the current labor paradigm that assumes it is the business of government to regulate labor relations and compel collective bargaining. Neither is willing to allow an individual employee the freedom to decide whether to join a union or to authorize the union's negotiations on his or her behalf.

Development of Public-Sector Unions

Because of the power that has accrued to labor unions as a result of the special privileges and legal immunities described above, the nation's laws are larded with other smaller, but no less significant, privileges. Among the most important are laws giving public-sector unions monopoly bargaining privileges. State lawmakers, apparently without due consideration to the fundamental differences between the private and public sectors have modeled public-sector collective bargaining laws on private-sector law. They contain the fundamental flaws outlined above, which are exacerbated due to some important differences.

The public sector is monopolistic. There is a single source of supply for government services, including some that are essential. There is only one fire department, one police department, one system of public education, etc. The private sector is competitive; there are alternative sources of supply for the goods and services produced. There are a multitude of choices in everything from automobile dealerships to grocery stores.

Public-sector decisions are political decisions no matter how great their economic impact. Government makes decisions every day that have profound economic consequences, but these decisions are based on political, not economic, considerations. Decisions that are politically popular but economically ruinous can get you reelected, while decisions that are economically sound but politically unpopular can ruin a political career.

Private-sector decisions are economic decisions no matter how great their political impact. The only votes that matter are consumers' dollars.

Government—the public sector—is sovereign. Sovereignty is the power to

use force—to compel. This is the exclusive province of government, within constitutional limits, adopted in the interest of public order and security. One of the best articulations of the challenge to sovereignty in public-sector collective bargaining is a U.S. District Court opinion that upheld the constitutionality of a North Carolina law that declared public-sector union contracts to be void:

> Moreover, to the extent that public employees gain power through recognition and collective bargaining, other interest groups with a right to a voice in the running of the government may be left out of vital political decisions. Thus, the granting of collective bargaining rights to public employees involves important matters fundamental to our democratic form of government. The setting of goals and making policy decisions are rights inuring to each citizen. All citizens have the right to associate in groups to advocate their special interests to the government. It is something entirely different to grant any one interest group special status and access to the decision-making process.[16]

All economic and social activity in the private sector is governed by free contract. You only have a free contract when both parties want one. You cannot be compelled to buy the product of a particular company. Businesses cannot be compelled to join a business or trade organization. Support of churches is entirely voluntary.

Every time that we elect representatives to run the public's business and they cannot carry out their programs because of opposition from public-sector unions, sovereignty has broken down and we have all lost.

The first state law compelling government agencies to negotiate contracts with public-sector unions and giving those unions monopoly bargaining privileges was enacted in Wisconsin in 1959.[17] The year before, New York City had enacted an ordinance along the same lines. During the 1960s, 21 states followed suit with laws covering some or all public employees.[18]

It should be noted that there is room for substantial differences in cal-

culating the extent to which states have enacted compulsory public-sector collective bargaining laws. In some states the laws are comprehensive, covering all government workers. In other states there are several laws covering different groups of workers.

Transformation of the Public Sector Workforce

During this time, many of the associations of government workers that were dedicated to protection of the civil service system from the bossism that preceded it went through a transformation to labor unionism, sometimes seemingly in self defense. The best example of this occurred in 1961 in New York City where the American Federation of Teachers, an AFL-CIO affiliated labor union, defeated the National Education Association, which was at the time a broadly based professional association of educators, in a representation election. By the early 1970s, the NEA, under the guise of protecting the education profession from labor unionism, had abandoned any pretense of representing a broad cross section of the education profession and had completed its transformation into a militant labor union.[19]

The same thing happened with state and local civil service associations all across the country. Once laws were enacted giving public-sector unions monopoly bargaining powers, these associations had to either transform or were replaced by unions. By 1968 the transformation was so complete that the U.S. Department of Labor, realizing that there was little or no practical difference, began reporting combined public-sector union and association membership.

By the late 1950s the writing was on the wall for private-sector unions. Union membership numbers were in decline and labor union officials had to seek elsewhere for new members and income. It's easy to understand why the public sector was an inviting target for a variety of reasons. Public employment at that time was, for all practical purposes, non-union and public employment was a growing industry. To put that in perspective, in 1919, the earliest year for which I have good data, only 10 percent of all employment was with government. By 1960 that figure had increased to 16 percent.[20]

In addition, at this juncture the political power of unions was at its zenith

and it was relatively easy for them to convince state legislators to enact public-sector collective bargaining laws.

Another factor that could have contributed to the enactment of compulsory public-sector bargaining laws were civil service reforms that made it increasingly difficult for politicians to give jobs to political supporters as patronage. But laws allowing public-sector unions to collect compulsory union dues established a new kind of mutual back-scratching operation: The politicians supported the unions, the unions collected the money, and then gave the money to the politicians. What was once seen as a form of corruption could now be sold as protecting employee rights.

The Future of the Labor Movement

It is risky to try to prognosticate about future developments. If this were being written in 1950 it would seem certain that by 2008 the terms and conditions of virtually all employment would be covered by collective agreements. With that caveat in mind, we can conclude that the long-term prospects for private-sector unions are not good. There are forces at work that make the continued existence of labor unions in the private sector problematic.

In many respects the prospects for improved and successful "worker-management relations" are very positive, while the future of "labor-management relations" may be rather bleak.

In 2001 then-AFL-CIO President John Sweeney was quoted as telling an Executive Council meeting that "if we don't begin to turn this [membership decline] around quickly and almost immediately, the drift in the other direction is going to make it virtually impossible to continue to exist as a viable institution and to have any impact on the issues we care about."[21] Since then, union density on private payrolls has continued to plummet. How much lower must it go before the unions admit that it is "impossible to exist as a viable institution"?

There will always be labor unions in the private sector. Their roles and influence may change but it is highly unlikely that they will ever completely disappear. As University of Pennsylvania law professor Michael Wachter aptly described them, unions are "Corporatist Institutions in a Competitive

World."[22] Passage of legislation, such as the "Employee Free Choice Act" might give them temporary relief from their freefall in membership, but it would take a major overhaul of our entire economic system—a return to New Deal-style highly intrusive regulation of almost every aspect of economic life—to save them.

In his book *Future Shock*, Alvin Toffler addressed the question of what organizations will look like in the future. He did so in the context of the present fear that we would be overwhelmed by an all-powerful bureaucracy.

> The kinds of organizations these critics project unthinkingly in to the future are precisely those least likely to dominate tomorrow. For we are witnessing not the triumph, but the breakdown of bureaucracy. We are, in fact, witnessing the arrival of a new organizational system that will increasingly challenge and ultimately supplant bureaucracy. This is the organization of the future. I call it "Ad-hocracy."[23]

Especially in the area of employment, or if you will "labor-management" relations, the future will increasingly be characterized by chaos. People won't like it. They will appeal to their political leaders for order. The *Journal of Labor Research* contained a very insightful article by John T. Delaney about the changes unions will be forced to adopt.

Our 20th Century labor laws, organizational forms, and institutions grew out of the turmoil of the Great Depression. Accordingly, one of the purposes of the resulting U.S. industrial relations system was the promotion of stability in the workplace and in the ongoing relations between management and labor. Union security clauses played a central role in ensuring stability.

For many years, having stability as a goal was consistent with the aims of employers and the nation. In that environment, union security was a difficult issue but a reasonable request on the part of a union movement that enjoyed widespread support from workers.

But stability no longer exists. Firms must now operate in unstable environments. The unchallenged dominance of world markets by American

firms is a thing of the past. Employment relationships have become unstable and employees' expectations have changed. Workers can no longer expect to have long term careers in one firm or a progression of related jobs until retirement. To survive in unstable situations, employees seek information from management, appropriate training and feedback, and a voice in how work is completed.

This environment is not compatible with all aspects of traditional unionism, notwithstanding unionists' claims to the contrary. The failure of unions to adapt to this new situation and provide a message and alternative that employees desire is the primary problem faced by organized labor today.[24]

Perhaps the role of labor organizations in the future will be vastly different than today. The trend in labor organizations in recent years has been toward consolidation while society is moving in the other direction. John Naisbitt commented on this in his book *MegaTrends: Ten New Directions Transforming Our Lives*.

> What is happening in America is that the general purpose or umbrella instrumentalities are folding everywhere.
>
> The meat cutters and the retail clerks merged in 1979, becoming one of the largest labor unions in the United States. This growth is like the sunset. The sun gets largest just before it goes under. Remember the brontosaurus? The brontosaurus got so huge just before its demise that it had to stay in water to remain upright. There were thirty-five mergers of labor unions between 1971 and 1981. In late 1980, the machinists and the auto workers announced merger talks that would make them the largest, most powerful union in the United States. If it comes off, it will appear that big labor is getting its act back together again. The reality will be the sunset effect.
>
> America is moving toward an almost union-free society.[25]

As employers and employees seek new ways to relate to each other, the nation's labor laws will need to catch up to the new arrangements that arise.

One of the big difficulties is our national labor policy granting unions the

exclusive right to represent employees in a designated bargaining unit. As long as unions enjoy a government-mandated monopoly over a segment of workers, the union's incentive to focus on core tasks and provide value for workers can be subsumed by other competing interests—ongoing financial growth, political power, legislative influence, etc. From an economic point of view, it would be desirable to repeal this policy of exclusive bargaining. From a political point of view, it will be very difficult—at least until the time when today's traditional labor organizations are teetering on the edge of extinction.

A major change is inevitable, whether the present laws giving labor unions monopoly status are changed or not. For many years there has been talk of repealing the postal monopoly, but those with a vested interest in preserving this monopoly, most notably the postal unions, prevailed and the monopoly was maintained. Look what happened—faxes and e-mail, UPS and FedEx. The market abhors a monopoly and when left free responds by destroying it; but the practical ability to do anything about union monopoly in the present political situation is very limited.

I have been studying organized labor since 1965, and every year around Labor Day I've read optimistic statements by union officials about how they've turned the situation around. Each year when the Bureau of Labor Statistics releases the figures showing a further decline in unionism the news release puts special emphasis on the slightest encouraging sign in the figures. And, of course, liberal pundits have taken every opportunity to forecast organized labor's imminent revival.

Let us turn to the other side of the issue—the relations between *employers and employees* in the future. There, the forecast is much rosier. Employees are becoming increasingly powerful in ways that affect public policy. In the industrial age it was the capitalist who provided the means and the knowledge for production. The role of the worker was merely to do exactly what the "time and motion study" expert told him to do. The people who have the knowledge in the information age aren't the capitalists, they are "labor." In the information age, knowledge is capital and the individual workers are carrying it around in their heads.

There is a democratic problem with this and it is likely to become a public policy problem. The relative differences in workers' ability to do "industrial" work may be significantly less than the differences in the ability of workers to do "knowledge" work.

When job performance could be measured on the basis of doing exactly what you were told to do, the skills could be more easily mastered by a wider group of people and it was taken for granted that the process moved along at the speed of the least productive worker. Compensation for this work could be much more uniform. Uniform wage rates for industrial workers made more sense because there was very little that the individual worker could do to improve performance.

When job performance is measured on the basis of intellectual ability, those with greater ability will be more highly prized. Uniform wage rates for knowledge workers don't make much sense because individual workers have greatly differing abilities and drives to be productive. The result of this will be a widening of the gap between high paid and low paid workers, not just within broad groups of society but within employees doing essentially the same work for the same employer. The reduced influence of labor unions will make it possible for the private sector to cope effectively with these issues.

The same cannot be said about the public sector. Much of the progress that has made labor unions anachronistic in the private sector may not even be possible in the public sector unless laws giving government unions monopoly powers are repealed or at the very least reformed to substantially restore public control. The impact of the present economic downturn on government revenues has created a situation where political leaders, even those traditionally friendly to unions, have had to confront some economic realities. At the same time, the public has had to take a long hard look at what has been happening over the last several decades of increased union influence over the size and cost of government.

In 1978, Cornell University law professor Robert S. Summers wrote:

> Collective bargaining and the processes of democratic public benefit conferral are not felicitous bedfellows. While it is possible

> to shore up these processes through the promulgation of codes for neutrals (and through other reforms), the extent its unhappy effects can be reduced or ameliorated by these means is limited. Abandonment of bargaining is necessary, for this and other reasons.[26]

As remote as the prospect for restoring public control of government may seem today, the future is full of challenges and opportunities. As noted above, it is unlikely that compulsory public-sector bargaining laws would have been enacted without private-sector union support. During the time when most of these laws were being enacted private-sector unions were far more powerful than they are today. The reduced size and power of private-sector unions is, therefore, an important factor when considering the possibility of meaningful reforms in these laws.

There is some evidence that union advocates are well aware of this problem. In 2001, Greg Tarpinian, who was at the time the Executive Director of the Labor Research Association and went on to become the first Executive Director of the Change to Win federation, sounded the warning in an economic situation very similar to the one we face today.

"Public-sector workers and their unions face a tougher road ahead as the economic recovery stalls, tax revenues fall, and a pro-privatization, anti-government mantra gains ground in Washington," Tarpinian wrote. He then went on to say:

> Why should the private-sector labor movement care about the challenges facing public-sector unions? Because without the public-sector labor movement, the American labor movement would have extremely limited political clout and resources. The private-sector workforce is less than 10 percent unionized. The public-sector labor force is nearly 40 percent unionized. Private-sector labor needs public-sector labor.
>
> The opposite holds true as well. On their own, without the support of the private-sector labor movement, public-sector workers would be sitting ducks for conservative, anti-worker/anti-government forces.[27]

The pace of change is accelerating rapidly. Changes will take place much faster than the political system can adapt to them. Most of these changes are going to be very positive for society, but they will cause quite a bit of discontent along the way from people who feel threatened by it or who are beneficiaries of the status quo.

Political leaders have the unenviable task of coping with this discontent. Hopefully, rather than trying slow down change, they can do the public a great service by enabling economic factors to implement the changes that will be necessary, and establishing a safety net for those who are temporarily in need of help. We will be far better off if policymakers realize that by maximizing freedom and letting the market work, they will be helping society at large.

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FIVE

The New Zealand Employment Contracts Act
From Coercion to Liberty

Michael Reitz

The New Zealand Employment Contracts Act (ECA) of 1991 revolutionized labor relations in a country that had long had a high density of union representation. New Zealand's brief experiment with a system of employer-employee relations based on freedom of association provides a model for policymakers that places workers in a position to pursue not only their preferred place of employment, but also the optimal terms of employment based on their unique skills, talents, needs, and priorities.

Origins of the Employment Contracts Act

In the 20th Century, New Zealand experienced several decades of poor economic conditions, which climaxed in the 1970s and 1980s, when the nation's economy, in the words of University of Chicago law professor Richard A. Epstein, "edged toward collapse."[1] The average wage earner paid 24 percent of gross income in income and social security taxes in the early 1980s, up from 14 percent in 1950.[2] Welfare costs exceeded 25 percent of Gross Domestic Product (GDP) in 1984, which pushed the country's deficit to over 7 percent of GDP.[3] New Zealand had the lowest productivity and the most highly-regulated economy of any country belonging to the Organization for Economic Cooperation and Development (OECD), lagging behind other countries for decades.[4]

As a result, New Zealand adopted several waves of reform. Led by Prime Minister Robert Muldoon, the National Party first attempted a number of

reforms premised on centralized intervention such as freezing wages and prices, and assuming risk for private investments.[5] These moves led to higher deficits, an increase of international debt, and a drop in the country's credit rating.[6]

Sweeping changes were needed, and the correlation between low economic performance and high regulation became more and more apparent. These realities set the stage for several significant reforms, including a revision to the nation's labor relations laws. In 1984, Roger Douglas became the new Labor finance minister and brought with him ideas for change that included not more regulation, but rather a plan for rapid reforms of deregulation. Later known as "Rogernomics," these reforms would deregulate businesses, trade, and investment, and would tighten monetary policy. Roger Kerr of the New Zealand Business Roundtable (NZBR) summarized the major elements of the reforms:

- By removing foreign exchange and interest-rate controls, the deregulation of financial markets;
- Eliminating farming and industry subsidies, lowering tariffs, and expanding trade with Australia;
- Simplifying the tax structure and cutting the top rate of personal income tax by half (66 percent to 33 percent). Introducing a flat-rate consumption tax;
- Opening the domestic air market and deregulating ports, coastal shipping and road transportation;
- Privatizing telecommunications, railways, and publicly owned banks.
- Decentralizing the education system.[7]

Douglas's reforms began the revolutionary transformation of the country's political climate, and opened wide the doors for labor reform. While the Labour Party maintained its foothold in the parliament, with government regulation continuing to cause economic instability, the National Party found itself wholeheartedly converted to free-market thinking.

This fresh way of thinking for New Zealand political leaders was based primarily on Economics Nobel Prize winner James Buchanan's writings about the three fundamental functions of government:

- It should protect the institutions that facilitate human interactions, and delineate and protect individual domains of freedom;
- Its production must be reduced to providing genuine public goods and services;
- Its redistributive function should be limited, abolishing government correction of market forces.[8]

In addition, policymakers determined that the government should also have a fiscal administrative function with a transparent budget that is accountable for revenue, assets, and liabilities. In New Zealand, the government reduced tax burdens and shifted taxation from progressive income to flat-value added taxes.[9]

On the heels of Rogernomics, the election of 1990 was the great turning point for labor markets. As the National Party won control of parliament, the long-reigning Labour Party lost its grip on the "social justice" impositions of labor regulation. With a second round of economic reforms came the freeing up of labor markets, and the attitudes of New Zealanders began to change as they were no longer able to rely on government regulation. This forced a thorough re-evaluation of the government's role in a new society.

Major labor market reforms proposed

It is both ironic and fitting that New Zealand would lead the world in liberalizing its labor market. New Zealand was the first country in the world to authorize collective bargaining when it passed the Industrial Conciliation and Arbitration Act of 1894.[10] By 1980 New Zealand labor law operated on the same theories of collective bargaining and exclusive union representation as are found in the United States' National Labor Relations Act, with several notable differences: for example, unions represented workers within an entire industry, negotiating multi-employer contracts.[11]

Roger Kerr notes four government-mandated privileges unions enjoyed during this era:

- Compulsory union membership for employees within an industry;
- A monopoly over all employers within the union's designated craft or occupation;

- Ability to negotiate with a "representative sample" of employers with the terms having blanket coverage; and
- Compulsory arbitration in court if negotiations stalled.[12]

The economic reforms that began in 1984 were accompanied by a push to revolutionize the country's labor laws. An early advocate of labor reform was NZBR analyst and economist Penelope Brook, who relied in part on the work of Richard Epstein. The New Zealand Business Roundtable and the New Zealand Employers Federation waged a long campaign to replace the then-existing labor arrangements with more flexible agreements between employers and workers in order to revitalize the economy.[13]

As the National Party campaigned to wrest control away from the Labour Party in 1990, labor market reform was one of its agenda's major features. The party vowed to introduce legislation that would allow for voluntary unionism and flexible workplace agreements. Once the National Party came to power, the Employment Contracts Bill was soon introduced and adopted.

Features of the Employment Contracts Act

In its final form, the Employment Contracts Act (ECA) of 1991 was an innovative law that sought to redefine labor as an economic good so that workers viewed their employment within the context of contract law, rather than from a viewpoint of subservience that required collective action as a counterbalance to the "power" of the employer.

The introduction of the Act predictably set off a storm of criticism and doomsday predictions. Opponents warned that wages would drop, anarchy and uncivilized behavior would run rampant, "gangster unionism" would become the norm, and high unemployment would become an unavoidable and permanent condition.[14] Based on a review of the impact of the Act, opponents' claims appear overblown.

The ECA sought to promote an efficient labor market and to provide for freedom of association, to allow employees to determine who should represent their employment interests, to enable employees to choose whether to negotiate an individual employment contract or to be bound by a collective employment contract, and to establish that the question of whether employ-

ment contracts are individual, collective, or should be determined by the concerned parties themselves.[15]

The Act was structured as follows:

- Part I established that employees have the freedom to choose whether to associate with other employees for the purpose of advancing their collective interests. Membership in labor unions or employee organizations was made voluntary and no person was permitted to apply undue influence on any other person "by reason of that other person's association, or lack of association, with employees." No special privileges or preferences were conferred in obtaining employment or the terms of employment by reason of a person's membership or non-membership in an employee organization.
- Part II gave employees the freedom to bargain either on their own behalf or through freely chosen representatives (which could be another person, group, or organization).
- Part III provided for a procedure for the settlement of "personal grievances" concerning dismissals, discrimination, harassment, and duress.
- Part IV recognized that employment contracts create enforceable rights and obligations.
- Part V granted the rights of strikes and lockouts, but only within certain constrains.
- Part VI established the institutions that retained exclusive jurisdiction to deal with the rights of parties in employment contracts. The Employment Tribunal would serve as a low-level, informal agency for providing "speedy, fair, and just resolution of differences between parties to employment contracts," while the Employment Court was to oversee the Employment Tribunal and dealt with legal issues that arose from employment disputes.

Wolfgang Kasper of Australia's Centre for Independent Studies summarizes the most innovative features of the Act:

- Employment was in principle the concern of freely contracting individuals, not, as previously, of collective entities such as entire industries or enterprises. Where people agreed to associate, deals could be struck

to cover entire enterprises or multi-enterprise groups (freedom of association).

- The law did not prescribe the content of employment contracts, although wage rates were subject to minimum wage laws.
- The ECA abolished compulsion and union monopoly powers. No area of work could be claimed any more as "belonging" to a group or organization.
- The ECA made it illegal for unions to strike against multi-employer (i.e., industry-wide) collective agreements; strike action has to be decided at the enterprise level.
- Recourse to arbitration was voluntary. The ECA, however, provided for special courts where conflicts remain (Employment Tribunals, the Employment Court) as well as appeals to the civil judicial system to enforce, interpret, and mediate employment contracts.
- "Blanket coverage" was gone. All affected were not involved in negotiating new wages and work practices.
- The New Zealand taxpayer, who previously used to fund the transaction costs of award negotiations, is no longer responsible for the expenses of contract negotiation. Contract negotiations were fairly straightforward and simple; this cut overall transaction costs in operating the labor market.
- Government did not register unions or collect detailed information on contracts, just as it did not collect much information on contracts or garage sales.[16]

The Employment Contracts Act stands in stark contrast with the United States' labor law established by the National Labor Relations Act.

In the broadest terms, the ECA allowed workers to control their employment as individuals, while the NLRA imposes collective conditions on entire classes of employees. The NLRA mandates that unions representing workers in a place of employment—or "bargaining unit"—enjoy a monopoly over those workers as their sole representative. Workers are not permitted to seek outside representation or to even negotiate terms and conditions of employment on their own behalf. Unions are selected through a carefully-

regulated process and the process of de-certifying a union is equally rigorous. Unlike the ECA, workers under the NLRA have very little flexibility in individually choosing their own employment representatives. Additionally, the ECA introduced flexibility for workers to work under collective agreements, individual agreements, or to designate agents to represent them. The NLRA provides only two options for workers: employees are either union or non-union. Furthermore, the NLRA allows unions to negotiate contracts that mandate that all workers within a bargaining unit must pay for the union's representation.

Impact of the Employment Contracts Act

Judging the impact of the Employment Contracts Act is a difficult task. While opponents were over the top with their apocalyptic forecasts, proponents of the Act were perhaps too sanguine in their predictions of its positive outcomes, and they have subsequently attributed many unrelated outcomes to the ECA. Several other factors contribute to the difficulty of assessing the impact of the ECA.

First, the ECA was a very brief experiment in New Zealand labor relations. The Act took effect in 1991 but was replaced by the Employment Relations Act of 2000. This short life restricts the ability of researchers to assess the Act's effect on the New Zealand economy.

Second, the wild swings of the regulatory pendulum—from compulsory unionism for nearly 100 years, to freedom of association in 1991, and then back to the pre-ECA policies in 2000—presumably hampered the stabilization of labor markets and the proper implementation of the ECA.

Third, the Employment Court has been criticized for importing many of the biases of the previous bargaining regime into its enforcement of the ECA. Finally, the ECA was adopted in the midst of several waves of economic reform, creating difficulty in determining the direct results of the ECA as opposed to those of some other economic policy.

Nevertheless, several results can be credited to the ECA.[17]

The institutional impact on labor organizations and the system of collective bargaining was drastic and perhaps the simplest to measure. One of

the uncontested outcomes of the ECA was the significant decline in union membership—the percentage of employees who were members of a union dropped from nearly 50 percent to around 20 percent.[18] By eliminating industry-wide "blanket coverage" and allowing individuals to represent their own employment interests, the ECA shifted huge numbers of employees from collective employment contracts to individual contracts. Prior to passage, 50 to 60 percent of employees were covered by collective contracts;[19] by 1996 some 70 percent of employees were covered by individual contracts.[20]

The ECA also affected work disruptions, with collective disruptions falling drastically. Annual work days lost though strikes averaged 266,000 in each of the five years before adoption of the ECA, while lost work days fell to 11,778 in 1998—the lowest figure in 64 years.[21] Individual disputes, however, saw a sharp uptick, with personal grievance claims filed with the Employment Tribunal rising from 2,332 applications in the ECA's first year of implementation to 5,144 in the year to June 1996.[22]

Several economic factors in New Zealand improved after adoption of the ECA, though there is some disagreement about which results can be directly attributed to the law. Unemployment dropped from 11 percent to 6 percent from 1991 to 1996, with a corresponding gain in employment of 17 percent.[23] Approximately 300,000 new jobs were created during the life of the ECA.[24] Wages fell marginally in the early 1990s and then began to rise after the initial market corrections occurred.[25] Productivity growth was modest in post-ECA New Zealand. One estimate showed a 1.1 percent per annum growth in productivity from 1984 to 1993, with 1.9 percent growth between 1993 and 1998.[26] Another estimate showed an increase in overall labor productivity by 2 percent per annum in 1991-96, with total factor productivity rising by 2.3 percent.[27]

The social impacts of the ECA have been criticized—some have argued that wage disparity worsened, with those in lower income brackets experiencing less growth relative to the better off.[28] Others argued that the ECA unfairly shifted power from employees, who were previously able to act collectively, to employers who retained disproportionate bargaining power. For example, after adoption of the act, bonus rates for overtime, shift, and week-

end were commonly eliminated from contracts,[29] though these were often replaced with performance-based pay and more flexible work practices.

Several studies, however, indicated that while employees had their concerns about the new system, they were generally satisfied with their working conditions. Five years after introduction of the ECA, a comprehensive survey showed high levels of satisfaction among employees: 41 percent of workers favored the ECA; 54 percent agreed that New Zealand was more competitive; 54 percent thought the ECA had a positive effect on the economy; and over 75 percent were satisfied with their working conditions, employers, and job security. Perhaps most significantly, 77 percent of workers preferred to negotiate directly with their employer, compared to 21 percent who wanted a third party agent, such as a union, involved.[30]

Subsequent analysis of workplace attitudes and results showed that the collectivist and compulsory relations of the previous regime were replaced with free associations and contracts with people; managers had additional flexibility in working with employees and were able to offer wage incentives to enhance productivity; and dismissals of inefficient employees were easier.[31] Unions no longer enjoyed an automatic monopoly over workers or industries, and had to compete with other bargaining agents for members, thereby becoming more responsive to the individual members they served.[32] One major intangible gain was summarized by Wolfgang Kasper:

> Arguably the most important gain for many New Zealanders was not material. The new contract relationship befits a modern society of self-assured, free, educated citizens. Many New Zealanders discovered that they could talk to each other directly and solve problems. The work relationship has become more satisfying for many, as opinion polls show, and management has become much more participative. All this has given new meaning and fulfillment to a very important part of many peoples' lives, namely their workplaces.[33]

Improvements to New Zealand's labor market reforms

The Employment Contracts Act has been called an "incomplete revolution" by some of its supporters. The most common criticism of the Act from the business community was the continued existence of the specialized Employment Court with its predisposition to rule in favor of grieved employees because of a perceived imbalance of bargaining power.[34] Critics charged the Employment Court with giving employees "special protection" without focusing on the mutual obligations that exist between employees and employers.[35] For example, one section of the ECA permitted a personal grievance for "unjustifiable dismissal" which prevented a full realization of the doctrine of at-will employment. The Employment Court's high rate of reversals by the Court of Appeals only fueled the calls for its abolition.[36]

The ECA also left in place three remnants of the previous employment law: legally mandated holidays, health and safety regulations, and minimum wages. These features, argued critics, dictated to employers and employees the content of labor agreements, and stifled potential innovation and personalized arrangements.[37]

The retention of the rights to strike and lockout also received criticism from proponents of the Act, who argued that its intent was to treat employment contracts like any other contractual relationship. By giving employers and employees the right to resolve disputes by breach of contract, they argued, the ECA prolonged the old attitudes and perceptions about employment contracts.[38]

Ultimately, the experiment with the Employment Contracts Act was short-lived. When the Labour Party regained power in 2000, it wasted little time in replacing the Employment Contracts Act with the Employment Relations Act.

But for a brief time, the ECA proved the economic stability of freedom of association in labor agreements. Richard Epstein offered the following commentary in 2005:

> The Employment Contracts Act was not perfect, but it was a great advance and certainly did not cause the sky to fall in. New Zealand should heed its lessons: labor markets are not special; they are not characterized by unequal bargaining power; common law

provides protections against fraud, misrepresentation and duress; and voluntary contracting is in the best interests of firms, workers and the unemployed—if not in the interests of protected unions.[39]

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SIX

A New Paradigm for Labor Relations
Creating an Ideological Framework for Building Solid Reform

Scott Dilley and Rachel Culbertson

Having examined the New Zealand experience, we must apply the lessons learned to America. In order to move further, we must determine what constitutes government neutrality in labor relations. What are the qualifications and limits? How must it fit within the spectrum of historical approaches to labor relations as legislated in the American context? Or is it really a new paradigm?

While scholars and political activists debate the role of the National Labor Relations Act in history, union organizing, and changing the economic balance of power, the Act itself defines a labor union in broad terms: "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[1] This definition succinctly states the goals and audience of a union. It does not define how large or small that union ought to be or what subjects it must consider important for bargaining. It offers a meaning that can transcend changes by governments to regulate unions.

Throughout American history, government—at both the federal and state levels—has approached labor relations using three distinct schools of thought. On the far conservative end of the spectrum is the criminal conspiracy approach, contrasted by the liberal (some might say Marxist) com-

pulsory unionism approach. In the middle is the free-market or government-neutral approach to labor relations.[2]

According to former National Labor Relations Board commissioner Robert Hunter, the criminal conspiracy approach existed in many U.S. states in the early to mid-19th century. Proponents of this thought believed labor unions were conspiracies to harm employers or stifle commerce. Union membership was illegal, and any collective action by workers to gain better benefits from employers was considered a threat.

On the other side of the spectrum is the compulsory unionism approach. According to Hunter, this approach does more than allow workers to bargain together. Through force of law, it requires some form of collective bargaining. Government plays a role in encouraging the formation of unions and forcing employers to recognize those unions. As practiced, with a majority vote of workers, unions become "exclusive bargaining representatives" within each bargaining unit, prohibiting individual workers from bargaining their own contracts with the employer. The union-negotiated contract applies to all workers, who may be forced to pay the union for its representation services regardless of whether they requested those services as individuals. This approach, says Hunter, became our current foundational model for labor relations during the Great Depression.

Hunter describes an approach that fits equidistant from these two extremes—the free-market or government-neutral approach. Under this approach government neither encourages nor discourages the existence and formation of unions. Rather, unions are permitted to exist subject to neither prejudice nor privilege. "Workers who choose to form a union are free to do so. Government does not prohibit union membership or union activity, provided existing laws against fraud, violence, and property damage are not violated. Individual workers may join or not join a union, and union leaders must earn each worker's voluntary support by providing desired benefits."[3] Hunter goes on to describe this approach as one in which "employers may choose to deal or not deal with the labor union and workers are free to strike regardless of how much it may economically harm their employer."[4] Some states allowed this model prior to the 1850s.[5]

This government-neutral model must be synthesized with those provisions of the NLRA that were set in place to protect workers. The example of labor relations in New Zealand under the Employment Contracts Act seems to dovetail well with this vision of government neutrality. It takes into account individual worker rights while also maintaining a proper framework for government.

A Comparison of Labor Climates in New Zealand and the United States

Directly transferring New Zealand's model for reform into the American context would not likely elicit lasting success due to differences between the two nations' government structures, economic climates, and socio-economic conditions. These components must be accounted for when developing a realistic and workable model for reform in the United States.

Wolfgang Kasper highlights several characteristics unique to New Zealand that were both advantages and disadvantages to its reform process.[6] First, the simple structure of New Zealand's parliamentary democracy has allowed it to make changes to the constitution based on a parliamentary majority vote. When the ECA was enacted, there was no codified constitution, therefore lack of checks and balances allowed for dramatic change to be legislated in a short amount of time. This type of "fast-track" passage would not be likely to happen in the U.S. Congress. Our system of checks and balances has made dramatic reform a lengthy and divisive process. Conversely, when bills are made into law, their longevity is almost inevitable, because once enacted, laws are very difficult to repeal. For example, the jurisdiction of the NLRA has been intact for almost 75 years, and amending this law has always proved very difficult.

There were also important economic changes made in New Zealand preceding the ECA that allowed it to have the impact that it did. Kasper suggests that a new economic constitution was created in which three central pillars upheld the sweeping changes in the country: the Reserve Bank Act of 1989, the Employment Contracts Act of 1991, and the Fiscal Responsibility Act of 1994.[7] Some of the results these reforms produced include a return to financial stability within the country, a withdrawal of state intervention in

the markets, and a re-opening of the economy to international competition.[8] Without this economic stability, the ECA would have had little effect on assisting in reviving the job market, reducing unemployment, and increasing competition within the labor markets.

Another large effect upon the ECA that Kasper points out is the fact that public opinion and debate were not a part of the reform decisions in New Zealand. This had both positive and negative implications for reform. In a very practical sense dramatic reforms were able to take effect quickly: a small group of politicians carried out both waves of reforms, and in this case with little or no rejoinder from their constituents. People were not educated by way of economic freedom, and legislative ideas didn't undergo extensive public debate. In essence, there wasn't time for public opinion to catch up to the sweeping radical changes of the ECA. This, of course, posed serious problems when the values of economic freedom and property rights weren't explained to citizens; and when these principles were placed on the chopping block in 2000 with the Employment Relations Act, again there was little public debate over the matter.[9]

Contrary to this lack of public education and involvement, sweeping change in labor relations within the U.S. can only occur after public opinion has been won over to the case for reform.

Adaptations for the American Model

Because such dramatic reforms are unlikely to be successful in a country with a federalist system of government and the weight of public opinion, incremental, rather than sweeping, changes in labor policy are more likely to take effect. Given America's federal structure, various states may be able to try different approaches to reform.

Reintroducing the principles of economic freedom and individual liberty to American citizens is fundamental to achieving legislative change. This is not likely to happen overnight, and, as Wolfgang Kasper has illustrated, policy changes should be consistent and held in place long enough for a nation to adapt accordingly. While certainly not as tightly regulated as 1980s New Zealand, labor relations in the U.S. are moving closer towards such a

climate, as described by Hunter in his discussion of our current model under the NLRA. Currently, most states in the U.S. operate under legislation that certifies a union to collect forced dues.

The Ultimate Destination: Voluntary Representation

What we need today is a new labor model that integrates the free-market approach. What distinguishes a newer model of government neutrality from a mid-1800s version is one important lesson learned from the NLRA—collective bargaining rights ought not be left to the whim of the employer. Rights to negotiate should be respected by all parties, including the employer, employees, and labor representatives.

With a few modifications, the Employment Contracts Act of New Zealand could serve as the basis for defining government neutrality in labor relations for this new paradigm:

- Government does not prohibit or mandate the existence and membership in labor organizations.
- Labor relations are based on freedom of association, allowing employees to select the agent best suited to represent their employment interests.
- Membership in a labor organization is voluntary, and no person is forced to operate under the terms of a contract negotiated by a union.
- Employees are free to choose whether to negotiate an individual employment contract or to be bound by a collective employment contract.
- No special privileges are conferred upon unions to represent entire classes of workers or places of employment.

In short, voluntary representation would mean that each worker is responsible for his or her own destiny. Achieving this requires dismantling obstructions found in existing law and replacing them with legislation that frees workers to make their own choices about contract negotiations.

Employees would then be free to make real, substantive choices regarding union representation. Employees not in favor of union representation would be free to negotiate the provisions of their contract on their own based upon their skills and experience. Individuals would possess the freedom to nego-

tiate wages, benefits, and working conditions with prospective employers, without a mandated third-party intervention.

Under this model, labor organizations are not illegal entities. Instead, they are simply not entitled to the statutory advantages they currently enjoy, such as monopoly representation and forced payments from workers, and are required to recruit members on the quality of the services they offer, nothing more. Union membership would be a result of workers exercising their freedom of association rather than the result of coercive mandates.

This model could result in reducing unions' activities and influence in areas that fall outside of the worker's direct employment interests. Large, multi-tiered labor organizations that focus primarily on political power would only exist if workers preferred these arrangements. And of course, if a worker determined that his or her union was not acting in the employee's best interest, the employee would be free to abandon the union. The outcome would be unions more attuned to the individual needs and demands of their members, and a membership comprised of workers that truly desire the union's services.

How can this be accomplished? As will be discussed in the next chapter, a majority of workers are in the private sector, which is governed by federal labor law. But a plurality of current union members are employed by government entities, and most of the labor laws governing those employees are at the state level. Given the scope of this new paradigm and the challenges presented with amending federal law, an incremental, state-by-state approach may provide reform advocates with an achievable goal and empirical data by which to evaluate the results of this model. Model legislation that states could adopt is found in Appendix B.

Endnotes

1 29 U.S.C. § 152(5).
2 Robert Hunter, "Michigan Labor Law: What Every Citizen Should Know," The Mackinac Center for Public Policy, August 14, 1999, at http://www.mackinac.org/article.aspx?ID=2286.
3 Ibid.
4 Ibid.
5 Ibid.
6 Wolfgang Kasper, *Losing Sight of the Lodestar of Economic Freedom: a Report Card on New Zealand's Economic Reforms*, (Wellington, New Zealand: The New Zealand Business Roundtable, 2002).
7 Wolfgang Kasper, *Gambles with the Economic Constitution: The Reregulation of Labour in New Zealand*, (St. Leonards, N.S.W.: Centre for Independent Studies, 2000).
8 Kasper, "Free to Work," pp. 163,164.
9 Kasper, *Losing Sight of the Lodestar of Economic Freedom.*

SEVEN

A Blueprint for 21st Century Labor Reform
Practical Steps for Obtaining Reform

Rachel Culbertson & Michael Reitz

Moving from compulsory unionism to voluntary representation will require a series of incremental reforms. Some of the reforms referenced below have been implemented in various states, while others are useful tools for lawmakers. They all move in the direction of worker freedom, but it is important to understand that many of these proposals are only partial solutions to the problem of compulsory unionism. For example, requiring union financial transparency and open collective bargaining sessions are crucial in maintaining union accountability, especially when an employee is required to be a part of a union as a condition of employment. All employees deserve to know how their unions spend their dues, and all taxpayers deserve to know how their tax money is being spent to employ state workers. Yet these two labor reforms, while positive, do not enable individual workers to choose whether they want to be represented by a union or not.

A Roadmap for Reform

The ultimate goal of this study is to find ways in which we can move away from compulsory unionism and empower individuals to make their own choices regarding representation. Such freedom can be obtained through legislation that frees the labor market by allowing voluntary representation. These reforms are steps towards that ultimate goal.

Right-to-Work – Based on the principle that no worker should be forced to pay tribute to a union as the cost of employment, right-to-work laws allow

employees to work without having to join a union. Workers are still covered by unions who possess exclusive bargaining rights over employees in a specific workplace. Twenty-two states have adopted right-to-work laws.[1]

Prohibiting Payroll Deductions by Government – Government employee unions often enjoy the privilege of deducting membership dues through automatic payroll deductions. Government resources, including public employee time, public property or equipment, and supplies should be used *only* for activities that are essential to carrying out the necessary functions of government. Necessary governmental functions do not include using government resources to deduct dues or payments for labor organizations, especially in a forced-unionism context where workers have no choice but to pay for representation.

Notification of Beck *Rights* – The U.S. Supreme Court ruled in *Communication Workers of America v. Beck* that while employees can be required to pay for the union's costs for collective bargaining, contract administration, and grievance adjustment, employees cannot be forced to subsidize a union's ideological expenditures, including political activities and lobbying expenses. Unfortunately, many workers are not aware of these rights and need to be informed through some mandate, similar to the posting of minimum wage laws. Additionally, the burden for notification should fall upon the union to demonstrate that funds are used for representation.

Paycheck Protection – Premised on the Jeffersonian ideal that no one should be forced to pay for another's politics, paycheck protection laws require unions to annually secure employees' permission to spend dues for political purposes, and allow workers to reject the political use of their union payments. Six states have adopted paycheck protection laws.[2]

Another method to accomplish the same outcome would be to prohibit unions from collecting more than the actual cost of their bargaining services. Instead of requiring non-members to pay a fee equivalent to full membership dues, as many states currently allow, legislatures could limit agency fees to the portion of union expenditures for activities relevant *only* to collective bargaining. This would safeguard public employees' First Amendment rights

by preventing unions from forcing them to contribute money to purposes unrelated to the union's collective bargaining responsibilities.

Open Bargaining Disclosure – In many states, the collective bargaining sessions between public-employee unions and government entities are not open to the public but are conducted behind closed doors. Legislators, the public, and union members deserve to know how the state arrived at the final collective bargaining agreements. States should consider legislation that requires all collective bargaining sessions between the employer and union to be subject to the provisions of each state's public meetings law, as well requiring records created or presented by the employer during collective bargaining sessions to be available to the public.

Union Financial Transparency – Federal labor law requires private-sector unions to disclose financial information to their members by submitting annual reports to the U.S. Department of Labor. The Department posts these public reports on a searchable website (unionreports.gov). The federal regulations do not apply to unions representing government employees at the state or local levels. State-level transparency requirements similar to the federal regulations would allow unionized government employees to know how their union dues are spent.

These are just a handful of the most important reforms that can be feasibly implemented on a state-by-state basis. They are by no means comprehensive; and as states continue to seek out other options that would move them closer to a model of total freedom of association in the workplace, each new option would do well to root itself in the guiding principles of government neutrality discussed in the previous chapter.

Legal and Political Obstacles to Labor Reform

Any proposal to reform organized labor's exclusive representation of workers will necessarily involve significant challenges. Some obstacles are the result of amending decades-old labor law and practices, while other obstacles involve entrenched labor interests that will oppose any change to their monopoly status.

Since the 1935 adoption of the National Labor Relations Act (Wagner Act),[3] several waves of reform have modified collective bargaining statutes in the United States. The Taft-Hartley Act[4] outlawed closed-shop arrangements, prohibited certain types of strikes, and permitted states to outlaw union security arrangements. This last feature, also known as right-to-work, gave workers a choice about whether to join and pay for union representation. To date, twenty-two states have adopted right-to-work laws, primarily in the 1940s and 1950s. In 1959 Congress passed the Landrum-Griffin Act[5] because of concerns about union corruption. And in the 1990s and early 2000s, several states introduced paycheck protection laws, designed to give workers the ability to opt-out of the portion of their union's expenditures that go toward political causes.

However, over the years unions have become increasingly effective in defeating proposals that affect their base of power. And when laws are adopted by the legislature or through a citizen's initiative process, unions have demonstrated a willingness to litigate for years to defeat even the most innocuous of labor reforms. The following discussion briefly outlines a few of the obstacles any significant labor reform would face.

Legal Considerations

Labor reform proposals necessarily involve a two-part discussion of reforms that affect workers employed in the private sector, and those that affect workers who are employed by a state or local government entity. Each field presents unique challenges.

The collective bargaining rights of most private-sector employees are governed by federal labor law, primarily the National Labor Relations Act. The NLRA makes it difficult for individual states to regulate or reform private-sector labor relations because of the pre-emption doctrine. The Supremacy Clause (Art. VI, § 2) of the United States Constitution provides: "This Constitution, and the Laws of the United Statesv ... shall be the supreme Law of the Land ... ". Accordingly, states can be prohibited from regulating fields of law where Congress has previously enacted some regulation. Even where there is no explicit conflict between a federal and state law, Congress may

imply that it intends to "occupy the field" and prevent state regulation in a particular area. As the Supreme Court wrote: "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[6]

The NLRA itself contains no express pre-emption provision, but the Supreme Court has held that the Act mandates two types of pre-emption as necessary to implement federal labor law. The first, under *San Diego Building Trades Council v. Garmon*,[7] forbids states to regulate activity that the NLRA protects or prohibits. The second type of pre-emption forbids regulation of conduct that Congress intended to control by the free play of economic forces under *Machinists v. Wisconsin Employment Relations Comm'n.*[8] The *Machinists* pre-emption is based on the premise that "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes."[9]

Thus, states are broadly precluded from regulating issues related to private-sector employees—collective bargaining rights, the process for selecting unions, labor organizations' exclusive representation rights and obligations, etc. As a result, any wholesale reform to private-sector collective bargaining reform must be accomplished at the federal level. While it may be possible to amend the NLRA to allow states to conduct their own pilot programs, a proposal that modifies the exclusive bargaining status that unions currently enjoy may be so drastic as to preclude individual state experiments due to strong union resistance.

Employees who work for state and local governments, on the other hand, are governed by the collective bargaining laws of each state. As might be expected, states vary greatly in how they recognize and regulate public-sector union representation—several states have declined to grant public employees the right to collectively bargain, while other states allow bargaining for scores of employee classifications. States that grant the right to bargain collectively to public employees often have several separate statutory chapters dealing with various categories of workers. State-by-state reform, therefore, must be tailored to the specific arrangements provided for in state law.

Regardless of the venue, proposals that weaken organized labor's monopoly status are sure to encounter legal challenges. Labor unions can endure years of litigation for the most incidental of legal victories thanks to their secure source of funding and tiered organizational structure, which allows local unions to access funds from their national affiliates.

Two illustrations of labor's willingness to battle issues in the courts come from the Northwest. The first case originated from an Evergreen Freedom Foundation (EFF) campaign finance complaint against the Washington Education Association (WEA). In August 2000, EFF filed a complaint alleging the union had used non-member agency fee payments for political expenditures without getting the requisite permission from individual teachers. Later that year the Washington State Attorney General filed suit against the union, and after a 2001 trial the WEA was found guilty of intentionally violating the law. The union appealed and the case went to the state Court of Appeals, then the Washington Supreme Court, and it finally reached the U.S. Supreme Court. In 2007 the Supreme Court upheld the law the union had violated as constitutional.[10] Eventually, in December 2008, the state and the WEA reached a settlement under the terms of which the union paid $975,000.

In another case, the Idaho Legislature passed the Voluntary Contributions Act in 2003. The law prohibited government entities from allowing the public payroll system to be used for political contributions to political action committees, and required unions to segregate political expenditures so there would be no co-mingling with general treasury funds. Union members were still free to contribute to union political causes, but unions could no longer employ automatic check-offs. A group of unions immediately challenged the Act in federal court. The unions won favorable rulings from the U.S. District Court and the Ninth Circuit Court of Appeals, arguing that their First Amendment rights of political expression were hampered by the obligation to raise political contributions without employing the state's automatic deductions' process. The State of Idaho appealed the case to the U.S. Supreme Court, which held in 2009 that the Voluntary Contributions Act does not infringe upon unions' rights and is a permissible regulation of the state's payroll system.[11]

Political Obstacles

In addition to the legal obstacles that must be overcome in order to implement meaningful labor reform, political realities must be taken into consideration. Union workers are entitled to a refund of any union expenditures that go toward political causes *if* the worker objects, but organized labor is still able to employ its secure source of funding to elect labor-friendly candidates and to defeat anti-labor legislation.

Public-sector unions continue to maintain their source of income and bargaining power through a "three-pronged strategy."[12] First, they help elect politicians by providing funding for campaign support. Second, they promote policies to maintain and expand union power and influence. Third, they lobby officials to implement the policies.

This strategy was clearly seen in the 2008 election cycle.[13] By some accounts, organized labor spent $1 billion in 2008 to elect its chosen candidates, thereby helping to place Barack Obama in the White House and expand Democratic majorities in Congress.[14]

And what did the unions get? Only days after Obama took office, administration officials began efforts to rescind new Department of Labor transparency rules under the Labor-Management Reporting and Disclosure Act, which requires unions to disclose financial information such as salaries, income, and expenditures. The AFL-CIO's "Turn Around America" transition project, which was submitted to the Obama transition team shortly after the November elections, included a list of recommendations regarding new policies they hoped to see implemented within Obama's first year in office. One of the top priorities (actually elevated to Day 1) was the AFL-CIO's recommendation to "stay all financial reporting regulations that have not yet gone into effect ... ". [15] The AFL-CIO had argued against the financial disclosure requirements by claiming that they would have imposed on unions costly requirements that had "little or no value to union members."[16] When the Department of Labor proposed the rules in 2003, the AFL-CIO stated that it could cost it more than $1 billion to comply. Yet the first year of compliance only cost the AFL-CIO $54,150.[17]

At the state level, unions can handily outspend labor reform proponents.

California Governor Arnold Schwarzenegger, for example, discovered the power of public-sector unions soon after taking office. In 2005, Schwarzenegger offered a package of reform measures that were placed on the ballot. One of the measures, Proposition 75, would have prohibited public employee unions from using worker dues for political expenditures unless affirmatively authorized by the employee each year. Political committees opposed to Prop. 75 outspent the proponents ten-to-one, with reported expenditures against the measure exceeding $54 million.[18] The measure lost.

Case Studies in Washington State and Colorado

Using the model described above, the following case studies illustrate how individual states could proceed in adopting a labor-relations system based on the principle of freedom of association.

Is New Zealand's Employment Contracts Act Right for Colorado?

Ben DeGrow

Historical Background

Colorado traditionally has not been a state dominated by labor unions or union politics. Historically, the state is most well known for the infamous 1914 Ludlow Massacre and ensuing Colorado Coalfield War, the deadliest labor conflict in United States history. The state legislature responded to the bloody affair by adopting the Industrial Relations Act of 1915, which afforded workers the right to strike and limited the coercive power of management.

Current law governing Colorado workplace relations primarily is grounded in the Labor Peace Act of 1943, which sets up a somewhat unique balance between business and labor interests. Twenty-eight states allow for the creation of coercive union shop agreements requiring a worker to join or pay fees to a labor union. Twenty-two states outlaw such agreements through "right-to-work" laws. Colorado is not a right-to-work state, but stands alone in allowing for union shop agreements only through a separate supermajority workplace election.[19]

Legislation proposed in 2007 sought to remove the Act's unique feature of a separate supermajority election, but Gov. Bill Ritter vetoed the bill (House Bill 1072).[20] The following year worker freedom advocates attempted to tip the balance in the other direction. However, the recent attempt to introduce right-to-work protections to Colorado employees—a 2008 statewide ballot initiative known as Amendment 47—was defeated 56 to 44 percent.[21]

Trends in Union Membership and Density

As of 2008, about 180,000 (or 8 percent) of Colorado's 2.2 million-person workforce belong to a labor union. More than half of the state's union members belong to the AFL-CIO coalition. An additional 27,000 non-union member employees are covered by a union contract.

Following the national trend, the unionized share of Colorado's workforce has steadily declined in recent decades. The state's total number of union member employees is the same in 2008 as it was in 1983, while the overall workforce size grew by 72 percent.[22] The decline of organized labor is nearly entirely accounted for by membership rate losses within the private sector. Over the past quarter century, the rate of union membership among the private workforce has dropped by half. Public-sector union membership has remained more or less stable.

Colorado Public Employee Unions

Colorado's government workers are more highly unionized than its private industry counterpart. About 77,000 (or 22 percent) of Colorado's 350,000 public employees belong to a union. An additional 15,000 (or 4.5 percent)

non-union members, mostly K-12 public education employees, are covered by a union collective bargaining agreement.[23]

Roughly half of the state's total public employee union membership belongs to an affiliate of the National Education Association. Other public education employees belong to the American Federation of Teachers. Representing 42 different school districts, nearly 90 percent of Colorado's 49,000 teachers are covered by an exclusive bargaining contract, as are thousands of classified employees in at least 15 different districts.[24] Licensed public school teachers cannot be coerced to "become a member of or belong to any group or organization "—in essence, are guaranteed right-to-work protections denied to other public and private employees.[25]

Of course, public-sector unionism is a different beast than its private-sector counterpart. The public interest in labor relations within governments is greater for a host of reasons, including the following[26]:

- The sovereign nature of government is distorted when government is compelled to recognize a narrow interest group as an equal bargaining partner;
- Decisions in government are driven by political considerations above economic considerations; and
- Government provides many taxpayer-funded, essential public services that could leave citizens without alternatives in the case of a strike.

Even so, the Colorado Supreme Court's 1992 decision in *Martin v. Montezuma-Cortez* extended to all government workers the right to strike under the terms of the Industrial Relations Act of 1915. In 2008, however, the state's General Assembly limited the presumed right by formally barring state government workers from striking—albeit with no effective mechanism for enforcement.[27]

The anti-strike legislation was filed in response to a controversy provoked by Governor Bill Ritter's November 2007 executive order which introduced union monopoly bargaining privileges to unions in state government workplaces. In a series of low-participation mail-ballot elections held the following year among the state's eight different employee groups, the Colorado WINS union coalition earned the right to serve as "exclusive representative" for the state's 32,000 employees.[28]

Power, Privilege, and Principle at Work

While state government has some limited jurisdiction over private-sector labor policy, it is in the public sector that the state has the greatest latitude to effect reform. As a matter of first principles, Colorado could have the opportunity to model a neutral role for the state in labor relations. While workers fundamentally deserve the freedom of association, that does not entail giving labor unions special legal or contractual privileges. Yet such privileges are commonplace in Colorado today, including the following examples:

- Negotiated contracts require non-union member employees of the city governments in Pueblo and Commerce City, and of seven Colorado school districts to pay fees for union services.[29]
- The 2007 executive order bringing collective bargaining to state government requires state workers to forfeit their right to vote out the union for two years—such decertification bars are commonly protected in negotiated union contracts.
- Unions in many Colorado school districts are guaranteed exclusive access to communicate with employees about workplace issues through bulletin boards, teacher mailboxes, and/or email systems.

The freedom to associate and to determine representation of one's own employment contract very well could improve workplace relations and increase taxpayer-friendly efficiency in Colorado governments.

Testing the New Zealand Experience in Colorado

From 1991 to 2000 the terms of the Employment Contracts Act (ECA) dictated New Zealand labor and employment law. Three core tenets of the law could serve as a framework for Colorado state and local governments:

- **Collective Bargaining Neutrality:** The state neither mandates nor outlaws collective bargaining.
- **Worker Free Agency:** Employees are afforded the right to choose their representation in negotiating employment contracts, whether individually or collectively.

- **Equitable Organization Status:** Labor unions are not accorded any special status under the law, but could "acquire legal status as voluntary societies or through other forms of incorporation."[30]

Colorado's public-sector labor law effectively provides for the first of these tenets. However, none of them are enshrined in law. To make the three tenets the hallmarks of government workplace relations in Colorado would mark a significant step forward for freedom and fairness by prohibiting government mandates to join a union, giving workers a full choice about affiliating with a union, and eliminating the monopoly status unions enjoy as bargaining representatives.

Collective Bargaining Neutrality

To accommodate this first principle of public-sector labor relations would bring little practical change but would require formal enshrinement in state law. Colorado essentially has no legislation governing collective bargaining for public education employees, nor for public safety and other municipal workers. Discretion is left to local government boards to establish or renew negotiated master contracts.

Thus, Colorado already essentially fulfills the first of the three ECA tenets. To complete the process, the General Assembly may codify in statute that the state and all of its political subdivisions neither are bound to negotiate working conditions and terms of employment on behalf of all employees, nor are forbidden from doing so. Alternatively, the language used in a Labor Peace Act provision to protect the "rights of employees" in the private sector could be borrowed, or extended to apply to government workers.[31]

Such an approach officially would distance the state of Colorado even further from the 1935 National Labor Relations Act (NLRA) governing nearly all private industry in the United States. Though within stated limits and established procedures, NLRA (also known as The Wagner Act) encourages the practice of collective bargaining as a positive good in workplace relations. Following the New Zealand example would place Colorado, like most other states, on officially neutral ground.

Worker Free Agency

The second ECA tenet would mark a distinct departure from a long-established standard of American labor law. Where unions are active and have organized under collective bargaining agreements in certain Colorado governments, they abide by the NLRA prescription that the union serves as the "exclusive representative" of all employees within the defined bargaining unit.

Perhaps the most common argument advanced by union officials and supporters against previous Colorado "right-to-work" proposals is that it would enable certain members to receive the benefits of union membership without having to pay a fee for representation. During the 2008 Amendment 47 campaign, United Food and Commercial Workers spokesman Manny Gonzales described right-to-work as a "freeloader system."[32]

However, there is a simple concept that would relieve union officials of the "freeloader" burden and preserve workplace freedom. Under New Zealand's ECA, individual workers were afforded the right to decide on their own representation—be it by themselves, an attorney, an outside agency, or the local union.

Because of the minimal body of law governing public-sector bargaining, Colorado would have an easier time than most states in adopting the practice of worker free agency. A provision would have to be written into state law that no labor organization could be obligated to represent any person based on his or her status as a government employee. The legal change in particular would nullify the Colorado Division of Labor's authority to make a "certification of exclusive representation," as established in Governor Ritter's 2007 executive order.[33]

Employees in government agencies without a negotiated union contract likely would notice no difference. In most cases unionized public employees would not observe a change, either, at least not immediately. Such a provision necessarily would have to be phased in. Existing agreements with exclusive representation language would continue to be recognized until their expiration. Within three years from the effective date of passage, no Colorado government employee could be compelled to join, support, or *be represented by* a union.

Equitable Organization Status

As Colorado state law currently grants no special status to labor unions to act as employee representatives in government workplaces, it is doubtful that legislation would be needed to ensure that no group or entity would be specially privileged above any other in its authority to represent state and local public employees. However, it may be prudent to include such a prohibition in any reform proposal in order to prevent a slide toward special treatment of unions.

Additional Reforms

Colorado officials should consider implementing one or more of the following reforms either as intermediate steps, or additional enhancements, to greater workplace freedom for government employees as previously described:

- **Union Financial Transparency:** Union-represented public-sector workers deserve the right to view their unions' detailed annual financial reports.[34] Under an ECA-like scheme, a worker's right could be extended to view the relevant financial disclosures of any agency with whom he or she contracts for representation. Of course, if union affiliation is completely voluntary, unions will have strong incentives to justify their expenditures to current and potential members.
- **Collective Bargaining Access:** Taxpayers should have the right to review not only approved collective bargaining agreements, but also the records of negotiation sessions that directly affect the distribution of tax dollars and the delivery of government services. Under an ECA-like scheme, the right could be extended to cover relevant non-union negotiation records.
- **Worker Free Agency Executive Order:** The governor could sign an executive order effectively barring exclusive representation of state employees in workplace bargaining. While this action would not carry the weight or permanence of legislation and would only affect state

workers, it would undo Governor Ritter's 2007 executive order and set a precedent for local governments to follow.

From a legal standpoint, Colorado's public sector is better equipped than most states to move to a government-neutral, free agent system of worker representation. Nevertheless, overcoming the inertia of seven decades of established national labor law and years of customary state practices for union recognition would pose a significant political challenge.

A monumental piece of legislation would not be needed to address the change so much as clear visionary leadership and political will that honors the principles of personal freedom and a government accountable to the public interest.

Implementing the Employment Contracts Act in Washington

Scott Dilley

Historical Background

The history of the labor movement in Washington state is storied, to say the least. From the Wobblies, which sought to unionize the timber industry and "took Marxism and made it accessible to relatively uneducated workers,"[35] to the use of one of the first project labor agreements during the construction of Grand Coulee Dam in 1937-1938, the roots of organized labor run deep in Washington's collective social consciousness.

It is small wonder, then, that the people, through the state government, have allowed public employees the rights to bargain. Ferry workers were also brought under the umbrella of public-sector labor after their private ferry boat companies were bought by the state in the 1950s.[36] The late 1960s through 1980s saw relatively little expansion of collective bargaining rights in Washington. One exception to the rule was the 1965 passage of the Professional Negotiations Act, which allowed for teachers and community college faculty to meet and confer with their management.[37] The next fifteen years saw stronger collective bargaining rights granted to public school teachers, community college faculty and uniformed employees such as police and firefighters.[38]

A paradigm shift occurred in 2001, when Washington voters approved Initiative 775.[39] This initiative allowed independent providers of long-term health-care services to form a union and bargain for increased wages, hours and working conditions. It marked the first attempt to capture private-sector workers with state contracts as public-sector workers for the purpose of collective bargaining. Union dues would be deducted from Medicaid or other state payments to the providers.

In 2002, the legislature passed the Personnel System Reform Act (PSRA), which allowed public employees to have more latitude in collective bargaining for wages and benefits. Unions now represent state employees across agency lines and negotiate labor agreements with the governor's Labor Relations Office (LRO). The legislature then votes—without opportunity to amend the agreements—on the funding of each master agreement.[40]

Also in 2002, two new groups were added to the list of employees with collective bargaining rights: faculty members at four-year state institutions of higher education were permitted to bargain collectively,[41] as well as teaching and research assistants at the University of Washington.[42]

In 2006 the legislature allowed family child-care providers to collectively bargain for the rates of subsidies, reimbursements, health benefits, training, and grievance procedures. The state provides child-care subsidies for low-income parents, and any provider who accepts at least one qualifying child will have union dues deducted out of the money the state sends to the provider for the parents' subsidy.[43]

In previous years, ferry worker unions negotiated their contracts with a division of the Washington State Department of Transportation (WSDOT). The legislature changed the bargaining arrangement by shifting negotiations from WSDOT to the LRO, in the process eliminating the requirement for bargaining agreement ratification meetings to be open to the public.[44]

In 2007 the legislature allowed adult family homecare providers who accept Medicaid and other state funds for long-term care to become public employees for the purposes of collective bargaining.[45] Bargaining subjects include rates of subsidies, reimbursements, health benefits, training and grievance procedures. In addition, a bill established certain long-term care training standards and allowed workers to bargain over the amount of state funding for that training.[46]

Another bill extended the maximum duration of collective bargaining agreements from three years to six years.[47] This law applies to cities, counties, municipal corporations and school districts. While the law may reduce public costs associated with negotiations, lengthening contracts can lock union members into a longer agreement and delay attempts by union members to exercise their democratic rights to decertify their union.

The overall trend for the past 50 years has been to incrementally increase collective bargaining rights for public employees. This movement has been codified in at least nine different chapters of the Revised Codes of Washington.[48]

Trends in Union Membership and Density

In 2008 more than 626,000 workers in Washington state (21.5 percent) were covered by a collective bargaining agreement. While the private sector boasts more union members and covered employees than the public sector does, the percentages of covered employees are much higher in the public sector (56 percent versus 14 percent).

At first glance, it seems that union numbers have gone down between 1983 and 2008 because of a decrease in percentages. However, the number of unionized workers has increased, but not at the same rate as the increase in overall employment. Over that time period, union membership in the

public sector has nearly doubled, while government jobs have grown by 40 percent.

In short, more public-sector employees are unionized thanks in large part to the changes in state law beginning with Initiative 775.

2008

Sector	Employment	Union Members	Employees Covered	Union % Members	Employees % Covered
Total	2,912,434	577,880	626,350	19.8	21.5
Private	2,390,864	311,655	334,746	13.0	14.0
Public	521,570	266,225	291,604	51.0	55.9

1983

Sector	Employment	Union Members	Employees-Covered	Union % Members	Employees % Covered
Total	1,549,392	419,894	499,740	27.1	32.3
Private	1,243,087	273,021	311,143	22.0	25.1
Public	306,305	146,872	188,598	47.9	61.6

Testing the New Zealand Experience in Washington

As identified above in the discussion of Colorado, the three tenets of New Zealand's Employment Contracts Act (ECA)—collective bargaining neutrality, worker free agency, and equitable organization status—could serve as a framework for public-sector labor reforms in Washington. The state's public-sector labor law currently provides for none of these tenets.

Collective Bargaining Neutrality

In Washington, widespread collective bargaining has changed the way the state government conducts business. For example:

- Collective bargaining changes the constitutional balance of power by shifting some control of the state budget from the legislature to the governor's labor negotiators.
- It expands the role of special interests in elections. Unions have enormous incentive to become large donors (direct and indirect) in races for governor, the legislature, county and municipal government, and school boards.[49]
- It expands the role of special interests in policy-making. Unions usually get a deal somewhere between what they want and what management offers, regardless of how much money is available.
- Public-sector unions have no bottom line and no need to make concessions. In the private sector, realities of the marketplace generally bring balance to labor negotiations, but in the public sector, no such balance exists.
- Collective bargaining for public employees has not improved the economy, effectiveness, or efficiency in states where it has been implemented. Unions may stand in the way of linking pay and/or bonuses to employee performance. Instead, unions may prefer traditional methods of pay and seniority rules that reinforce equity at the cost of efficiency.
- Unions traditionally have an adversarial relationship with management, though less so in the public sector where both "management" and labor want to increase the flow of tax dollars.

- Collective bargaining may weaken contracting-out provisions. In Washington state, certain contracting-out provisions are now subject to collective bargaining. Unions have consolidated their power—not just over state workers, but over state contracts and services as well. [50]

The system described above involves government in the labor equation in more than just the role of employer. Government, in fact, owns the system, sets up the game, establishes the rules, and is a player itself. Too much authority is handed over to other interested parties, and the rights of individual workers are not necessarily represented.

In order to devise a system where these characteristics respect collective bargaining rights and a worker's desire to fully choose whether to be part of a union, the components of state law that allow for exclusive bargaining and essentially force the payment of union dues or fees must be completely overhauled. Unfortunately, the current political makeup of the legislature is not conducive to such changes. In fact, merely holding the line at the status quo has been quite a challenge,[51] much less making substantive, free-market revisions to the state's collective bargaining processes.

Worker Free Agency

Washington state already creates a right of employees to associate and bargain collectively. As Ben DeGrow mentioned in his analysis of Colorado, this second tenet of the ECA would "mark a distinct departure from a long-established standard of American labor law." Washington, like Colorado, allows unions to be the exclusive bargaining representative of all employees in a bargaining unit. State laws allow union contracts to include union security clauses, which perpetuate the practice of collective bargaining because decertification procedures are complicated and limited by a very short timeframe. Union contracts almost always include security clauses.

For Washington state law to change to accommodate this philosophy of collective bargaining, portions of at least nine sections of state law would have to change.[52] A first step toward collective bargaining neutrality would include the elimination of the monopoly privilege of a single labor representative being able to speak on behalf of an entire bargaining unit. By elimi-

nating exclusive bargaining and outlawing union security clauses, Washington would allow public workers more free choice in who represents them. Unions would be accountable for their actions because they would need to be responsive to members' requests or risk obsolescence.

Because the roots of organized labor run deep in Washington, dislike and distrust of right-to-work laws is palpable. Given the current political climate in Washington, any right-to-work proposal is dead on arrival. Moreover, right-to-work laws grant a significant amount of worker freedom, but their approach is hardly perfect. Even under the best right-to-work scenario, all employees in a unionized collective bargaining unit fall under the union contract. In this regard, union criticism of "free-riders" under right-to-work laws holds some degree of merit. Right-to-work does not truly allow for the kind of free agency New Zealand workers experienced.

There may be a glimmer of hope for the ideas of free agency to grow in Washington. During the debate, in 2009, over a bill extending collective bargaining rights to child-care center directors and workers, one legislative committee approved an amendment to the proposed bill that discarded certain parity requirements for contractual benefits.[53] In other words, some legislators realized that unionized employees could negotiate a contract for their own payments without making those same rates of subsidy and reimbursement necessarily available to other employees who were not a part of that union. All versions of the bill subsequently died due to other political pressures, but at least some legislators seem to understand that a union can negotiate only for its voluntary members, not necessarily everyone who arbitrarily belongs to the bargaining unit.

The most promising approach for enacting free agency is through a ballot initiative to the people. Washington state law allows for two types of initiatives—those to the people and those to the legislature. Initiatives to the people require more signatures in an earlier time frame, but, if all conditions are met, the text of the initiative is placed on a general election ballot. Initiatives to the legislature require fewer signatures and a different timetable. Once certified, the initiative language will be forwarded to the legislature for action. If no action is taken or if the legislature passes an amended ver-

sion of the bill, both versions will appear on the next general election ballot. Because Washington state does not have a political environment conducive to free market principles at this time, there is no guarantee that the legislature would uphold or enact favorable language. And distinguishing two similar, yet competing, ballot measures on the same ballot can make for a complicated campaign.[54] Therefore, an initiative to the people would seem to make the most sense to implement the free agency portions—and perhaps other portions—of this discussion.

Equitable Organization Status

The closest thing Washington has come to this concept is the contracting-out portions of the Personnel System Reform Act of 2002.[55] That law, which also inaugurated the current collective bargaining process between state employees and the government, allowed for agencies to use competitive contracting as one option for providing services efficiently and effectively. In order to give negatively affected government employees the opportunity to stay employed, the law allowed for the formation of Employee Business Units to offer competing bids. These units may potentially serve as a model for smaller, employee-driven units that function as labor representatives in a competitive climate for bidding on state work.

What was conceived well in theory, though, was undercut by other provisions of the law. The contracting provisions were subject to time-consuming compliance requirements, and competitive bids were themselves subject to collective bargaining.[56] In short, unions retained the power to veto attempts to reduce their size through competitive bidding. However, the Personnel System Reform Act still could be amended to overcome these problems and allow government-neutral Employee Business Units to become a more prevalent component in delivery of state services.

Conclusion

The biggest challenge to adoption of a government-neutral, free agency system of worker representation in Washington is overcoming the traditional model of labor relations with something that seems new and unproven.

However, a New Zealand-style approach to collective bargaining in Washington state could strike a balance between respect for unions and individual rights. Consequently, the more populist approach of an initiative would be the best way of achieving this public policy change, as long as the campaign is equally as well-financed as organized labor's opposition would be—a tall order but worth pursing given the necessary resources.

If adopted, this change would introduce an element of union accountability not present in the current system in Washington, could reduce the political effects of monopoly unions, could improve relations in the workplace, and could give the state multiple options for increasing efficiency and for negotiating the funding of particular contracts.

Endnotes

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4 Labor Management Relations Act, 29 U.S.C. §§ 141-197.
5 Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq*.
6 *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).
7 359 U.S. 236 (1959).
8 427 U.S. 132 (1976).
9 Ibid., p. 140, n. 4.
10 *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 127 S.Ct. 2372 (2007).
11 *Ysursa v. Pocatello Educ. Ass'n*, 129 S.Ct. 1093 (2009).
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22 Union membership and coverage database, at http://UnionStats.com.
23 Ibid.
24 For more information, see Benjamin DeGrow, "Setting the Standard for Pro-Worker Transparency: Ensuring Financial Disclosure from Colorado's Public Employee Unions," Independence Institute Issue Backgrounder 2009-B (March 2009), http://www.i2i.org/files/pdf/IB2009B_Web.pdf.
25 Colo. Rev. Stat. § 22-61-102.
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29 DeGrow, "Setting the Standard for Pro-Worker Transparency." Many of the school districts have an annual opt-out provision whereby non-union members must file a written request before a deadline to avoid paying full union dues for an entire year.
30 Roger Kerr, New Zealand Business Roundtable, "Lessons from Labour Market Reform in New Zealand," a speech given at The H R Nicholls Society's XXVI Conference, March 2005, p. 5.
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32 Al Lewis, "Right to shirk the union?", *Denver Post*, May 23, 2008.
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EIGHT

Conclusion: Opportunity or Captivity, The Choice is Ours

Rachel Culbertson

Try as one might to escape this most basic reality, all choices have consequences. Our world operates under the forces of cause and effect. That indefinite and continuous duration called time will continue to produce the variables of progress, regression, and continual change. Consequences will lurk behind every action taken. And they are never neutral.

Consequences are an inherent thread woven into the discussion of labor relations. Our nation's current state of affairs leaves Americans with two options. We can continue to rely on the current labor model created over seventy years ago—one that has failed when the variables of competition, technology, globalization, and specialized skill sets have been thrown its way—or we can reform it.

Either option will produce great change, but continuing with the status quo will never result in anything more than inadequate quick fixes while sacrificing the values of freedom and opportunity. Those consequences have been highlighted clearly in this study: overwhelming percentages of public-sector union density, continued forced union membership that fails to represent workers' best interests, and public policy shaped primarily around the special interests of powerful union monopolies.

Allowing this Depression-era labor model to reach its logical conclusion would likely result in a society devoid of private-sector jobs; instead, employers would be constrained by law to hire only state workers. Meanwhile, union monopolies would demand concessions from a government that can't

say "no" because it is not beholden to market forces and can continually reach into the bottomless pit of taxpayer money.

The advocates of this option are quickly making progress. By targeting the group most likely to affect change in our society, the young workforce, organized labor's campaign for growing public-sector unionism is gaining widespread success.

AFL-CIO's latest Labor Day study, entitled "Young Workers: A Lost Decade," is an excellent example of the union's political influence on the next generation. The study is based on a national survey of 1,156 people by Peter D. Hart Research Associates for the AFL-CIO and their affiliate "Working America." It examines the economic situations that many young people face, inquiring about their worries and hopes for the future.

The study gives results that undoubtedly solidify the union's insatiable quest for growing its *own* business—higher union membership—by changing legislation and creating more government jobs. It states that close to 60 percent of young workers identify either Wall Street and banks or corporate CEOs as bearing the most responsibility for the current economic crisis; and that 44 percent choose job creation as one of the top two economic priorities for the president and Congress.[1] It also found that by a 22 percent margin, "young workers favor expanding public investment over reducing the budget deficit, a significantly greater divide than among older workers. Women and workers of color are particularly supportive of increased public investment…young people are more likely to view the government as effective and efficient."[2]

The study concludes that:

> [Y]oung people … understand that investment in everyday people—and young people in particular—will help repair and strengthen the economy so all workers, not just CEOs, benefit from the country's prosperity ... it is essential that lawmakers hear young people's call for job creation and increased public investment ... for the sake of the country's young people and ultimately, for the sake

> of a stronger economy, President Obama and Congress must make good on their promises of change for working people.[3]

With an administration ready and willing to bring change for working people through advancing the causes of forced union membership, lack of union transparency, and increased government involvement in employee relations, the American Dream will slowly be replaced by the mediocrity that is born when "job security" is valued over freedom of choice and association. If that scenario seems chilling, it should—and that should make the second option of reform an easier sell.

While moving into this uncharted territory is undoubtedly daunting at times and doesn't come without risks, we have much to hope for by way of reform. Thankfully, we are creating a model based on a method previously tested and proven successful. Our federalist system of government will allow for balanced, incremental changes, and state experimentation. And thankfully our legislative structure provides a system of checks and balances that will allow our nation to enjoy lasting change for the better.

Now we have only to take action, with the comforting reminder that history has paved the difficult path before us. It has proved time and again that in all cases where individual freedom prevails and government powers are limited, the human spirit is able to flourish.

Endnotes

1 "Young Workers: A Lost Decade," a study published by the AFL-CIO and Working America, 2009, p. 29, at http://www.aflcio.org/aboutus/laborday/upload/laborday2009_report.pdf.

2 Ibid., p. 31.

3 Ibid., pp. 33, 41.

APPENDIX A

The figures in Tables 1 – TK in Chapter 3 come from Heritage Foundation analysis of data from the March 2006, 2007, 2008, and 2009 Current Population Survey obtained from the Integrated Public Use Microdata Series – CPS project at cps.ipums.org. March CPS data was analyzed in order to examine pension and employer health benefits status for union and nonunion workers, which is unavailable in the regular monthly CPS outgoing rotation group data. The analysis was conducted on fulltime workers between the ages of 20 and 65. Workers with imputed earnings were excluded from the sample.

The data in Tables 1 and 2 come from regressions of the log of hourly pay on union coverage status and selected control variables. Hourly pay was constructed by dividing cash earnings in the previous week by the hours worked that week for all individuals with at least $100 in earnings and who had worked at least 5 hours in the previous week. Union coverage includes all workers who are members of labor unions, or who are not members of unions but are covered under a collective bargaining contract at their place of employment.

Control variables consisted of individual state dummy variables for the 50 states and the District of Columbia, and dummy variables for each year. Age and its square, as well as potential experience and its square were additional control variables, where potential experience was constructed by computing age – education – 6. Demographic variables consisted of dummy variables for gender, for being a Caucasian, for being Hispanic, and for those born in a foreign nation. Marital status consisted of individual dummy variables for

individuals who were married, divorced, widowed, separated, or never married, as well as an interaction term for married men.

Educational controls consisted of dummy variables for high school dropouts, high school graduates, individuals with an academic associates degree, those with an occupational associates degree, those with some college education but without a degree, individuals with a bachelors degree, individuals with a professional degree, with a masters degree, and those with a Ph.D.

Occupation controls were based on the 1990 Census Bureau occupational classifications and consisted of dummy variables for workers in the following fields: Executive, Administrative, and Managerial occupations; Management occupations; Professional Specialty occupations; Post-Secondary Teachers, All Other Teachers, Technicians; Sales; Administrative Support; Service; Agricultural; Precision Production Craft and Repair; and Operators, Fabricators, and Laborers.

Because the regressions was specified as a semi-log model the coefficient on the union coverage dummy variable β is related to the percentage difference in pay for union workers Δ by the formula $\Delta = (e^{\wedge} \beta) - 1$. In order to simplify the interpretation of results for readers unfamiliar with regression analysis, Tables 1 and 2 report the percentage difference Δ and not the coefficient on the dummy variable β. For further explanation on the interpretation of the coefficient on a dummy variable in a semi-logarithmic regression, see Robert Halvorsen and Raymond Palmquist, "The Interpretation of Dummy Variables in Semilogarithmic Equations," *American Economic Review*, American Economic Association, vol. 70(3), pages 474-75, June 1980.

Table 4 reports the marginal effects of dummy variables for state and local government employment on ordered probit regressions on pension coverage and employer provided health benefits. The control variables in the model were those used in specification (4) from Table 2, but excluded union coverage. The regressions were restricted to state and local government employees and private sector wage and salary workers. Federal employees and self-employed workers were excluded from the analysis. The marginal effects were evaluated for the outcomes of the employer providing a pension plan and for the employer providing health coverage and paying all the premiums.

Tables 5 and 6 report the marginal effects of a dummy variable on union coverage from separate ordered probit regressions on the provision of pension and health benefits for state and local government employees. The control variables in the model were those used in specification (4) from Table 2. The marginal effects were also evaluated for the outcomes of the employer providing a pension plan and for the employer providing health coverage and paying all the premiums.

The full results from all regressions used to construct these tables are available from the author upon request.

APPENDIX B

Scott Dilley

Public Employee Choice in Representation Act

[Note: This model language is for use in states that already allow public-sector collective bargaining. Passing it in a state that does not allow for some or all collective bargaining will actually expand these rights.]

Summary

Public employees are subject to state and local laws governing collective bargaining. Many of these laws are "monopoly bargaining laws," which means that even if an employee chooses not to join a union, he or she must accept the terms of the contract negotiated for unionized workers in the workplace. This act establishes a system in which each worker has the right to decide for himself or herself which union, if any, will represent them.

Model Legislation

Section 1. {Short Title.} This Act shall be known as the Public Employee Choice in Representation Act.

Section 2. {Legislative Declarations.} The legislature finds and declares that:

A. The public employer and each public employee should be free to contract on their own terms;

B. Existing laws establishing mandatory, exclusive bargaining in which one labor representative negotiates a contract for everyone in a collective bargaining unit violate this freedom;

C. Employees should determine who should represent their interests regarding employment issues;

D. Each employee should be able to choose either to negotiate an individual employment contract with his or her employer, or to be bound by a collective employment contract to which his or her employer is a party; and,

E. Each employer should be able to choose to negotiate an individual employment contract with any employee, to negotiate or to elect to be bound by a collective employment contract that binds two or more employees, and to establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves.

Section 3. {Definitions.}

A. For the purposes of this Act, "public employer" means any state or local government, government agency, government instrumentality, special district, joint powers authority, school board or special purpose organization that employs one or more persons in any capacity.

B. "Employee organization" means any association or organization of employees, and any agency, employee representation committee, or plan in which employees participate that exists, in whole or in part, to advocate on behalf of employees about grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, or other forms of compensation.

C. "Public employee" means a person holding a position by appointment or employment in the government of this state or any of its political sub-

divisions. "Public employee" does not include employees whose jobs entail managerial, supervisory, or confidential responsibilities.

Section 4. {Public employee freedom guaranteed.}

A. Public employees shall have the freedom to choose whether to associate with other employees for the purpose of advancing collective employment interests.

B. No provision of any agreement between an employee organization and a public employer, or any other public policy, shall impose representation by an employee organization on public employees who are not members of that organization. Nor shall any provision in any contract or any other arrangement between persons shall require any person to become or remain a member of any employees organization, to cease to be a member of any employees organization, or not to become a member of any employees organization.

C. Nothing in any contract or in any other arrangement between persons shall confer on any person, by reason of that person's membership or nonmembership of an employees organization any preference in obtaining or retaining employment or any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

D. No person shall exert undue influence, directly or indirectly, on any other person with intent to induce that other person:

(1.) To become or remain a member of an employee organization or a particular employee organization; or

(2.) To cease to be a member of an employee organization or a particular employee organization; or

(3.) Not to become a member of an employee organization or a particular employee organization; or

(4.) In the case of an individual who is authorized to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or
(5.) On account of the fact that the other person is, or is not a member of an employee organization or of a particular employees organization, to resign from or leave any employment.

E. No person shall be required, as a condition of employment or continuation of employment:
(1.) To resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
(2.) To become or remain a member of a labor organization;
(3.) To pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
(4.) To pay to any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization; or,
(5.) To be recommended, approved, referred, or cleared by or through a labor organization.

Section 5. {Collective bargaining procedures.}

A. Choice of representation: Each person, in negotiating for an employment contract, may determine whether:
(1.) That person wishes to be represented by another person, group, or organization; and
(2.) The person, group, or organization by which the person will be represented.

B. Ratification of settlement: Where a person, group, or organization is authorized to represent any employer or employee in negotiations for an employment contract, that person, group, or organization and the employer or employee being represented shall, before entering into the negotiations,

agree, within the three months preceding the commencement of negotiations, on a procedure in relation to the ratification of any settlement negotiated later by that person, group, or organization and any such agreed procedure shall for the purpose of concluding the negotiations, be binding on the employer or employee being represented, from the time a proposed settlement is first reached on their behalf by that person, group, or organization.

C. Representative may become party to employment contract: Any person, group, or organization authorized to represent any employee or employer in negotiations for an employment contract may become a party to that contract with the agreement of the other parties.

D. Individual employment contracts:

(1.) Where there is no applicable collective employment contract, each employee and the employer may enter into such individual employment contract as they think fit.

(2.) Where there is an applicable collective employment contract, each employee and the employer may negotiate terms and conditions on an individual basis that are not inconsistent with any terms and conditions of the applicable collective employment contract.

(3.) Where an employee negotiates terms and conditions of employment under this Act, that employee is still bound by the applicable collective employment contract.

(4.) Where an applicable collective employment contract expires, each employee who continues in the employ of the employer shall, unless the employee and the employer agree to a new contract, be bound by an individual employment contract based on the expired collective employment contract.

(5.) Every individual employment contract shall, if the employee so requests at the time when it is entered into, be in writing and the party that prepares the employment contract shall supply a copy of that employment contract to the other party as soon as practicable.

(6.) Every employee who is bound by an individual employment contract, including an employee who has negotiated terms and conditions on an individual basis under this Act may request his or her employer to record in writing all or any of the contents of that contract, and, on any such request, the employer shall, as soon as practicable, provide a written record of those contents to the employee.

E. Collective employment contracts:

(1.) An employer may enter into a collective employment contract with any or all of the employees employed by the employer.

(2.) Any employer may, in negotiating for a collective employment contract, negotiate with:

(a.) The employees themselves; or

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

(3.) Every collective employment contract shall be in writing.

(4.) Every employer who is bound by a collective employment contract shall, on being requested to do so by an employee who is bound by that contract, give to that employee, as soon as practicable, a copy of that contract.

F. New employees: If a collective employment contract contains a term allowing the extension of its coverage to other employees employed by any employer bound by it, any such other employee may, in addition to the employees who are parties to it, become a party to, and be covered by, that collective employment contract if that employer and any such other employee so agree.

G. Expiration of collective employment contract: Every collective employment contract shall state the date on which it expires and shall remain in force only until the close of its expiration date.

H. Variation of collective employment contract: The parties to any collective employment contract may, at any time while it remains in force, agree in writing to the variation of any or all of its provisions.

I. Requirement to post collective employment contracts online: The public employer shall post a copy of each collective employment contract on a state-sponsored website within 30 days of ratification of the contract.

Section 6. {Prohibition of automatic payroll deductions.} No dues, fees, assessments or any other automatic payroll deductions by public employers from public employee payroll compensation shall be allowed for transmission to any public employee organization, any intermediary, or private individual, other than for primary and supplemental pension plans, life, health and other employee benefits, or contributions made to 501c(3) charitable organizations through a workplace givings program.

Section 7. {Agreements in violation, and actions to induce such agreements, declared illegal.} Any agreement, understanding, or practice, written or oral, implied or expressed, between any employee organization and public employer that violates the rights of employees as guaranteed by provisions of this chapter is hereby declared to be unlawful, null and void, and of no legal effect. Any strike, picketing, boycott, or other action by an employee organization for the purpose of inducing or attempting to induce an employer to enter into any agreement prohibited by this chapter is hereby declared to be for an illegal purpose and is a violation of the provisions of this chapter.

Section 8. {Coercion and intimidation prohibited.} It shall be unlawful for any person, employee organization, or officer, agent, or member thereof, by any threatened or actual intimidation of an employee or prospective employee, or an employee or prospective employee's parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to an employee' or prospective

employee's property, to compel or attempt to compel such employee to join, affiliate with, or financially support an employee organization.

Section 9. {Penalties.} Any person who directly or indirectly violates any provision of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine not exceeding (insert amount) or imprisonment for a period of not more than (insert time period), or both such fine or imprisonment.

Section 10. {Civil remedies.} Any employee harmed as a result of any violation or threatened violation of the provisions of this chapter shall be entitled to injunctive relief against any and all violators or persons threatening violations and may in addition thereto recover any and all damages, including costs and reasonable attorney fees, of any character resulting from such violation or threatened violation. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this chapter.

Section 11. {Duty to investigate.} It shall be the duty of the prosecuting attorneys of each county (or the attorney general of this state) to investigate complaints of violation or threatened violations of this chapter and to prosecute all persons violating any of its provisions, and to take all means at their command to ensure its effective enforcement.

Section 12. {Prospective application.} The provisions of this chapter shall apply to all contracts entered into after the effective date of this chapter and shall apply to any renewal or extension of any existing contract.

Section 13. {Severability clause.}

Section 14. {Repealer clause.}

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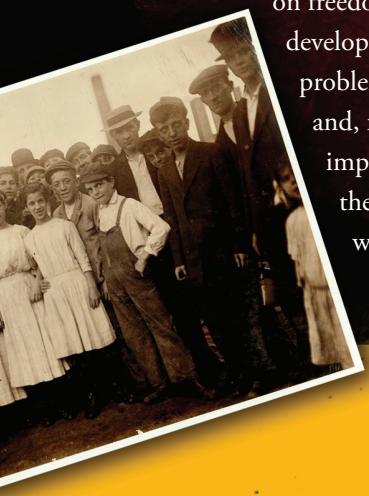
For decades, union membership in America has been declining. In the 1950s over 35 percent of the workforce was unionized; today that number is down to 12 percent. While unions are losing market share, they have retained significant power—political, legislative and industrial. Unions possess considerable advantages that shield them from market forces, giving them little incentive to work in the best interests of their members.

As a result, millions of American workers are trapped in a decades-old system where government at all levels is heavily involved in workplace matters beyond compensation. This pattern of over-regulation hobbles a thriving, free marketplace—and thus government revenue and the overall economy.

The authors of this paper propose a model of labor relations premised on freedom of association. This paper reviews the history and development of the American labor movement; discusses the problems associated with the coercive, collective model; and, finally, looks to New Zealand—a country that implemented fundamental market-oriented reforms in the early 1990s—for an example of a successful new way to conduct labor relations in the United States.



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