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GETTING TO IMPASSE: NEGOTIATIONS UNDER THE NATIONAL LABOR RELATIONS ACT AND THE EMPLOYMENT CONTRACTS ACT

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ABSTRACT¹

This paper employs a comparative method to illustrate how the subject of impasses in collective bargaining negotiations offers sub-

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1. This article is an expanded version of a paper originally presented at the 10th World Congress, International Industrial Relations Association, Washington, D.C., May 31 - June 4, 1995. It is part of a series of articles examining novel legal issues created by New Zealand's Employment Contracts Act. See Ellen Dannin, *Solidarity Forever? Unions and Bargaining Representation Under New Zealand's Employment Contracts Act*, 18 LOY. L.A. INT'L & COMP. L.J. 1 (1995) (discussing the impact of the Employment Contracts Act on unions in New Zealand) [hereinafter Dannin, *Solidarity*]; Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455 (1996) (discussing the Employment Court's interpretation of coercion under the ECA) [hereinafter Dannin, *Bargaining*]; Ellen Dannin, *Brother, Can You Spare a No-Wage Job: Labour Law Reform in New Zealand Brother*, in LABOUR GAINS, LABOUR PAINS—SOCIALIST STUDIES/ETUDES SOCIALISTES, VOLUME 10 (Cy Gonick, et al., eds. 1995) (presenting an overview of the ECA). For information about the passage of the ECA and guidance to related sources individuals: see Ellen Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 15 BERKELEY J. EMP. & LAB. L. 1 (1995) (giving the history of the ECA's passage) [hereinafter Dannin, *Overcome*].

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stantial insights into the nature of statutory and common law. Specifically, it illuminates how judicial laws. The systems examined are those of the United States (the National Labor Relations Act) and New Zealand (the Employment Contracts Act). The National Labor Relations Act provides a widely followed framework for supporting collective bargaining. The Employment Contracts Act, in contrast, embodies principles of freedom of contract and market as understood by its drafters. This article examines how judges apply these two statutes to the problem of managing impasses. It then explores how the interaction of law and society provides insights which help to address current issues in collective bargaining law reform.

INTRODUCTION

Collective bargaining is traditionally regarded as a pluralistic, remedial response to inequality in the employment relationship.² Most industrialized nations establish regulatory procedures to provide a voice to those likely to suffer exploitation in the employment relationship; the most common of these is collective bargaining. Now, as we approach the end of the twentieth century, collective bargaining has existed as a widely embedded feature of the employment landscape for generations. New Zealand, for example, legalized collective bargaining over a century ago in 1894 through the Industrial Conciliation and Arbitration Act (the IC&A Act).³ The United States, a newcomer by comparison, slowly extended legalized collective bargaining for nearly three-fourths of a century through the enactment of miscellaneous statutes, including the Railway Labor Act of 1926,⁴ and the National Labor Relations Act (Wagner Act) of 1935,⁵ which still remain in force.

Longevity, however, is no longer a guarantee of success. Indeed, today, it is just as likely to be taken as evidence of a system that is outmoded and ill-suited to contemporary conditions. In this decade, traditional collective bargaining is often spoken of as a discredited structure. Many suggest collective bargaining should be, and is being, discarded in favor of systems designed, insofar as is possible, as vehicles to permit unfettered market forces to act as the medium for allocating

2. See *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 47 (Sheldon Friedman, et al. eds., 1994).

3. A.J. GEARE, *THE SYSTEM OF INDUSTRIAL RELATIONS IN NEW ZEALAND* 30-31 (2nd rev. ed., 1988).

4. 45 U.S.C. §§ 151-63 (1986).

5. 29 U.S.C. §§ 151-68 (1994).

goods and services.⁶ Supply-side economics, notions of market clearing, and individual choice in the labor market now dominate the discourse in various guises.⁷ Supporters advance these concepts as providing virtually scientific and infallible foundations for deregulating fundamental features of modern society.⁸ In the context of this debate, policy makers closely scrutinize the traditional ends of labor legislation and, in some cases, discard them.

The struggle over collective bargaining plays out in the law itself.⁹ Today, collective bargaining and neo-classical economics¹⁰ are not abstract theories, nor are they conflicts between their proponents locked in abstract debate. The Wagner Act¹¹ and the New Zealand Employment Contracts Act, 1991 (ECA) models¹² embody these conflicting philosophies.¹³ The Wagner or National Labor Relations Act (NLRA),¹⁴ values government regulation intended to support independent collective representation as a legitimate force whose purpose is to contest management control and prerogative. The Wagner Act demonstrates a belief that management control, if left unfettered, harms society.¹⁵ The ECA mod-

6. See Ellen J. Dannin, *Collective Bargaining, Impasse and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment*, 19 TOLEDO L. REV. 41-68 (1987) [hereinafter Dannin, *Collective*]; Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. OF EMP. & LAB. L. 307 (1994).

7. See EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR 425 (Christoph F. Buechtemann, ed. 1993) [hereinafter EMPLOYMENT SECURITY].

8. *Id.*

9. Cf. Robert Kagan, *How Much Does Law Matter? Labor Law, Competition, and Waterfront Labor Relations in Rotterdam and U.S. Ports*, 24 L. & SOC'Y REV. 35, 35-36 (1990).

10. Throughout this article, the phrase "neo-classical economics" is used to refer to current popular views concerning appropriate ways of ordering society, which advocate reliance on market forces. It is also referred to as New Right or neo-liberal economic theory.

11. 29 U.S.C. §§ 151-68 (1994).

12. Employment Contracts Act, 1991, Long Title, (N.Z.) [hereinafter ECA].

13. The State of Victoria, Australia adopted ECA-like legislation in 1992, and various provinces of Canada, European countries and Japan currently are considering similar changes. Although we see this debate as new, discussion surrounding the NLRA involved many of these same arguments. Daniel Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 L. & HIST. REV. 59, 63-65 (1993).

14. 29 U.S.C. §§ 151-68.

15. *Id.*

el,¹⁶ in contrast, perceives the employment relationship through the conceptual lens of neo-classical economics. In this system, representational issues are matters of individualized preference and the market tests the value of any regulation.¹⁷

In most ways, the two models are antithetical to one another. The goal of the NLRA model is the creation of institutions consciously designed to impede the forces of market clearing.¹⁸ The NLRA imposes an obligation on employers to engage in collective negotiations to establish work place terms and conditions as soon as a majority of the employees selects a labor organization as their representative.¹⁹ Therefore, a bargaining obligation comes into existence before any formal contract of employment exists and regardless of whether any agreement ever emerges.²⁰ Although a grossly simplified statement, in essence, the bargaining obligation continues as a matter of a union's attaining the status of bargaining representative, almost without connection to the contractual relationship.²¹ This bargaining obligation applies whenever a party wishes to alter existing work place conditions.²²

In contrast, the ECA states that the New Zealand legislature enacted it "to promote an efficient labour market."²³ Its structure rejects the idea

16. ECA.

17. *Id.* §§ 5-8.

18. The statement of findings declares that Congress enacted this legislation to promote the peaceful adjustment of disputes by "restoring equality of bargaining power" between employees "who do not possess full freedom of association or actual liberty of contract" and "employers who are organized in the corporate or other forms of ownership" and to encourage the practice and procedure of collective bargaining. 29 U.S.C. § 151. Encouraging this practice was based, in part, on setting up a system which, once in place, could meaningfully give the parties autonomy to seek their own ends. The individual, not the state agent, was to be responsible for doing so. David Brody, *Section 8(a)(2) and the Origins of the Wagner Act*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 29, 47 (Sheldon Friedman, et al. eds., 1994); see Thomas Kohler, *The Overlooked Middle in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 224, 236 (Matthew Finkin, ed. 1994).

19. See 29 U.S.C. § 158(a)(5) and (d); ROBERT GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 374-531 (1976).

20. *Id.*

21. *Id.*

22. See *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

23. See ECA, Long Title. Minister of Labour Bill Birch expressed this view when, in debates on the ECA, he stated:

That is what labour market reform is all about—increased productivity and better ways of doing things, leading to better output, more exports, better profits, a higher standard of living, and better wages. That is the bottom line. It is

that individual workers do not possess the power to bargain meaningfully with their employers. Rather than impeding market forces, the ECA exposes workplace relationships to their full impact.²⁴ To the extent that they actually operate in the labor market, the ECA model places no obligation on the parties to contend against the laws of supply and demand.²⁵ Furthermore, it expresses no preference for either the collective or the individual, either in contracts of employment or in negotiations.²⁶ The ECA model does, however, presume that all work place contractual relationships, collective or not, exist between the employee and the employer only.²⁷ In effect, the ECA frees employers to pursue contracts unfettered by institutional regulations so they can make discrete calibrations in line with labor market conditions.

If the express policies of the two acts fully informed their application, collective bargaining in the two countries ought to function very differently. Remarkably, however, when the court systems in the United States and New Zealand have interpreted how their legislative regimes intend to resolve bargaining impasses,²⁸ they have appeared to converge. At times, the practical application of the courts' doctrines are virtually identical. Yet any convergence suggests that the courts in these two countries have deviated from their drafters' original intentions. These divergences offer opportunities for understanding how statutory and judge-made law interact with each other and with society.²⁹ In their times, both the NLRA and the ECA were radically remedial statutes, enacted to redress perceived systemic defects in the operation of their respective labor markets.³⁰ This article ultimately focuses on the

time for us to seek improvements in our work arrangements so that we are more efficient, more productive, and more export oriented.

PARL. DEB. (HANSARD), 43D PARL., 2D SESS., 1429 (Apr. 23, 1991).

24. ECA.

25. *Id.*

26. *Id.* §§ 18-20.

27. *Id.* § 17.

28. In this paper, "impasse" is used to mean the point in negotiations at which the parties are stalemated and are unable to achieve rapprochement in the bargaining context without resort to economic weapons or procedures designed to foster agreement. Cf. THE RANDOM HOUSE COLLEGE DICTIONARY 665 (1988) (defining impasse as "deadlock").

29. See RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION (1986).

30. See Anne Knowles, *Four Months Down the Track: Is Employment Contracts Act Working?*, EXAMINER, Sept. 5, 1991, at 19; Ellen J. Dannin, *Labor Law Reform in New Zealand*, 13 N.Y. L. SCH. J. INT'L & COMP. L. 26 (1992) [hereinafter Dan-

way judicial interpretation, public mores and tacit pressure have transformed such remedial legislative schemes.

Impasse is a particularly appropriate subject for studying the intersection of these forces. In public discourse today, getting one's economic figures right is more important than trying to achieve goals such as social justice, order, or democracy. The economic thought represented in most current public discourse, however, is but a narrow spectrum: the neo-classical school as understood and explained by its popularizers. This perception has important implications for labor law. It assumes that, for the ECA and, increasingly, the NLRA model, any regulation is assumed to delay market sensitivity and causes alarm.³¹ In addition, it is more likely that proponents of this viewpoint will interpret stalemate or impasse in contract negotiations as an unjustifiable restraint on trade as opposed to a stage in a relationship or, more negatively, a breakdown in a relationship. Thus, how legislation and the judiciary deal with an impasse in collective negotiations is the contemporary crucible of labor law. It demonstrates dramatically whether the legislative system both recognizes and supports, as legitimate, rights to independent representation and to co-determination of employment conditions.

All industrial relations systems provide some means to break deadlock, expressly or implicitly, formally or informally, balanced or unbalanced, even if the means for resolving deadlock is not ordinarily identified as an impasse procedure.³² It is crucial to realize that even the absence of an express impasse procedure in legislation does not mean that none exists. Not providing third-party assistance is but one of many ways to deal with a bargaining impasse. Although all of these exist as choices among a range of ways of dealing with impasse, different consequences flow from choosing a system with an express mechanism as opposed to one with no mandated procedure.

Neither the ECA nor the NLRA provides express means for resolving negotiating impasses. It must be asked how the two statutes both come to have no express method of resolving impasse, leaving the parties, unaided by government intervention, to their own means of resolving impasse. This similarity at first seems odd, given the difference in their philosophical underpinnings. In fact, one came about as a matter of omission and one as a result of commission.

nin, *Labor*]; GEARE, *supra* note 3.

31. See EMPLOYMENT SECURITY, *supra* note 7, at 47; Reinhold Fahlbeck, *supra* note 6, at 307-09.

32. See Daniel R. Ernst, *supra* note 13, at 62; Kagan, *supra* note 9, at 35-37.

The ECA is silent on how parties should resolve impasses because its drafters trusted in the operation of the market and common law to fill any gaps. In addition, and more important, the ECA was a reaction against what existed before. From 1894, New Zealand operated under a regime which imposed a high degree of government intervention in the settlement of contracts.³³ This included conciliation councils and setting terms of employment through mandated arbitration awards.³⁴ The ECA's drafters wanted the new system to be free of these conditions.

The reason behind the lack of an express impasse system in the NLRA is less clear. Although exploring this could be the subject of a full article, a few points are relevant here as background for the way in which the NLRA was interpreted by the courts. First, although the United States Congress enacted the NLRA to promote worker empowerment and democratize the work place, its paramount goal is not human rights but stabilizing commerce.³⁵ The statute's focus on business as its ultimate goal, a value that would override others such as economic democracy, may leave the statute to give less attention to provisions for impasse. Furthermore, an important philosophical trend among some who influenced the drafters of the NLRA was to see the state "as little more than the enforcer of the bargains created by autonomous, organized and voluntary but conflicting economic interests."³⁶ In addition, the interplay of statute and common law was current among those whose thought influenced the NLRA. The drafters of the NLRA argued for a rejection of the absolutes of existing jurisprudence and a return to particularism and empiricism, which they believed informed the common law courts nearly a millennium before.³⁷

33. See A STUDY OF THE LABOUR EMPLOYMENT COURT (New Zealand Bus. Roundtable ed.) (on file with AM. U. J. INT'L. L. & POL'Y); Peter Boxall & Peter Haynes, *Unions and Non-Union Bargaining Agents Under the Employments Contracts Act of 1991: An Assessment after 12 Months*, 17 N.Z. J. INDUS. REL. 223 (1993).

34. See Boxall & Haynes, *supra* note 33, at 223-27.

35. Elinore Herrick testified that whether the NLRA legislation provided a program for economic recovery stood or fell on "the reality of opportunity given to labor to bargain collectively." H.R. REP. NO. 8423, 73D CONG., 2D SESS. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 211 (1935) [hereinafter NLRB LEG. HISTORY]. This is obvious in a reading of NLRA § 1, 29 U.S.C. § 151 (1994).

36. Ernst, *supra* note 13, at 67, 74-75, 81-82. John R. Commons, for example, expressly rejected mechanisms such as compulsory arbitration. *Id.*

37. *Id.* at 69-70.

Thus, although their purposes were different, there are important respects in which similar strains of thought influenced both the ECA and NLRA, particularly faith in common law. They differ in that ECA proponents saw the common law as the repository of universal truths,³⁸ while NLRA proponents saw the common law as a means of rejecting the universal for the particular.³⁹ Therefore, for a variety of reasons, some different and some similar, both the ECA and NLRA do not prescribe intervention or any other express method of resolving impasse.

When legislation is silent on important issues, such as resolving impasse, the judiciary must address the lacunae by applying common law substantive and interpretational principles.⁴⁰ Separate court systems fill this legislative gap in the ECA and NLRA by interpreting antithetical statutes to provide similar methods of impasse resolution, allowing employers to impose contract terms unilaterally. Yet a reading of the statutes' representational structures, language and philosophical underpinnings suggests that such an interpretational outcome would be impossible.

Indeed, the more recent New Zealand court decisions, discussed below, reign in employers' power to impose employment terms, arguably making the ECA more protective of the employee in bargaining than the NLRA.⁴¹ These developments caution any who assume that labor legislation, including its express intent and purpose, are indurate methods of regulation which mechanistically determine outcomes. This, in turn, suggests we explore the mechanisms which fail to insulate labor legislation from wider social forces. Just as judicial interpretation of the Wagner Act subverts its original intent, so, too, interpretation of the

38. These universal truths were, for many, based in economics. The NZBR argued that the proper form for labor law was that it should be no different than the common law of contract. Supplementary Submission to the Labour Select Committee on the Options Paper 1 (New Zealand Bus. Roundtable ed., Mar. 1991) (on file with AM. U. J. INT'L L. & POL'Y). The only criteria by which all statutes were to be judged, according to the NZBR, was by "their impact on the willingness of employers to take on new staff." *Id.* at 4. See Dannin, *Overcome*, *supra* note 1, at 49-50.

39. More recently, labor leaders such as Richard Trumka and Lane Kirkland have called for the repeal of the NLRA and a return to common law. Trumka explained: "I have a profound faith in the judiciary and jury system as it exists at common law. It has been the enduring bulwark against biased decision making by 'experts.'" Richard Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987).

40. LEMPERT & SANDERS, *supra* note 29, at 440-44.

41. See discussion *infra* at I.B.2.

market-driven ECA hinders its ability to deliver the perfectly competitive labor market its drafters strove to create.⁴²

The industrial relations literature, labor law articles and treatises largely overlook the judicially developed doctrine of employer unilateral implementation of final offers upon impasse under the NLRA.⁴³ Most standard industrial relations texts expend their energies on bargaining tactics and the possibilities of using third-party mediation when it appears that resolution is not forthcoming.⁴⁴ Academic labor lawyers focus on other issues and thus fail to appreciate the importance of impasse for those who negotiate under the NLRA.⁴⁵ Overlooking impasse and implementation encourages the perception that a degree of equality operates between the parties. In reality, however, this doctrine decisively tips the balance of power in favor of the employer. Academics in labor law focus their discussion of law reform elsewhere, ignoring how powerfully this judicially developed doctrine reshapes the legislative system.⁴⁶ This leads reformers to advocate rewriting the legislation, when it is not the statute, so much as its interpretation by the courts, which legalizes conduct its drafters defined as violating the law.

These oversights on the doctrine of impasse are difficult to explain. Compared with striker replacement, an issue which has recently been the focus of extensive scholarship and attempted legislative reform in the United States, unilateral implementation of final offers is a far more widespread phenomenon with a more pernicious impact on collective

42. Cf. *The Labour Relations Bill*, THE EMPLOYER, April 1987 (pointing out the areas in which the Labour Relations Act failed to live up to the drafters' hopes).

43. One exception is Kate Bronfenbrenner's work, which addresses the issue within the context of first contracts as opposed to bargaining in general. She found that when an employer declares an impasse and implements its final offer, unions won first contracts in only four of seven units. Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 84, 86 (Sheldon Friedman et al., eds., 1994).

44. For examples of such texts, see WILLIAM COOKE, UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS 56 (1985); THOMAS KOCHAN, ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 223 (1994).

45. For examples of such discussions, see Martin Malin, *Afterword: Labor Law Reform: Waiting for Congress?* in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 252 (Matthew Finkin, ed. 1994); PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

46. Cf. Fahlbeck, *supra* note 6; Jeffrey S. Follett, *The Union As Contract: Internal and External Union Markets After 'Pattern Makers'*, 15 BERKELEY J. EMP. & LAB. L. 1 (1994).

bargaining.⁴⁷ Its impact occurs even in situations where there is no impasse nor implementation of final offers. Parties enter bargaining knowing that this power to implement exists and hence shape their strategies according to whether they want to reach or forestall impasse.⁴⁸ It is peculiar that scholarly attention focuses on the problem of permanent replacements without addressing the role impasse and implementation play in creating the necessary prerequisites for permanent replacement of strikers to occur.⁴⁹

47. A conservative and preliminary estimate is that from the period 1980-1995, unilateral implementation upon impasse resulted in NLRB charges at least ten times as often as did charges of permanent replacement of strikers. The preliminary results of the authors' search of NLRB cases through the Labor Relations Reporting Manual for 1980-1995 discloses 261 cases involving impasse during negotiations for a successor contract and 26 involving permanent replacement of strikers, with a great deal of overlap. These results likely understate the relative incidence and impact of unilateral implementation, compared with permanent replacements, for several reasons. Intuitively speaking, an NLRB charge is more likely to be filed where strikers are permanently replaced; whereas, only the more egregious and clear case of unilateral implementation will result in the filing of NLRB charges. Those instances in which the employer's ability to implement only influences bargaining by, for example, forcing the union to make concessions to stave off impasse, will not result in charges. A charge involving unilateral implementation is more likely not to go to trial, and thus, is less likely to be reported than is one involving permanent replacements, since the differences in remedies make it easier to settle the former. The remedies for most unilateral implementation cases is only a cease and desist order and no monetary damages. The authors are currently trying to establish with greater precision the incidence and impact of implementation.

48. The authors together with Dr. Terry Wagar, St. Mary's University, Nova Scotia, Canada, are currently collecting data on the incidence and precursors to impasse.

49. Getting accurate figures of the incidence of replacement of strikers is difficult. One study, rooted in a search of Westlaw databases, found that between 1935 and 1991, 299 strikes involved replacements, or slightly over five per year. See Michael LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. EMP. & LAB. L. 169, 169-184 (1995); Michael LeRoy, *The Changing Character of Strikes Involving Permanent Striker Replacements, 1935-1990*, 16 J. LAB. RES. 423 (1995).

I. BARGAINING AND IMPASSE RESOLUTION

A. THE NATIONAL LABOR RELATIONS ACT

1. The Statutory Scheme of the NLRA

When Congress first introduced the NLRA as S.2926⁵⁰ or "The Labor Disputes Act," it stated:

[that the tendency towards integration] and centralized control has long since destroyed the balance of bargaining power between the individual employer and the individual employee, and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living.⁵¹

Had the drafters of the legislation enacted the original bill, the NLRA would today provide for conciliation, mediation and arbitration, as suggested by the quote. Individuals argued that the legislation must remedy "the matter of bringing collective bargaining negotiations to a conclusion."⁵² Today, however, the NLRA is expressly inhospitable to conciliation and mediation.⁵³ Rather than assist in resolving impasses, the NLRA opted for a system that, as another witness at the Wagner hearings testified, gives "the reality of *opportunity* . . . to labor to bargain collectively."⁵⁴ The NLRA does this through providing legislative supports to collective action by workers, because "the isolated worker is a plaything of fate."⁵⁵

Many who testified at these early hearings recognized that it was imperative for the new legislation to require an employer to confer with its employees' representative to resolve grievances.⁵⁶ Economist Arthur

50. H.R. REP. NO. 8423, 73D CONG., 2D SESS. (1934), *reprinted in* NLRB LEG. HISTORY, *supra* note 35, at 1.

51. *Id.*

52. *Id.* at 149-50 (testimony of Sidney Hillman).

53. "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis." NLRA § 4(a), 29 U.S.C. § 154(a) (1994).

54. H.R. REP. NO. 8423, 73D CONG., 2D SESS. (1934), *reprinted in* NLRB, LEG. HISTORY, *supra* note 35, at 149-50 (1935) (testimony of Elinore Herrick).

55. *National Labor Relations Act: Hearings on S. 1958 Before the Senate Comm. on Educ. & Labor*, 74TH CONG., 1ST SESS. (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2321 (1935) (hereinafter NLRB LEG. HISTORY II).

56. *Id.*

Suffern observed that labor regarded the prior legislation, § 7(a) of the National Industrial Recovery Act (NIRA),⁵⁷ as inadequate because it was "merely a pious declaration of the right of labor to organize and to bargain collectively [which went] to the right of every employer to determine his own course as he will, regardless of the wishes of the workers."⁵⁸ He concluded it was impossible to expect "that the rules of the game will be fair, if those with power and selfish interests at stake are allowed to make them."⁵⁹

Employers, however, objected that an unfair labor practice which required them to demonstrate that they had exerted every reasonable effort to make and maintain agreements would harm the economy.⁶⁰ They argued that labor paid no attention to the economic exigencies employers faced and "refused to be guided by any economic laws, by any conditions affecting local plants, striving to continue in existence, by any requirements of competition or any ordinary business economics or economy."⁶¹ In short, the preexisting assumptions were that the business, including corporations, were in effect the employer's private possessions and that only the employer could be trusted to protect the business' productivity and even existence.⁶² The NLRA's basic structure incorporates this unquestioned assumption.⁶³

57. 48 Stat. 198 (1933). See Brody, *supra* note 18, at 29 (discussing Section 7).

58. H.R. REP. NO. 8423, 73D CONG., 2D SESS. (1934), reprinted in NLRB LEG. HISTORY, *supra* note 35, at 315.

59. *Id.* at 316.

60. *Id.* at 539-40.

61. *Id.* at 541.

62. These views later came to dominate the interpretation of the NLRA. See JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1-16 (1983).

63. In a statement redolent with meaning for the future, the Senate Committee reported that, with regard to employer refusals to bargain collectively:

The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory. But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding

Individuals raised the idea that labor legislation needed to provide protection in those cases in which the employer was "strong enough to impress his will without the aid of the law."⁶⁴ The drafters of the NLRA created no mechanism for intervention to respond to this concern. Should impasse occur, they are not allowed to resolve it by anything that would, as the drafters of the NLRA noted:

compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met. But the right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives.⁶⁵

2. Unilateral Implementation of New Terms of Employment

The National Labor Relations Board (NLRB) and other American courts hold that the statutory prohibition against bargaining in bad faith and the definition of bargaining in good faith, in the NLRA,⁶⁶ bar employers from making unilateral changes in working conditions.⁶⁷ Thus, an employer who takes unilateral action with respect to wages, hours, and other terms and conditions of employment, violates the NLRA's legal obligation to recognize and to bargain with its employees' representative.⁶⁸ Even parties acting in good faith, however, cannot always reach an agreement. When there is an extended impasse and no means of resolving it, the parties can not make changes that one or both desires.⁶⁹

governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.

National Labor Relations Act: Hearings on S. 1958 Before the Senate Comm. on Educ. & Labor, 74TH CONG., 1ST SESS. (1935), reprinted in NLRB LEG. HISTORY II, supra note 55, at 2321.

64. *Id.* at 2335.

65. *Id.* at 2335-36; *see infra* notes 98-108 and accompanying text (demonstrating a great resemblance to the ECA on this point).

66. 29 U.S.C. §§ 158(a)(5), (d) (1994).

67. *See* NLRB v. Katz, 369 U.S. 736 (1962).

68. *But see* Old Line Life Ins. Co. of Am., 96 N.L.R.B. 499, 502 (1951), *enforced*, Associated Unions of America v. NLRB, 200 F.2d 52 (7th Cir. 1952).

69. *Id.*

A bargaining impasse places two important values in conflict: the mutual co-determination of the workplace expressly provided for in the NLRA and the concern that work will halt, imperiling the enterprise's profitability. The courts give the latter ascendancy because, as the decisions reveal, there is a presumption that the natural state of affairs is for the employer to determine workplace terms.⁷⁰ Co-determination, particularly when it entails opposition to the employer's plans, is an example of one of the ways in which the NLRA is inconsistent with those values of the American legal system which support the central role of the free market and the unrestricted flow of goods and services.⁷¹ Not surprisingly, the courts resolve this conflict by permitting an employer to implement its final offer, once a bona fide impasse occurs.⁷² This concern and its solution, ceding to the employer the power to create impasse, to decide when impasse exists, and to resolve impasse by imposing the employer's will as to any terms the employer wishes, is an overreaction. This solution not only ignores the role the employer plays in creating the problem, it actually rewards the employer for conduct at odds with the NLRA's purpose. The courts' response to this problem has broken with the spirit of the NLRA.

Allowing the employer to implement its final offer, once a bona fide impasse exists, permits the employer to supplant jointly determined contract terms with terms known to be unacceptable to the union. Arguably, when an employer wants new workplace conditions, by definition, the employer no longer finds the existing ones attractive. Nonetheless, there is a significant difference between maintaining once agreed-upon terms and implementing new terms one side rejected. Even if some of the existing terms become wholly unacceptable, this cannot justify allowing the employer to implement its entire proposal. By the same token, allowing an employer to implement its final offer piecemeal creates a distortion. The employer can renege on issues it conceded during negotiations and keep those conceded to by the union. This would allow the employer to achieve terms more favorable to it than those in its last offer.

70. Cf. WEILER, *supra* note 47, at 228 (revealing a presumption in favor of employer unilateral control).

71. See generally Fahlbeck, *supra* note 6, at 307, 314 (stating that the "U.S. was unparalleled in . . . its fight against restrictive business practices and its encouragement of industrial competition"); see also Jeffrey Follett, *supra* note 48, at 2-3 (giving collected arguments and citations).

72. See ATLESON, *supra* note 62, at 14; Dannin, *Collective*, *supra* note 6, at 55.

The judicially created impasse and implementation doctrine provides an elaborate method for subverting the bargaining process. As originally conceived, this doctrine permitted implementation only after ensuring that it enforced the obligation to bargain.⁷³ Before an employer can implement its final offer, the parties must reach a bona fide impasse. A bona fide impasse exists only if the employer fulfills its statutory duty to bargain in good faith.⁷⁴ This finding depends on "whether its conduct at the bargaining table (and elsewhere) demonstrates a real desire to reach agreement and enter into a collective-bargaining contract."⁷⁵ A bona fide impasse entails finding that the employer had a "serious intent to adjust differences or a desire to reach acceptable common ground."⁷⁶

Finding this intent entails examining the totality of the employer's conduct, that is, inferences drawn from its behavior as a whole.⁷⁷ Courts can take into account actions outside negotiations, particularly "conduct which is inconsistent with an intent to bargain with the Union in good faith at the bargaining table."⁷⁸ Conduct which evinces bad faith includes regressive offers and renegeing on prior agreements.⁷⁹ An employer can take a firm position;⁸⁰ however, a take-it-or-leave-it attitude, "*Boulwarism*," is a classic example of bad faith bargaining.⁸¹ Once the parties are at a bona fide impasse, an employer may implement some or all of its contract proposals.⁸² Impasse is defined as "the point at which further bargaining would be futile."⁸³ Even if such a

73. See generally *Colorado-Ute Electric Assoc.*, 295 NLRB 607 (1989), *rev'd*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992) (reversing an earlier decision allowing an employer to implement a wage plan unilaterally because it fulfilled the duty to bargain in good faith before a valid impasse).

74. See *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993).

75. *Industrial Electric Reels*, 310 NLRB 1069, 1071 (1993).

76. *Id.*

77. *Id.* at 1072; see *Dayton Electroplate, Inc.*, 308 NLRB 1056, 1062 (1992).

78. *Dayton Electroplate, Inc.*, 308 NLRB at 1063.

79. *Id.*

80. See *Industrial Electric Reels*, 310 NLRB at 1071-72; *Larsdale, Inc.*, 310 NLRB at 1319-20.

81. See *General Electric Co.* 150 NLRB 192 (1964), *enfd*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

82. *Goldsmith Motors Corp.*, 310 NLRB 1279, 1285 (1993); *Colorado-Ute Electric Assoc.*, 295 NLRB 607 (1989), *rev'd* 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992).

83. *Larsdale, Inc.*, 310 NLRB at 1318.

point is reached, new concessions or an expressed willingness to compromise makes it difficult for the courts to find an impasse.⁸⁴

The trend in decisions since the mid-1980's has been to find that the parties have reached a bona fide impasse, despite little time spent bargaining and weak evidence that more effort might not result in agreement.⁸⁵ The NLRB willingly excuses conduct which it once found to be evidence of bad faith.⁸⁶ In a recent case the Board stated that "the duty to bargain does not preclude a party from making its best offer first, or require 'auction' bargaining."⁸⁷ The inevitable results are like an awkward dance. Unions make successive concessions, attempting to narrow differences, to stave off having terms imposed. Employers, on the other hand, stand firm or try to widen the gulf because, doing so successfully gives them the ability to set workplace terms without compromising.

Allowing employer implementation creates the doctrinal problem that, if bona fide impasse is too easily found, then the doctrine permits a legalized form of Boulwarism. This anomalous result is made possible because the statute provides no means to break impasse, other than a requirement to notify mediation services that a contract is nearing expiration.⁸⁸ By the courts' logic, implementation is superior to requiring the parties to remain on the old terms until they reach agreement.⁸⁹ The NLRA forbids turning to dispute resolution methods which have been used in countries, such as Canada,⁹⁰ and pre-ECA New Zealand,⁹¹ and in public sector negotiations in the United States,⁹² such

84. *Id.* at 1319.

85. Dannin, *Collective*, *supra* note 6, at 52-54, 63-64.

86. *Id.*

87. Industrial Electric Reels, 310 NLRB 1069, 1072 (1993).

88. NLRA § 8(d)(2), 29 U.S.C. § 158(d)(2) (1994).

89. *See supra* notes 88-96 and accompanying text.

90. *See generally* Gary Chaison & Joseph Rose, *The Canadian Perspective on Workers' Rights to Form a Union and Bargain Collectively*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 241, 242 (Sheldon Friedman, et al. eds., 1994) (stating that the American system is concerned with establishing the framework of the relationships, and not with the process of bargaining). In contrast, the Canadian system focuses on disputes, negotiation and providing machinery to administer agreements. *Id.*

91. GEARE, *supra* note 3, at 32-37, 201-03.

92. *See* Charles Craver, *Public Sector Impasse Resolution Procedures*, 60 U. CHI.-KENT L. REV. 779 (1984); *see, e.g.*, PA. STAT. ANN. TIT. 43, §§ 1101.801-110-1.807; WIS.STAT.ANN. § 111.70(4).

as voluntary and compulsory conciliation, mediation, and interest arbitration.⁹³

The courts, as judicial bodies, can not usurp the legislative function of creating institutions to resolve impasses. On the other hand, nothing compelled them to develop the doctrine of implementation upon impasse. By putting a process in place so at odds with the Act's purposes, the courts have upset the legislative balance and provided employers with a threat they can always hold in reserve. The doctrine of unilateral implementation of an employer's final offer is such a potent weapon in the employer's arsenal that it frequently defines the manner in which collective bargaining takes place, even when no impasse or implementation ever occurs.

B. THE EMPLOYMENT CONTRACTS ACT

1. The Statutory Scheme of the ECA

The ECA is so novel that a discussion of impasse issues must begin with a sketch of ECA bargaining. Most fundamentally, the ECA does not support or promote collectivity and thus, lacks any mechanism to foster collective, as opposed to individual, negotiations. The ECA neither requires bargaining with the other party nor makes bad faith bargaining a violation.⁹⁴ Collective action cannot arise from the legislation's prescription for collective, as opposed to individualistic, arrangements for bargaining working conditions, since there are none. The ECA's hands-off or nonprescriptive attitude toward collectivity stems from its underlying philosophies: that it is undesirable and unnecessary to level the playing field in negotiations between employers and their employees and that, to do so, creates rather than solves problems.⁹⁵

The ECA, and particularly as the Employment Court interprets it, treats its two forms of employment contracts, the individual employment contract (IEC)⁹⁶ and the collective employment contract (CEC),⁹⁷ in

93. See NLRA § 4(a), 29 U.S.C. § 154(a) (1994)(stating that "[n]othing in [the Act] shall be construed to authorize the [NLRB] to appoint individuals for the purposes of conciliation or mediation").

94. See generally Dannin, *Overcome*, *supra* note 1, at 122.

95. Cf. *id.* at 43 (stating that at the time of the ECA's introduction "[New Zealand] society had come to view the rights of consumers and investors to maximum freedom of action as the paramount interest").

96. ECA § 19. An IEC is "an employment contract that is binding on only one employer and one employee." ECA § 2. Their existence as part of bargaining legisla-

non-intuitive ways. Negotiations, on an individual or collective basis, do not predict and have no bearing on, whether the result is an IEC or CEC. The only significant distinction between an IEC and a CEC is the number of signatory employees. The only meaningful distinction between "individual" and "collective" under the ECA is the number of names at the end.

A CEC is not collective as a result of the process used to achieve it. Employees can sign CECs one-by-one and, hence, without the power and processes of collective negotiation. New Zealand workplaces are filled with identical IECs, without one having terms tailored to the individual. An IEC can even arise from collective negotiations, either engaged in with the purpose of achieving an IEC or by default at the expiration of a CEC, when its terms are incorporated into an individual contract by force of law under § 19(4).⁹⁸

tion is a result of the ECA proponent's libertarian agenda, which included the individualized employment contracts as a means of imposing on employees behavioral norms based on individualistic common law principles. This view holds that "courts could be relied on to rule against collective interventions by reference to freedom in the labor market." Guy Standing, *Labor Regulation in an Era of Fragmented Flexibility*, in *EMPLOYMENT SECURITY*, *supra* note 7, at 426-27.

97. ECA § 20. A CEC is "an employment contract that is binding on one or more employers and two or more employees." ECA § 2.

98. When the parties are unable to agree on a successor document, the product of collective negotiations (in the case of an award) or at least a CEC lives on. ECA § 19(4). All terms of the CEC are incorporated into the IEC unless they "could have no application to the individual employment contract and [did] not affect or concern the employee, either directly or indirectly." *Prendergast v. Associated Stevedores Ltd.*, [1992] 1 ERNZ 737, 752 (1991). Section 19(4), in essence, incorporates by reference the collective terms into the individual contract. *United Food Workers v. Talley*, [1992] 1 ERNZ 756 (1991). Even customs, that is, implied terms, can become part of the individual contract under § 19(4). *See New Zealand Merchant Serv. Guild Indus. Union of Workers, Inc. v. New Zealand Rail, Ltd.*, [1991] 2 ERNZ 587, 599 (1991) (incorporating an implied term into an employment contract); *cf. James v. James*, [1991] 3 ERNZ 547, 552 (1991) (allowing rates under the CEC to apply to the individual employment contracts). During the ECA's first three years as many as 34% of New Zealand employees worked under IECs whose terms arose from expired awards by operation of § 19(4). JOHN DEEKS, *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND* 518 (2d ed. 1994). The figure may be either larger or smaller to an unknown degree, since no good data collections or surveys exist to explain how conditions were set for nearly half New Zealand's employees. *Id.* at 518-19. Prior to the ECA, collective agreements applied to occupations across work places. They were called awards for historical reasons that did not necessarily reflect recent reality. For many years collective agreements did emerge as awards made in interest arbitration. More recently arbitration was a rare occurrence. *Id.*

The ECA gives employers power to control workplace conditions by, first, permitting employers to enter into a CEC "with any or all of the employees employed by the employer"⁹⁹ and, second, by making those terms determinative.¹⁰⁰ When a CEC exists, "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."¹⁰¹ Thus, an employer can enter into an agreement with two employees, the minimum for a CEC, and then use it to set all other employees' terms since an IEC must not conflict with the CEC. In other words, the ECA provides a creative and bold employer with extraordinary power and means to reach agreement on the employer's terms.

2. Impasse Resolution Under the ECA

Within its first four years, ECA case law has gone through wide swings: from developing a doctrine which permitted employer unilateral implementation to its current retreat from that position. The Employment Court's earliest decisions suggested that unions and employees should not follow their natural tendency to assert power through collectivity but, rather, were better off seeking IECs. In *Lyn Grant v. Superstrike Bowling Centres Ltd.*,¹⁰² the court held that employers could not change a worker's pay and working conditions provided by an IEC unless the worker consented to the changes.¹⁰³ The Minister of Labour, Bill Birch, applauded the *Superstrike* decision, because it enforced "the government's intention that employment contracts [could] not be changed unilaterally."¹⁰⁴ This case also allayed union concerns that

99. ECA § 20(1).

100. *Id.*

101. ECA § 19(2).

102. [1992] 1 ERNZ 727 (1991).

103. *Id.* at 734.

104. Rebecca Macfie, *Cook Strait Ferry Row Charts Way for Future*, NAT'L BUS. REV., Sept. 13, 1991, at 15. The National Government had been at some pains to quell widespread opposition. It tried to assure people that the ECA would not be used as harshly as was feared. For a description of these events, see ELLEN DANNIN, *WORKING FREE: NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT* (forthcoming through Auckland University Press in 1997). One month prior to the ECA's enactment—even before it was reported back to Parliament from the Select Committee and its final form could be known—Birch issued a "householder's pamphlet" which stated that changes in collective contract terms could come about only if both employer and employees agreed to them. INDUS. RELS. SERV., DEP'T OF LABOUR (TE TARI MAHI),

employers who had believed they would be allowed unilateral power to change pay and conditions under the ECA would not find it so easy to impose their wills.¹⁰⁵ The New Zealand Council of Trade Unions (NZCTU) announced that workers could take courage and not sign inferior contracts.¹⁰⁶

The NZCTU was, however, prematurely optimistic, although with good cause. *Superstrike* was a reasonable interpretation of the ECA's application in the then-common situation in which a CEC or award expired with no successor agreement. Perceptive unionists quickly altered their way of dealing with employers as a result of *Superstrike*.¹⁰⁷ In May 1992, Graeme Clarke, secretary for the activist Manufacturing and Construction Workers Union, advocated IECs in difficult bargaining situations, both to protect workers' conditions, and to force collective negotiations. At this time Graeme Clark noted that:

[T]he legislation is such that an employer cannot unilaterally change an individual contract. And the one thing that we did in the panel beating [collision] industry and anywhere for that matter, where we couldn't re-

THE EMPLOYMENT CONTRACTS ACT: A BRIEF GUIDE (TE TURE KAWENATA MAHI) 3 (1991). Comments by government officials on these early cases betrayed a sense of relief, suggesting they had shared the ECA critics' concerns. PARL. DEB. (HANSARD), 43D PARL., 2D SESS., 898 (March 19-20, 1991) (ques. no. 2).

105. See Diane Keenan, *Landmark Contracts Act Ruling Pleases CTU*, THE PRESS, July 16, 1991, at 1. Murray French of the Wellington Employers Association placed the blame for this misconception on unions.

The problem that we encountered was that the opponents of the Act very much created an environment where it was suggested that employers would be doing all sorts of horrible things to employees, simply taking conditions off them, unilaterally reducing wage rates, the whole lot if you can imagine what that is they claimed the Act would do. Now, unfortunately, that created some misconceptions out there in terms of what employers could actually do and the more hard nosed employers in fact believed that propaganda and in fact they were as much a problem to us as they were to the employees that they employed, quite simply because they believed what they were reading in the newspapers and therefore acted accordingly. And we had employers doing silly things.

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

106. See Keenan, *supra* note 105, at 1. These reactions were "a sad reminder of just how far away from anything approaching a balance in bargaining the new legislation has led us" and that the decision "simply asserted a fundamental principle of contract law." John Hughes, *Changing Contracts*, INDUST. L. BULL. 74 (Nov. 1991).

107. Interview with Graeme Clarke, General Secretary, Manufacturing & Construction Workers Union, in Wellington (May 5, 1992).

new the award for an increase, which an increase in wages would have helped organize people and consolidate them, we refused to renew it. And so on the 15th of May [1991], everyone was suddenly on an individual contract, and we went around and we told people: 'they cannot change your individual contract. If you don't sign anything, they can't change it.' And the sheer fact in a recession where things are being cut, they cannot change an individual's contract and must force them to change through a collective contract, means that an employer who wants to change has got to negotiate the collective contract; that's the only way he can get a change.¹⁰³

During this early period, the Employment Court solidly supported the imperviousness of IECs. In *Northern Local Government Officers Union, Inc. v. Auckland City*,¹⁰⁹ Judge Goddard observed:

It is therefore important not to whittle away the rights of parties during the period between the expiration of a collective employment contract and the negotiation either of a new collective employment contract or of new individual employment contracts. During that intermediate period nothing should change except that provisions which are extraneous to the individual employment relationship will lapse.¹¹⁰

However consonant this might be with normal contract law, these decisions did not resolve employer desires for changed conditions. The early decisions of the Employment Court frustrated employers because they felt that contemporaneous high unemployment would have given them the upper hand in bargaining.¹¹¹ Ironically, it was this very disparity between employers, who were strong at this time, and workers, who were economically and legally weak, which prompted the workers to

108. *Id.*

109. [1992] 1 ERNZ 1109 (1991).

110. *Id.* at 1123.

111. In May 1991, when the ECA came into effect, official unemployment was on the rise, topping 10.1% or 163,800 unemployed. Rebecca Macfie, *Unemployment Rate Tops 10%*, NAT'L BUS. REV., July 9, 1991, at 1. By June 1991, the figure had soared to 253,000. Herbert Roth, *Chronicle*, 16 N.Z. J. INDUS. REL. 317, 317 (1991). 48,000 jobs were lost between November 1990 and 1991, most, 36,700, were lost between May 1991 and November 1991. Jason Barber, *Contracts Act 'A Disaster'*, THE DOMINION, May 2, 1992, at 3. Real unemployment undoubtedly was much higher. As of December 13, 1990, it was estimated that true unemployment figures were between 15-20% through 1990. Roth, *supra*, at 95, 98.

cling to their IECs.¹¹² At this point, the very nature of the ECA as the embodiment of the neo-classical vision was in danger.

Employers had several options open to them. First, they could pull up short and abandon the potential of the ECA by letting workplace terms stay in status quo indefinitely. Second, they could press forward ruthlessly with the ECA vision by terminating recalcitrant employees and replacing them with new ones willing to agree to the employer's terms.¹¹³ Finally, they could take a middle ground and press the courts to permit them to apply their desired terms to existing employees. While each of these options had potentially negative consequences for employers, different employers found one or another more desirable depending on the skill level of their current workers, the strength of the employer's desire for new terms, and the employer's ability to engage in litigation to create new precedent.¹¹⁴ No employer, particularly one who just achieved the power available under the ECA, was likely to seek legislative change to balance employer-employee strength.

Enough employers chose to compromise the ECA's vision and press for the third option (apparently having decided they wanted to retain their current employees but on different terms) that case after case before the Employment Court attacked the principle that changing employment terms required employee agreement.¹¹⁵ Again and again, unions battled the question whether employers could unilaterally alter individual

112. See generally Macfie, *supra* note 111, at 1 (discussing the bargaining climate).

113. This option would appear to be available based on debates on the ECA. Labour party MP Michael Cullen unsuccessfully attempted to amend the ECA so that any employee-party to an IEC would have seven days to repudiate its terms without that repudiation being a resignation; pay and other conditions of work in an IEC could not be decreased or altered without the consent of the employee and that it be an offense for an employer "to terminate, or threaten to terminate, the employment of any employee who does not agree to amend the pay, conditions of employment, penal rates or provisions relating to paid holidays." See PARL. DEB. (HANSARD), 43D PARL., 2D SESS. 1581 (Apr. 30, 1991).

Michael Cullen re-proposed these amendments when the personal grievance section of the ECA was debated and they were again defeated. He proposed that it would be grounds for a personal grievance if an employer terminated or attempted to terminate an employee in retaliation for an employee's refusing to agree to a change in pay or working conditions. This was also defeated. *Id.* at 1594-95. For a full discussion of this, see Ellen Dannin, *Transnational Migration of At-Will Employment: Radical Law Reform and Its Social Context*, B.U. INT'L L.J. (forthcoming 1997).

114. See Dannin, *Bargaining*, *supra* note 1, at 472.

115. See *New Zealand Resident Doctors Ass'n v. Otago Area Health Bd.*, [1991] 1 ERNZ 1206; *Northern Local Gov't. Officers Union, Inc.*, [1991] 1 ERNZ at 1109.

contracts and won.¹¹⁶ There were, however, strong signals even in these early decisions that the *Superstrike* doctrine was not stable. Even in cases in which the Employment Court held for the employee, the Court revealed its difficulty reconciling employees' right to refuse to change their employment conditions with employers' claims of economic necessity. Even in *Superstrike*, the judge said that he sympathized with the employer's desire to eliminate penal rates.¹¹⁷

The Employment Court was faced with a dilemma and no clear way to resolve it. Employers wanted concessions; however, employees could remain indefinitely on their terms and thus had no incentive to accede to concessions. The statute provided no impasse resolution mechanisms other than a strike or lockout. Strikes were not an option for employees under these poor economic conditions. For employers, lockouts were not appealing for several reasons. First, employers assumed, rightly or wrongly, that ECA would lead to easy agreements.¹¹⁸ Such assumptions rendered the reality of irresolvable conflict and the need to consider locking out incomprehensible. Furthermore, lockouts would have led to unwelcome costs in a troubled economic situation.

Logically, this stalemate made no sense, since the ECA's purpose was not to insulate employees from market forces. However, in reality, the normal weapons for ending impasse were too blunt or too frightening for the opponents to wield. The Employment Court was troubled by the ECA's promoting freedom of choice, both for employees and employers, and how to reconcile their rights with other parts of the legislation. These conflicting legal and practical issues pressured the judges to find a way through the morass created by the legislature.

116. See, e.g., *New Zealand Resident Doctors*, [1991] 1 ERNZ 1206; *Northern Local Gov't. Officers Union, Inc.*, [1991] 1 ERNZ at 1109; *Beazley v. City of Auckland*, [1992] 2 ERNZ 716, 721-22 (1991).

117. *Superstrike*, [1991] 1 ERNZ at 736.

118. During the time the ECA was being drafted, the major employer umbrella organization, the New Zealand Employers Federation (NZEF) stepped up its propaganda in support of the new conflict-free regime which was about to come into existence. For example, in November 1990, just before the draft ECA was introduced by the National Party, the NZEF issued *The Benefits of Bargaining Reform*, "a publication designed to change employer attitudes so that they will take full advantage of the menu of opportunities National is offering them." New Zealand Employers Federation, *The Benefits of Bargaining Reform* 3 (1990). The publication enumerates NZEF goals for industrial relations in a short essay entitled "The Vision - An Ideal Organization" and contrasts this with "The Reality - A Picture of Many Enterprises." *Id.* Ideally, there would be a sensitive and rapid defusing of controversy to obtain mutually satisfactory results. *Id.*

Perhaps equally as strong pressures on the Employment Courts came from the severe criticism of powerful forces (particularly the New Zealand Employers Federation (NZEf) and the New Zealand Business Roundtable (NZBR)) who just succeeded in their long campaign to enact the ECA.¹¹⁹ In a 1992 study of the Labour and Employment Courts, the NZEF and NZBR warned that, if the courts engaged in judicial activism, which they defined as protecting workers rights, the result would be lower wages and unemployment.¹²⁰ This argument reflected criticisms made during debate on the ECA by the NZBR,¹²¹ the NZEF,¹²² and employers¹²³ as they argued against retaining a special-

119. See Rebecca Macfie, *Opinion*, NAT'L BUS. REV., Sept. 20, 1991, at 8.

120. NEW ZEALAND BUSINESS ROUNDTABLE & NEW ZEALAND EMPLOYERS FEDERATION, A STUDY OF THE LABOUR-EMPLOYMENT COURT 1 (1992). This paper made a strident attack on the Court's integrity and demanded that it be eliminated. *Id.* at 1. The study noted:

In the open, competitive economic environment that New Zealand firms now face, employers will not be able to absorb additional employment costs arising from Court decisions. As the pattern of judicial rulings is factored into firms' decision making, any cost-increasing restrictions in the name of workers protection will be offset by lower wages and/or other employment conditions that are less favorable. The overall change in the balance of contractual terms could disadvantage many employees. Those most adversely affected would tend to be marginal and low paid workers who will either not be employed at all, or will be employed at rates of pay that are lowered further by the artificial increase in costs arising from Court-imposed standards.

Id. This was a continuation of arguments made before the enactment of the ECA. See Dannin, *Labor*, *supra* note 30, at 28.

121. It argued that retaining a specialist labor court would perpetuate a specialist body of law and viewpoint not rooted in general contract law, to the detriment of the economy. Submission to The Labour Select Committee on the Employment Contracts Bill 22 (New Zealand Bus. Roundtable ed., 1991) (unpublished paper) (on file with AM. U. J. INT'L L. & POL'Y).

122. The NZEF favored a specialist labor court but with jurisdiction limited to hearing appeals on questions of law. NEW ZEALAND EMPLOYERS FEDERATION, EMPLOYMENT CONTRACTS BILL 1991: SUBMISSION B26 (1991).

123. Many charged that the predecessor Labour Court had overturned discharges because the employer failed to follow its own disciplinary procedures and thus had created a trap for the unwary. Interview with Murray French, *supra* note 105. Other evidence suggested that the Labour Court had never reversed otherwise valid discharges solely on procedural grounds. Richard Whatman, Submission to the Labor Select Committee on the Employment Contracts Bill 4-5 (n.d.) (unpublished paper) (on file with AM. U. J. INT'L L. & POL'Y).

Some employers charged that the court was unsympathetic to employer needs. For example, John Foster of Richmond, Ltd. faulted the Labour Court for not allowing an employer to cut costs by laying an employee off, except when the economic

ist labor court to resolve labor disputes, or at least strictly restricting its jurisdiction. The ECA embodied the latter argument, establishing the Employment Court.¹²⁴

That such pressures affected the Employment Court can be no more than speculation. Nonetheless, within one year, the Court gradually distinguished those cases which permitted employees to remain on IECs so that eventually the right became meaningless. During its first months, the Employment Court continued to refuse employers the right to unilaterally modify employment terms, either explicitly or by erosion through nonobservance.¹²⁵ The Court was firm in its rejection: "[W]e feel bound to say that we regard as dangerous the suggestion that a party to an employment contract may breach it at will so long as that party is motivated by reasons of a commercial nature which it finds compelling."¹²⁶

The Employment Court rejected employer arguments based on commercially compelling reasons for not being bound by provisions of the employment contract or that it could exercise managerial prerogative.¹²⁷ Judge Goddard relied on analogy to normal contract law and stated:

Such an approach, if accepted, would enable almost any contractual obligation to be evaded By and large, however, the time for the exercise of the management prerogative is when entering into employment contracts and not at the time of their performance. If an obligation has been assumed then it must be discharged and a party to an employment contract which fails to discharge an obligation is always at risk of being ordered to comply with the contract. It is quite fallacious to regard some obligations under an employment contract (for example, to pay wages) as being important and others . . . as being in some way subsidiary and requiring to be complied with only if the party on whom the obligation rests sees fit. The cardinal rule is that employment contracts create en-

survival of the company was at stake, thus ignoring the "reality that if cost-cutting measures are not taken by down-sizing an operation then full scale closures and redundancies may follow." JOHN FOSTER, *REALISING THE POTENTIAL OF THE MEAT INDUSTRY* 105, 108-09 (New Zealand Bus. Roundtable, ed., 1990).

124. ECA § 104.

125. See *Prendergast v. Associated Stevedores Ltd.*, [1991] 1 ERNZ 737, 753; Rebecca Macfie, *Labour Court Stops Move to Dilute Work Contracts*, NAT'L BUS. REV., July 31, 1991, at 12.

126. *Northern Local Gov't. Officers Union Inc. v. Auckland City*, [1992] 1 ERNZ 1109, 1125 (1991).

127. *Id.*

forceable rights and obligations and it is not for the Court or the Tribunal to decide which obligations should be enforced and which need not be; the parties have already decided that for themselves by entering into the contract, and it is not open to the Tribunal to exempt any party from the obligations assumed.¹²⁸

Although § 43 of the ECA compelled this outcome, which protected the sanctity of contract,¹²⁹ some ECA supporters attacked it. One employer argued that protecting the sanctity of contract, when the parties reach an impasse, was wrong because "the ruling, if unchallenged, would allow workers' terms and conditions to survive indefinitely in conflict with the employer's desire to rearrange its business more effectively."¹³⁰ The NZEF blasted the court's decision as "retrograde" and continuing "the old rigidities" of prior law.¹³¹

This anger illuminates the problem of resolving the impasse under the ECA and the skewed view some ECA proponents had of the new law. When placed in the history of advocacy for the ECA, it reveals unpleasant realities about the process of law reform which led to its enactment. The drafters of the ECA only included § 43 because the same groups, which now attacked it, had demanded sanctity of labor contract terms for at least a decade.¹³² The NZBR, for example, argued that without such a provision the prior law was defective and that this omission was

128. *Id.* at 1127-28; see *Northern Distribution Union (Inc.) v. 3 Guys Ltd.*, [1992] 3 ERNZ 903, 921-22 (1992). In a later case, the Court continued to reject arguments based on Respondent's "wider responsibilities." As the Court noted:

If by that he meant wider than its contractual obligations and so wide as to relieve the respondent from performing those obligations, I must firmly reject that submission out of hand as being without foundation in law or reason. As I indicated in the course of argument, the fact that the respondent could make a large saving by altering the contractual environment did not authorize it to do so any more than a similar consideration would authorize it to stop paying its taxes or its rates.

New Zealand Merchant Service Guild Indus. Union of Workers, Inc. v. New Zealand Rail, Ltd., [1991] 2 ERNZ 587, 601 (1991).

129. Part IV of the ECA provides: "The object of this Part of this Act is to establish that—(a) Employment contracts create enforceable rights and obligations" ECA § 43(a). The ECA also provided for midterm modifications of CECs in writing. ECA § 23.

130. Keenan, *supra* note 105, at 1.

131. *Retrograde Decision Under Appeal*, THE EMPLOYER, Sept. 1991, at 1; see Knowles, *supra* note 30, at 19.

132. See NZBR, *New Zealand Labour Market Reform: A Submission in Response to the Green Paper 38* (Apr. 1986) (unpublished paper) (on file with AM. U.J. INT'L L. & POL'Y).

"a major reason why unions are encouraged to behave irresponsibly, why the relationship between unions and employers often becomes sour and confrontational, and why the opportunities for productivity-enhancing cooperative behavior are severely restricted."¹³³ It continued:

One of the employers' most common complaints concerns (the absence of) sanctity of agreement. Agreements have come to be broken with impunity, sometimes because the cost of insisting on adherence is greater than the immediately discernible benefits of preventing the erosion of legally acceptable behavior. What gradually develops is the industrial habits of the swamp. Agreements should have the standing of contracts. If one party breaches the contract the other party should have access to remedies within the law. It should also be the basic responsibility of the parties to a contract to ensure it is enforced.¹³⁴

The NZEF concurred, arguing that labor agreements "should be contractual. This would grant them greater sanctity because the parties would be bound by agreements which they themselves had fashioned and are thus bound to enforce."¹³⁵

Despite this, within four months of the enactment of the ECA and § 43, these groups found sanctity of contract not to their liking. To their credit, even before the ECA's enactment they realized that the conjunction of impasse and sanctity of contract presented precisely this problem and had already ceased pressing for it. During the debate on the ECA, the NZEF advocated letting employers establish terms of employment unilaterally.¹³⁶

An employer's ability to decree workplace terms, however, conflicted with sanctity of contract and it also undermined the basic premise which employer groups advocated: that contract terms be set by market forces through party negotiations.¹³⁷ For example, the NZBR responded angrily-

133. *Id.*

134. *Id.*

135. *Employers Federation Submissions on Industrial Relations Green Paper, THE EMPLOYER*, June 1985, at 3.

136. See Macfie, *supra* note 119, at 18; NZEF, Submission on the Employment Contracts Bill 1991 Part A, at 3 (Jan. 30, 1991) (unpublished paper) (on file with AM. U. J. INT'L L. & POL'Y). Some employers wanted both sanctity of contract and the ability to set at least some terms unilaterally. Select Committee Chair Max Bradford stated that "[t]he common thread running through employers' submissions was to introduce more certainty and stability into the collective-bargaining process. In addition, employers wanted final control over the form and number of collective employment contracts in a particular work-place." *PARL. DEB. (HANSARD)*, 42D *PARL.*, 2D *SESS.* 1425 (Apr. 23, 1991).

137. See NZBR, *New Zealand Labour Market Reform: A Submission in Response*

ly to the draft Labour Relations Act of 1987¹³⁸ (the legislation which preceded the ECA) because it failed to provide for market contracting.¹³⁹ Had the idea been accepted that sanctity of contract was a nullity and employers were allowed to impose their own terms, the legislation would have violated free market ideology, as well as claims that employers and employees could peaceably resolve workplace terms without intervention.

For years employer groups argued that employers and employees' interests were unitary and that negotiation and discussion permitted them to reach common ground.¹⁴⁰ In the post-ECA reality that faced them, however, employers found that it was difficult to convince employees that the employer's terms were in the best interest of both business and employees; the only alternative appeared to be to impose terms unilaterally.¹⁴¹ Employers' inability to secure agreement through discussion and explanation seriously weakened an important tenet of the ECA: that employers and employees' interests were unitary.¹⁴²

Impasse illuminated other fundamental conflicts between key parts of ECA ideology. On the one hand, imposition naturally follows from the ECA as one of its stated purposes since it allows economic change to flow efficiently, or at least quickly, through the economy. Imposing terms, however, conflicts with its goal of freedom of contract. The ECA presupposes that it is freedom of contract, a willing buyer and seller

to the Green Paper 40 (Apr. 1986) (unpublished paper) (on file with AM. U. J. INT'L L. & POL'Y); *The Labour Relations Bill*, THE EMPLOYER, Apr. 1987, at 5.

138. NZBR, Submission to the Labour Select Committee: The Labour Relations Bill (Mar. 1987) (unpublished paper) (on file with AM. U. J. INT'L L. & POL'Y).

139. *Id.* Even more ironically, on the eve of the ECA's enactment, some employers argued that they be able to make changes if they could prove economic necessity. See Rebecca Macfie, *Lawyers Split Over Breach of Contract*, NAT'L BUS. REV., May 21, 1991, at 12. Obviously, this was an argument that was tantamount to reestablishing the prior system of interest arbitration.

Had the Court accepted either this or the argument that sanctity of contract not be respected, it then truly would have been continuing "the old rigidities" of the prior law in the sense of reestablishing aspects of the law against which the NZEF and NZBR had fought vigorously. *Id.*

140. See ALAN FOX, INDUSTRIAL SOCIOLOGY AND INDUSTRIAL RELATIONS: RESEARCH PAPER NO. 3, THE ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS ASSOCIATIONS: THE DONOVAN COMMISSION (1966).

141. See generally Dannin, *Solidarity*, *supra* note 1 (discussing the ECA's application in its early years).

142. This problem is a fallout from the gap between their use of economics as an exercise in logic as opposed to an economics based in the complexities of how people actually interact. *Id.*

coming to terms, that achieves the optimum condition, not through dictating change.¹⁴³ Rather than serving as an instrument of change, the theory of freedom of contract, as envisioned, now stood as a dam to change.

The existence of impasses, which employer and employee could not resolve amicably, casts serious doubt on the way ECA proponents argued bargaining would work.¹⁴⁴ To the extent there was a labor market, its functions were far more complex than envisioned. Employees seemed unwilling to realize that their interests were one with their employers. Employers seemed unable to provide information to permit a win-win solution to be reached. Where employers had employees who they deemed overpaid for their skills but unwilling to agree to the rate of pay their employers offered them, the employers, theoretically, should terminate the relationship and retain new workers willing to accept the offered rate.¹⁴⁵ Ideally employers should bid against each other for workers.¹⁴⁶ None of this happened.

Employers proved reluctant to terminate the relationship when unable to reach agreement and to pursue negotiations with a new willing seller of labor, as ECA advocates theorized would happen.¹⁴⁷ This reluctance cannot be fully explained by law. The problem was not legal, since the law supported such grounds for termination.¹⁴⁸ Instead, economic and

143. See PENELOPE BROOK, *FREEDOM AT WORK* 108 (1990); Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984).

144. In November 1990, just before the ECA was introduced, the NZEF issued *The Benefits of Bargaining Reform*. NEW ZEALAND EMPLOYERS FEDERATION, *THE BENEFITS OF BARGAINING REFORM* 3 (1990). *Benefits* gives a fair example of how the NZEF assumed ECA bargaining would operate. "[E]ach employee is committed to a set of operational and personal objectives, through participation in the planning process." *Id.* The workers are individually fulfilled, problem solving team workers who work through "[s]taff associations [which] where they exist are strong and loyal" and facilitate the sensitive and rapid defusing of controversy to obtain mutually satisfactory results. *Id.* Management provides information freely and regularly and shares profit with the workers, "after capital retention and dividend decisions have been made." *Id.* Bargaining freedom would be "the first step in which workers and employers decide their own destiny." *Id.* at 4.

145. See WEILER, *supra* note 45, at 125-126.

146. *Id.*

147. *But see* Culhane v. Ports of Auckland Ltd., [1991] 3 ERNZ 497.

148. Discharge was likely made more difficult by the existence of redundancy provisions in existing agreements. Others may have feared that discharge would contravene ECA provisions on lockouts or invite personal grievances. However, nothing in the ECA suggested that such a discharge was illegal. Terminating or threatening to terminate an employee's job to force agreement would seem to be harsh and oppres-

social factors made the process of setting terms far more complex than the rudimentary version of economics described by ECA proponents.¹⁴⁹

It is no simple matter to terminate a work force. Training even low-skilled workers is expensive. Employee tenure, with its retention of worker knowledge and skills which can be disseminated to new workers, are an advantage to an employer. Workers who fear replacement by others are reluctant trainers. Some employers may fear acquiring an unsavory reputation which would spread easily in a small country like New Zealand and make it difficult to hire all but the least desirable workers. Whether for these or other reasons, workplace utopia, as long and powerfully advocated by groups such as the NZEF and NZBR, was at an impasse.

Even worse than being proved intellectually wrong,¹⁵⁰ arguing now

sive behavior, undue influence, or duress of the sort forbidden by § 57. ECA § 57. Section 57, however, expressly requires that a contract have come into existence as a consequence of the conduct for the infringement to be brought before the court and does not apply where none was consummated. *Id.* Furthermore, § 57's chief remedy—setting aside the contract or ordering “any party to the employment contract to pay to any other party” appropriate compensation—would be an inadequate remedy for termination. ECA § 57(4)(b).

Other remedial provisions are equally inapplicable. Section 28 is not directed to conduct in bargaining but, rather, only to issues of membership and representation. ECA § 28. Section 28 prohibits dismissing employees or imposing detriment on them in retaliation for their “involvement in the activities of an employees organization.” ECA § 28(1)(b). The ECA makes a clear separation between union membership and bargaining. Thus, though § 28 comes close, it also does not prohibit termination for lack of agreement.

149. See Christoph Buechtman, *Introduction: Employment Security and Labor Markets*, in *EMPLOYMENT SECURITY*, *supra* note 7, at 3, 47 (Christoph F. Buechtman ed., 1993) (observing that, given turnover costs, the labor market does not function like an auction market so that what appear to be rigidities (e.g., sluggish work force adjustment or wage stickiness) are actually the outcome of efficient transactions between workers and firms). Indeed, maximum flexibility in employment adjustment may not be desirable. See Robert Boyer, *The Economics of Job Protection and Emerging New Capital-Labor Relations*, in *EMPLOYMENT SECURITY*, *supra* note 7, at 70, 71.

150. The NZEF and NZBR argued that labor flexibility would have an unambiguously positive impact on employment. However, these problems demonstrated that the neoclassical theory they relied on was flawed.

The theory relies on crude and irrelevant hypotheses about the employment relationship, which have been rejected by recent theories of capital-labor relations. Labor market flexibility is optimal for employment and welfare only if labor can be assimilated to its services and if labor is hired in a spot market where no adverse selection problems occur or commitment and loyalty issues are at stake. By contrast, when we recognize the separation of contracting labor

against sanctity of contract and freedom of contract left them open to claims that their justifications for the ECA were no more than a means of disguising their real goals: to give employers unilateral control of the workplace. For those who cared about history and consistency, the stream of studies, polls, experts, and position papers produced by the NZBR and NZEF over at least a decade and all their claims to be acting unselfishly, purely for the good of the country, were reduced to mere propaganda pieces without substance or meaning.

Few saw these conflicts and problems. Despite the problems just described, when employers argued for the right to unilateral control based on economic exigency, this created an intellectual and practical conflict which profoundly troubled the Employment Court.¹⁵¹ Slowly, a new trend became visible in its decisions, a trend toward giving employers absolute control over how they would get on with their businesses.

The first steps were subtle. In *Culhane v. Ports of Auckland Ltd.*,¹⁵² the employer argued that it should be able to replace its twenty-seven port workers, who were on IECs, with lower-paid workers because it had commercially compelling reasons and because it should be allowed to exercise managerial prerogative.¹⁵³ The court was unwilling to permit the employer "merely to replace the 27 workers in this case with other workers doing practically the same work."¹⁵⁴ However, when the employer filed affidavits stating that it had accepted bids to subcontract the work, the court seized upon this argument and ruled that the employer could do this pursuant to its inherent managerial prerogative.¹⁵⁵

After *Culhane*, those who had thought they could avoid concessions by remaining on IECs would soon learn they had no way to prevent

from its actual utilization, the long-term character of most modern employment relationships, and the key importance of work effort and loyalty to the firm, then the basic neoclassical model collapses. New and more sophisticated models provide evidence of numerous contradictory effects that the impact of employment security can no longer be assessed on a priori grounds.

Boyer, *supra* note 149, at 117.

151. See *Grant v. Superstrike Bowling Centres, Ltd.*, [1992] 1 ERNZ 727 (1991).

152. See *Culhane v. Ports of Auckland, Ltd.*, [1991] 3 ERNZ 497.

153. *Id.* at 498.

154. *Id.* at 501. As discussed, it might have permitted the employer to do this, since the ECA's philosophy, legislative history, and structure suggest an employer can terminate employees who are unwilling to agree and replace them with those ready to accept the employer's offer. *Id.*

155. *Id.* at 502. As discussed above, terminating employees who refused to accept an offer and replacing them with ones willing to would seem to be contemplated by the ECA. See *supra* notes 87-89 and accompanying text.

employer implementation. The Employment Court announced a series of decisions which soon permitted an employer unilaterally to modify even IECs. The key to avoiding *Superstrike* and its progeny and to legitimate an employer's unilateral modification of IECs was to expand § 64(1)(b), which covered only lockouts involving CECs,¹⁵⁶ apply it to employees on IECs, and couple it with a unique interpretation of partial lock-out.¹⁵⁷

The case of *Prendergast v. Associated Stevedores Ltd.*,¹⁵⁸ provided the link between the concepts. When negotiations broke down, the employer wrote all employees that negotiations for a CEC were at an impasse and that it would no longer observe the terms of their IECs on the deadlocked issues:

"The Company's non-observance and non-performance of these terms will continue until you and each of you agree to comply with the demands of the Company to enter into a Collective Employment Contract which incorporates the following terms:

"(i) The NZ Waterfront Worker's Union is not a party to a Collective Contract to which you and other permanent employees are a party together with the Company.

"(ii) There is no restriction on the Company's ability to engage whatever number of non-permanent employees it requires.

"(iii) There is no requirement on the Company under the Employment Contract to engage other Company's permanent employees to drive the ship's cranes, derricks or other mechanical equipment."¹⁵⁹

The employer stated that the company's "breach" of the IECs' terms would continue until employees agreed to the terms and that it expected its workers to perform their work as usual, except for these changes.¹⁶⁰ The union charged that this was an unlawful lockout and that the company was in breach.¹⁶¹ This placed the issue of interpreting §§ 62 and 64 squarely before the Employment Court and in the light least favorable to the employer, particularly since the employer's actions were in

156. The ECA defines a lawful lockout as relating to the "negotiation of a collective employment contract for the employees concerned." ECA § 64(1)(b).

157. ECA § 62 defines as a lockout either an employer's discontinuing employees' employment wholly or partially, § 62(1)(b), or breaking some or all of the employment contracts to compel compliance. § 62(1)(c).

158. [1991] 2 ERNZ 728 (1991) [hereinafter *Pendergrast II*]; see Rebecca Macfie, *Watersiders Fail in Bid for Lockout Injunction*, NAT'L BUS. REV., Sept. 6, 1991, at 3.

159. *Prendergast II*, [1991] 2 ERNZ at 732.

160. *Id.*

161. *Id.* at 732-33.

defiance of a prior decision by the Employment Court, and thus arguably contemptuous.

Instead of finding a violation or contempt, the Court, in *Prendergast II*, held that the company's breach of contract was actually a lockout under § 62.¹⁶² The Court reasoned that the employer satisfied the elements of a lockout because it was the discontinuance of employment, either wholly or partially; the breaking of some or all of the employment contracts; or the refusal to engage employees for work it usually employed employees to perform with the employer's purpose being to compel the employees to accept its proposed terms or demands.¹⁶³ The judge held that the outstanding issues demonstrated that the lockout related to the negotiation of a CEC, and thus did not violate the law,¹⁶⁴ which provided that a lockout was lawful only if it related "to the negotiation of a collective employment contract for the employees concerned."¹⁶⁵

The judge in *Prendergast II* dismissed arguments that the partial lockout was merely a subterfuge to evade the court's earlier decisions which forbade the unilateral alteration of IECs, because, he found, the employer had directed the partial lockout towards securing a CEC.¹⁶⁶ The judge admitted, however, that it was difficult to reconcile decisions denying an employer the right to alter IECs unilaterally with the decision that an employer could achieve the same result by partially locking the same employees out of their terms of employment.¹⁶⁷

The case which came to stand for the partial lockout doctrine was *Paul v. New Zealand Society for the Intellectually Handicapped (IHC)*,¹⁶⁸ issued January 15, 1992. IHC notified its employees that it

162. *Id.* at 734. See ECA § 62.

163. *Prendergast II*, [1991] 2 ERNZ at 734.

164. *Id.* at 741.

165. ECA § 64(1)(b).

166. *Prendergast II*, [1991] 2 ERNZ at 741.

167. As the judge stated:

The defendant now seeks to selectively breach individual employment contracts, thereby creating a lockout in order to compel each and every permanent employee to agree to the removal of these provisions from their individual employment contracts. There are difficulties in establishing exactly what constitutes the status quo and I accept [plaintiff counsel] Mr. Quigg's submission that here the defendant is attempting to do something it previously could not do.

Id.

168. [1992] 1 ERNZ 65 (1992); see generally Jason Barber, *Employment Court*

was unilaterally cutting their wages by a third as a lockout to compel them to accept this as a contract reduction in their wages.¹⁶⁹ The IHC reduced plaintiff Evelyn Paul's pay from \$NZ30,555 [\$18,027] to \$NZ20,650 [\$12,184].¹⁷⁰ As in *Prendergast*, IHC told its employees that it would require them to continue "to perform all the work specified in your Contract of Employment . . . the action by IHC as your employer in breaching some of your terms of employment is taken with the view to having you accept employment on the foregoing terms."¹⁷¹

Breaching contracts by imposing new terms violated the ECA,¹⁷² but since the employer's intent was to compel its workers to accept its terms, the cuts were a lawful partial lockout.¹⁷³ Plaintiffs argued that the breach of contract and the employer's demands were identical, that the cuts were a breach and could not be a lockout, and that the court's distinction based on employer intent was meaningless.¹⁷⁴ The employer countered that it was not simply changing or breaching the workers' IECs, but was trying to force workers to accept those terms as part of a new CEC.¹⁷⁵ This was, thus, a lockout where the employer was "discontinuing the employment of any employees, . . . wholly or partially."¹⁷⁶ The court agreed with the employer that, since the changes occurred in conjunction with negotiations for a CEC, the employer took the actions to compel an agreement.¹⁷⁷

Ruling Angers Unions, THE DOMINION, Jan. 15, 1992, at 1 (discussing the decision).

169. [1992] 1 ERNZ at 76-77; see Jason Barber, *IHC Parties Plan Talks Under Threat of Action*, THE DOMINION, Dec. 5, 1991, at 9; Roth, *supra* note 111, at 123.

170. Paul, [1992] 1 ERNZ at 81-82.

171. *Id.* at 77.

172. See *NZ Dairy Food and Textile Workers' Union v. Cavalier Bremworth, Ltd.*, [1991] 2 ERNZ 519 (1991).

173. See Roth, *supra* note 111, at 125.

174. Paul, [1992] 1 ERNZ at 83.

175. *Id.*

176. ECA § 62(1)(c); see [1992] 1 ERNZ at 83; Rebecca Macfie, *Employers Exercise Muscle Under Contracts Act*, NAT'L BUS. REV., Mar. 6, 1992, at 39.

177. Paul, [1992] 1 ERNZ at 84-85. Judge Castle stated: "[T]he only relevant issue is whether negotiations are in fact being conducted, not quality or bargaining strength of them or the parties. The allegation that IHC has been unreasonable or inflexible, if found to be so, is therefore of no avail to the CSU." *Id.* at 85. Judge Castle further noted that sections 9 and 18 of the ECA gave the court no role to play in deciding whether negotiations were or were not fair. *Id.* Section 9 provides that the object of bargaining under the ECA was to allow the parties to negotiate terms of employment in a variety of forms. ECA § 9. Section 18 provided that negotiations should include negotiations as to whether contracts would be individual or collective and the number and mix of contracts at an employer. ECA § 18(1)(a)(b).

In *Hyndman v. Air New Zealand Ltd.*,¹⁷⁸ the Employment Court admitted that its motive for permitting partial lockouts was to allow changed conditions when one party would not agree to them.¹⁷⁹ Judge Colgan said that it made no sense to call strikes or lockouts unilateral variations of the terms of employment contracts, because:

[s]uch a proposition does not permit of any legitimate attempt to vary a contract of employment and could, if taken to its logical conclusion, mean that either an employer or its employees could indefinitely frustrate the other from ever being able to move from the existing terms and conditions of an inherited employment relationship [The lockout or strike] is more realistically recognized by the legislation as being a strategy in the negotiation of another CEC as occurred here.¹⁸⁰

Trade unionists criticized these cases and the court's holdings as evidence that the ECA's purpose was to give employers unilateral control over employment conditions.¹⁸¹ Anne Knowles of the NZEF claimed that the doctrine was a simple and limited endorsement of the rights of strike and lockout under the ECA.¹⁸² The patent illogic of the partial lockout doctrine made defending it difficult. All consequences turned on the employer's definition of its intent. Changing working conditions is illegal when the employer simply desires to impose changes but legal when the employer says it wants to have the workers surrender to its will by agreeing to those changes. In the former case, workers have the right to enforce the original contract terms. In the latter, they have no such right. An employer has no incentive to end a lockout, since the ECA places no onus on an employer who refuses to bargain. As a consequence, once imposed, changed conditions through a partial lockout could last a very long time indeed, further reducing the discernible difference from a unilateral change.

Labor relations reporter Rebecca Macfie savaged the Court's treatment of the issue.

Any employer looking for concessions in wage bargaining from his workforce should be swotting up on the Employment Court's decision on the recent IHC dispute with the Community Services Union. It's a step by step guide to how to enforce immediate pay cuts on an unwilling

178. [1992] 1 ERNZ at 820 (1992).

179. *Id.* at 835.

180. *Id.*

181. See Barber, *supra* note 168, at 1.

182. See Macfie, *supra* note 104, at 39.

work force without falling foul of the law. All he needs to do is follow the protocols established in the IHC case:

*First, ensure the collective employment contract with his workers has expired.

*Tell his workers that he wants a new collective contract(s), listing the changed conditions he wants included in that new contract.

*When the workers resist the proposals in negotiations, notify them the changes will be imposed on them regardless, being careful to specify that this measure takes the form of a lockout under section 62 of the Act, and that the lockout section is taken with the intention of compelling them to accept the proposed new terms of employment.

*Let them know they are expected to front up for normal work regardless of the lockout. (Remember, a lockout doesn't necessarily involve literally locking the factory gates. As the IHC case shows, non-observance of selected provisions of workers' contracts can constitute a lockout.)

Voila! Immediate cost savings have been achieved without having to laboriously extract an agreement from an intransigent union.

True, having taken this course of action the employer does not yet have a new contract with his workers, but the terms and conditions he was seeking are in place, and there is no compulsion to end the state of lockout.¹⁸³

It is no exaggeration to say that, by permitting this tactic, the Court replaced the possibility of parties' reaching mutually agreeable terms with a regime of non-bargaining. Indeed, a study of bargaining outcomes and behavior during this period confirmed Macfie's observations. The study found that in nonunion work places, the situation of the majority of workers at the time, no bargaining was taking place, regardless of the form of contract.¹⁸⁴

Certainly, Macfie was not far wrong in her description of how easily an employer could avoid bargaining and unilaterally vary terms of employment. The Employment Court handed down case after case which rapidly expanded the doctrine. In *Petricevich v. Transportation Auckland Corporation Ltd.*,¹⁸⁵ the union (the Northern Local Government Officers Union) sought a CEC for 154 salaried employees. The employer, however, wanted them on IECs. When the employer unilaterally changed the terms in the employees' IECs, the Court held that this was not an

183. Macfie, *supra* note 176.

184. See Ian McAndrew & Matt Ballard, *Negotiation and Dictation in Employment Contract Formation in New Zealand*, 20 N.Z. J. INDUS. REL. 119 (1995).

185. [1992] 3 ERNZ 807 (1992).

illegal unilateral modification of IECs, but rather, a legal partial lockout because one of the parties (the union) had sought CECs.¹⁸⁶ In other words, even though the partial lockout was to force employees to agree to IECs, the Employment Court found it actually related to the negotiation of a CEC, since the employees wanted a collective agreement. The court reasoned that since the union could have struck in support of its demand, the employer had the reciprocal right to lockout.¹⁸⁷

This case cut deeply into the *Superstrike* protections for employees with IECs. The court denied, however, that its decision permitted the employer to unilaterally impose a new contract, an act which would violate *Superstrike*.¹⁸⁸ As the Court in *Petricevich* noted:

There can on the facts placed before me be no issue about that. The employer on the facts is clearly proposing to reduce its compliance with its obligations under the subsisting contracts. It proposes not to pay as it had before. It proposes no other interference with the terms of the present contracts. It does not propose to bring in any terms of any new contract.¹⁸⁹

In other words, a new contract did not exist; the workers were indefinitely working under terms identical to the desired new contract.

The minimal differences between the ways a CEC versus an IEC could be consummated arguably made it reasonable to permit lockouts to apply to both forms of contracts whenever some element of collective negotiations existed. However, justifying the partial lockout doctrine on these grounds would be an entirely different matter if employers could

186. *Id.* at 810-11.

187. *Id.* at 813. See *Adams v. Alliance Textiles (NZ), Ltd.*, [1992] 1 ERNZ 982, 986-87 (1991), *appeal dismissed as moot*, [1993] 2 ERNZ 783 (Ct. App. 1993). There is another side to this issue of reciprocity. Although it seemed fair to treat both sides of the relationship equally or reciprocally, to do so there must be parties who are similarly situated. The Employment Court believed this to be the case and if it permitted conduct to one side, the other was to be given the same liberality. See *Emergicare (Henderson) Ltd. v. New Zealand Nurses Union*, [1991] 2 ERNZ 583, 586 (1991). This, however, ignored significant contextual distinctions. If workers stage a slowdown, a species of partial strike, they can give themselves a raise only in the sense that they work less for each dollar received. Short of outright theft, workers cannot unilaterally raise their pay. A partial strike is even less effective for achieving goals not based on money for unit of time or effort, for no partial strike can impose an improved insurance benefit. The employer, conversely, can establish the very conditions it desires.

188. *Petricevich*, [1992] 3 ERNZ at 812.

189. *Id.*

lock out employees when negotiations were taking place on an undeniably individual basis, that is, with only one employee. Were an employer to be given the power to impose a partial lockout against a single individual, the doctrine would be exposed as nothing more than sophistry designed to let employers have the terms they wanted. It was not long before the court did precisely that.

In *O'Malley v. Vision Aluminium Ltd. (I)*¹⁹⁰ and *O'Malley v. Vision Aluminium Ltd. (II)*,¹⁹¹ the employer offered a concessionary IEC to an employee. When he refused to agree to the reduced terms, the employer notified him he would be locked out.¹⁹² The employer next assembled all the separate IECs into a document it called a "CEC which incorporated all IECs in its workplace".¹⁹³ The Court accepted this compilation of IECs as a CEC, even though there was no collective bargaining or collective contract.¹⁹⁴ The Court found collectivity since the "individual workers were made aware by management—and no doubt through discussion with each other—that their IECs essentially reflected the same terms and conditions which were to apply through the work force."¹⁹⁵ If this was not sufficiently egregious, the employer made threats to lock out before the employee had seen the contract at issue.¹⁹⁶

The employer's power to impose its terms unilaterally developed in cases other than those involving a partial lockout and through the expansion of other legal doctrines. For example, in *United Food Workers v. Tally*,¹⁹⁷ the Employment Court grossly expanded the contractual requirement of consideration as a requirement for a contract. It held that, although consideration was necessary to vary an employment contract, the changed terms themselves might constitute such consideration, even

190. [1992] 2 ERNZ 368 (1992) [hereinafter *O'Malley (I)*].

191. [1992] 2 ERNZ 660 (1992) [hereinafter *O'Malley (II)*].

192. *O'Malley (I)*, [1992] 2 ERNZ at 369.

193. *Id.* at 370.

194. *Id.*

195. *O'Malley (II)*, [1992] 2 ERNZ at 677.

196. *Id.* at 678-79. In the end, a technicality, the failure to include an expiration date in the contract, as required by § 22, was fatal to the employer's efforts to lock out the single employee who had not signed. Thus, had the contract contained an expiration date, the employer could legally have locked out its employee only hours after he was first shown the document and despite there having been no collective negotiations. *Id.* at 682, 685, 686-88.

197. *Id.*

though these terms "superficially appear to be one-sided." The Court stated, a court should find consideration where it could.¹⁹³

The Court also expanded the employer's power by giving it the ability to force the other side into negotiations on the employer's terms. In the months after September 18, 1991, when the award granted to Designpower employees expired,¹⁹⁹ about half the staff signed new IECs offered by the employer.²⁰⁰ When the first partial lockout cases appeared, the employer reversed itself and said it wanted a CEC, but the union, the Public Service Association (PSA), and those employees who had not signed new IECs now wanted to retain their IECs based on the terms of the expired award.²⁰¹ To make it absolutely clear that there was no element of collectivity, the employees informed the company that they had withdrawn the PSA's authority to negotiate collectively.²⁰² The company responded that it would lock them out unless they agreed to begin negotiations for a CEC.²⁰³

Unlike the NLRA, the ECA does not limit bargainable issues, but, instead, permits employees and employers to negotiate even fundamental matters, such as "whether employment contracts are to be individual or collective" and "[t]he number and mix of employment contracts to be entered into by any employer."²⁰⁴ This means that even basic issues, akin to the NLRA's unit determination,²⁰⁵ can be the subject of nego-

198. *Id.* at 439.

199. Designpower was an Electricorp subsidiary. Electricorp was a former government agency. After NZBR member Rod Deane became the Commissioner of the State Services, the process of converting government agencies to state-owned enterprises proceeded. Electricorp was one of the new state-owned enterprises in which the NZBR was most heavily involved. See Michael Williams, *The Political Economy of Privatization*, in *THE FOURTH LABOUR GOVERNMENT: POLITICS AND POLICY IN NEW ZEALAND* 140, 141-144 (Martin Holland & Jonathon Boston eds., 2d ed. 1990); Nicola Natusch, *An Analysis of the Influence of the New Zealand Business Roundtable Since Its Inception* 68 (unpublished paper 1990) (on file with AM. U. J. INT'L L. & POL'Y). During the period 1987 through 1989, NZBR members Athol Hutton, Roger Kerr, and Rod Deane had board positions at Electricity Corporation and its SOE form, Electricorp. *Id.* at 68-69. At Electricorp, even before the ECA, management was able to break the award down into seven separate documents which emphasized the worker-employer relationship. *Id.*

200. *Designpower*, [1992] 1 ERNZ at 672-75.

201. *Id.*

202. *Id.* See Jason Barber, *Lockout Comes as Court Hears Union's Case*, DOMINION, April 13, 1992, at 3.

203. *Designpower*, [1992] 1 ERNZ at 674.

204. ECA § 18(1)(a), (b).

205. See NLRA § 9(b), 29 U.S.C. § 159(b) (1994).

tiation. In *Designpower*, negotiations concerned a § 18 preliminary matter, the number and mix of contracts, and not the substantive terms of the contract.²⁰⁶ The employer argued for an expansive reading of § 18 to define these negotiations as relating to a CEC.²⁰⁷ Furthermore, the employer borrowed from partial lockout doctrine and contended that, since its objective was coercive, the lockout was lawful.²⁰⁸ The judge agreed and held that § 64(1)(b) permitted lockouts intended to coerce the other party to engage in negotiations for a CEC when it preferred IECs.²⁰⁹

On April 13, 1992, *Designpower* locked out those employees who had not signed agreements or given assurances they would negotiate for a CEC.²¹⁰ The union argued that the lockout violated § 5(a) by transgressing employees' freedom of association, their rights to "choose whether or not to associate with other employees for the purpose of advancing the employees' collective employment interests."²¹¹ The judge found that the ECA disaggregates the contract from the process of negotiations so that the employer's desire for a CEC could not affect employees' collective rights.

I am satisfied on an assessment of all of the evidence presented that, as the defendant asserts, it is indifferent to whether its relevant employees associate with others of them in relation to the company's desire to negotiate a collective employment contract I accept that *Designpower* is even now indifferent as to how the negotiations for a collective employment contract are to be conducted in the sense that its coercion of employees has not been for the purpose of persuading them to associate with others of them to advance their collective employment interests but has rather solely been to coerce them into negotiations for a collective employment contract.²¹²

206. *Designpower*, [1992] 1 ERNZ at 689-90.

207. *Id.*

208. *Id.*

209. *See id.*

210. *See Barber, supra* note 168, at 3; Roth, *supra* note 111, at 252. A similar situation occurred in *Hawtin v. Skellerup Indus. Ltd.*, [1992] 2 ERNZ 500 (1992). In that case an employee sought individual negotiations. When he refused to sign the CEC, he was given a lockout notice. *Id.* at 527.

211. ECA § 63(d) defines a lockout or strike as unlawful if it deals with matters of freedom of association. ECA § 63(d).

212. *Id.* The union also argued that an employer's use of its superior position through a lockout, as an attempt to coerce employees into collective action, was an "unconscientious abuse of power" and thus constituted undue influence. *Id.* at 685-86. However, the court held, given that all strikes or lockouts include the use of coer-

In other words, the Employment Court sanctioned the disjuncture of the final document from the process used to gain it.²¹³ This interpretation effectively read the word "collective" out of § 64(1)(b); it permitted a strike or lockout whenever there was the form of collectivity even if not the substance of collectivity in a contract.

One interesting feature of the union's strategy against *Designpower* was that it tried to use this disaggregation to its advantage by concertedly engaging in individual actions. It took this peculiar course because it thought engaging in overt collective resistance rendered the employees more directly vulnerable to coercion and the application of partial lockouts. This decision, however, cut off an avenue for a union to respond to a court's interpretations of collective act and contracts. The *Designpower* decision thus permitted an employer to define every action it wished to take as collective, however tenuous the connection with matters collective. The impact of the decision was immediate; the union acceded to the employer's demands.²¹⁴

Designpower was not the end of the Court's expansion of the meaning of a lawful lockout which related to "the negotiation of a collective employment contract" under § 64(1)(b). The Employment Court in *Hawtin v. Skellerup Industrial, Ltd.*,²¹⁵ construed the level of negotiation required by § 64(1)(b):

The phrase, within its particular context, 'relates to the negotiation of a collective employment contract,' enables an employer, I hold, to peremptorily and without any prior process of negotiation with its affected work force, to present an otherwise lawful collective employment contract to its particular employees and to uncompromisingly insist that unless they

cion, there must be something extreme to lead to a conclusion that they constitute undue influence. *Id.* at 686.

213. One important implication of this for researchers is that data as to number or percentage of CECs versus IECs is meaningless in terms of telling us whether collective or individual negotiations are taking place. In fact, it is impossible to know what is happening in the process of New Zealand negotiations without seeking workplace data that asks specifics about the process of bargaining, or, to put it more carefully, the process by which the CEC or IEC was achieved, since no bargaining at all may have been involved. As the Employment Court has said, negotiations for an employment contract "can amount to the presentation by one intended party to the contractual relationship of a form of contract to the other and the former's refusal to deviate from its offer." *Northern Distribution Union (Inc.) v. 3 Guys Ltd.*, [1992] 3 ERNZ 903.

214. *Id.*

215. [1992] 2 ERNZ 500 (1992).

accept the collective contracts terms within a prescribed time, they will then be locked out. Mr Weston [employer's counsel], I conclude, has correctly submitted that: 'An employer . . . can, theoretically, set its bottom line as from day one. If that bottom line is not acceptable to the employees then it can lock them out.'²¹⁶

The judge said that this was true even though it was "significantly removed from the primary meaning of 'negotiations', contemplating a process of 'conferring with another with a view to compromise or agreement'."²¹⁷

Those who are familiar with American labor law will recognize the court's language as a version of the unfair labor practice known as "Boulwarism," a term which essentially refers to "take-it-or-leave-it" bargaining. Boulwarism is a violation of the NLRA's duty to bargain in good faith. Although the employer wants to sign an agreement, it is essentially going through the motions of collective bargaining and not attempting to adjust the parties' differences in order to reach common ground.²¹⁸

Contemporaneous with the Employment Court's acceptance of the tenets of Boulwarism, the Court explicitly promoted an idiosyncratic version of Boulwarism as a legitimate method of bargaining related to labor-management cooperation.²¹⁹ As the proponent of this concept ex-

216. *Id.* at 536.

217. *Id.* at 537; accord *Northern Distribution Union (Inc.)*, [1992] 3 ERNZ at 915 (indicating that negotiations for an employment contract can amount to no more than the presentation of a contract to the other party with a refusal to deviate from the offer).

218. LEROY S. MERRIFIELD, et al., *LABOR RELATIONS LAW: CASES AND MATERIALS* 512 (8th ed. 1989). Even though Boulwarism remains an unfair labor practice, in the 1980's the NLRB all but sanctioned conduct which was essentially indistinguishable from Boulwarism. See Dannin, *Collective*, *supra* note 6, at 64-68.

219. Cf. *Northern Distribution Union (Inc.)*, [1992] 3 ERNZ at 915-16. The same confused view has apparently spread to Australia. The reporter here demonstrates that he has completely reversed what is understood as good faith bargaining in the United States, although, fortunately, the Australian court had it right:

Another issue the full-bench decision raises is bargaining in good faith, a US concept alien to Australian industrial relations in the legislative sense before the Industrial Relations Reform Act of 1993. It promises to generate considerable legal and industrial debate as parties contest what constitutes good-faith bargaining. The full-bench decision says: 'Negotiating in good faith would generally involve approaching negotiations with an open mind and a genuine desire to reach an agreement, as opposed to simply adopting a rigid predetermined position and not demonstrating any preparedness to shift.'

plained it, this take on Boulwarism linked employers' approaching workplace relations based on "greater consensualism and involvement" making use of "[v]arious innovative practices . . . including a greater use of performance-based pay within job ranges, a new interest in productivity gainsharing and a bargaining stance based on a good first offer from the employer Th[e] latter appears to be a New Zealand application of what the Americans call Boulwarism" ²²⁰ This interpretation failed to recognize Boulwarism as an illegal act in the United States and as the antithesis of the give and take that is part of collective bargaining. ²²¹

The Employment Court's embrace of Boulwarism was fleeting. It soon began to retreat from allowing employer implementation at im-

But this definition is at odds with what is understood by bargaining in good faith in the US. There, General Electric devised the concept of the first offer to employees being 'final and fair.' Called Boulwarism after GE's vice-president for labor relations, it has been upheld in the US courts. It represents a different interpretation of good-faith bargaining, suggesting the Commonwealth Government may have opened a Pandora's box by introducing this concept.

Nicholas Way, *Australia: Employers Losing Faith in Bargaining*, BUS. REV. WKLY., Sept. 19, 1994, available in LEXIS, World Library, Txtlne File.

220. Peter Boxall & Peter Haynes, *The Impact of the Employment Contracts Act 1991 on Unions and Non-union Bargaining Agents: An Assessment After 12 Months* (speech at Industrial Relations Centre, Victoria University of Wellington) (May 15, 1992); see Peter Boxall, *Management Strategy and the Employment Contracts Act 1991*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 148, 160 (Raymond Harbridge, ed., 1993); Peter Boxall & Peter Haynes, *Unions and Non-union Bargaining Agents Under the Employment Contracts Acts 1991: An Assessment After 12 Months*, 17 N.Z. J. IND. REL. 223, 227 (Aug. 1992).

221. See, e.g., Merrifield, *supra* note 218. The interpretation also suggests a lack of familiarity with how Boulware himself conceived of his eponymous practice; rather than making "a good first offer," he relied on extensive research and a full and lengthy exchange of views with the unions before making an offer. The offer included a willingness to change on the basis of new information. In fact, in all but one negotiation, new information from the union induced the company to alter its offer. HERBERT NORTHRUP, BOULWARISM: THE LABOR RELATIONS POLICIES OF THE GENERAL ELECTRIC COMPANY—THEIR IMPLICATIONS FOR PUBLIC POLICY AND MANAGEMENT ACTION 29 (1964).

Boulware did believe that the employer should take the lead in bargaining, making an offer it believes is appropriate and right

If, after further bargaining with the union, the management still believes that its position is correct, then the company should stand willing to take a strike rather than to accede to demands which it believes are not in the "balanced best interests" of all "contribution-claimants."

Id. at 139.

passee. By early 1994, the retrenchment was well under way. In *Mineworkers Union of NZ Inc. v. Dunollie Coal Mines Ltd.*,²²² the Mineworkers Union sought an injunction to restrain the employer from locking out two employees who refused to sign what purported to be a CEC.²²³ *Dunollie's* facts were neither better nor worse than many cases in which the Court permitted partial lockouts: the employees' expired awards had been converted to IECs by operation of law and the Mineworkers Union attempted to negotiate a CEC.²²⁴ As in many other cases, the employer changed its goal from IECs to a CEC. Precedent thus supported the lockout as legal because it related to negotiations for a CEC.

The Employment Court, however, held the lockout unlawful because there had been no negotiations and thus the lockout could not be in relation to the negotiation of a CEC.²²⁵ The Employment Court tacitly overruled *Designpower* by accepting the union's agreement that § 64(1)(b)

cannot mean that an employer, by deliberately bypassing the known bargaining agent for its workers and submitting a collective contract to them personally which the employer requires them to sign, can then lawfully lock those workers out if they refuse to sign the contract upon the basis that what has materially occurred relates to the negotiation of a collective employment contract for the employees concerned.²²⁶

The judge found that, by isolating the workers, the employer could force them individually to sign the collective contract.²²⁷

In June 1994, the full Employment Court, in *Witehira v. Presbyterian Support Services (Northern)*,²²⁸ explicitly repudiated the partial lockout

222. [1994] 1 ERNZ 78 (1994).

223. *Id.* at 80.

224. *Id.* at 83.

225. *Id.*

226. *Mineworkers Union of NZ Inc.*, [1994] 1 ERNZ at 83.

227. *Id.* at 91.

228. [1994] 1 ERNZ 578 (1994). The employer imposed a partial lockout by paying employees the new CEC hourly rate but no penal rate until they agreed to sign the offered CEC. The court found the impact to be "both immediate and severe." *Id.* at 582-83. It stated:

[I]t can cause no surprise that a lockout can be as far-reaching [as a strike] if not more so as employees are less likely than employers to have reserves to fall back on. While the impact may seem less severe where the action consists of a reduction in pay and falls short of a total cessation of pay as happens in the course of an ordinary lockout, the evidence showed that many employees

doctrine and three years' work crafting its intellectual underpinnings.²²⁹ The Court rejected, as tortured logic, that an employer's coercive motive can justify its unilateral variation of terms, stating, "We do not think that such a distinction can reliably be drawn in practice. Often a unilateral variation will take the form of an imposition of the employer's demand. We find the defendant's argument to be circular, unhelpful, and spurious."²³⁰

The Court also fully repudiated its iteration of the partial lockout as a mirror image of a strike. The Court asserted that a lockout in New Zealand was always understood to mean that an employer lost production but could withhold wages.²³¹ The court reasoned: "We find it unthinkable that parliament ever intended that employers could withhold wages without suffering any halt in production."²³²

The Court also found no support in the ECA itself for its interpretation of a partial lockout, stating that:

It cannot have been intended that the employers should be able to require their employees to work while paying them nothing. There is, in principle, no difference between paying nothing and paying a fraction of the correct amount. Therefore the employees in this case would be seen as having been required to perform their work for no pay. This is because if the employer could require them to work for less than their contractual entitlement, it must have logically been able to require them to work without being paid at all or for a purely nominal amount. Once seen in that light the partial lockout, so called, is exposed in its true character. Just as employees are, or can be, required to lose remuneration when on strike, so the employer must lose productivity when conducting a lockout.²³³

relied on the full amount of their earnings for their living and household expenses.

Id.

229. *Witehira*, [1994] 1 ERNZ at 582-83.

230. *Id.* at 585. In reaching its conclusions, the court turned to a number of dictionaries—both legal and those for the general public. It found that none of them included the concept of a partial lockout. *Id.* at 585-86.

231. *Id.* at 592.

232. *Id.*

233. *Id.* at 594. The Employment Court returned full circle to its holding in *Superstrike* by basing its decision on the Householders Pamphlet's assertion that employers could only change wages and other terms of employment with the employee's agreement. *Id.* at 596.

If this was not sufficient rejection, the Court even argued that partial lockouts violated natural justice and common law values so deeply held that even Parliament could not destroy them.²³⁴ In the end, the Court concluded that to allow the employer to require employees to perform work under the conditions of a partial lockout was to force the employees to become serfs instead of free people, making the more accurate term a "lock in."²³⁵

In reaching this point, the Employment Court has apparently returned to its starting point at *Superstrike* and to a plain meaning reading of the relevant sections of the ECA.

DISCUSSION

Comparing impasse under United States and New Zealand law provides useful insights into the interaction of labor legislation, judicial interpretation and social contexts. At the risk of stating the obvious, both systems demonstrate how impossible it is to understand a system if all that is examined is its legislative framework. The problem is that labor scholars often proceed as if merely examining statutes sums up all that is to be known about a country's labor system. New Zealand Council of Trade Unions Secretary Angela Foulkes echoed this limited perspective when she observed that the Employment Court used the ECA's stated purpose, "to promote an efficient labour market," as its benchmark.²³⁶ As Ms. Foulkes notes: "It has taken a long time for industrial relations practitioners to appreciate just how crucial this purpose has been in determining rights and obligations on matters such as access to work sites, supply of information, union recognition, and bargaining procedures."²³⁷

Legislators, no doubt, would support what Foulkes says. Certainly when they enact legislation they wish to see it applied according to the policies and purpose they intended it to achieve. One would like to think that a statute's purpose should shape its interpretation. We think that law performs a pedagogical function; it shapes and develops "habits that undergird the legal order."²³⁸ Thus, Foulkes continues, had the

234. *Witehira*, [1994] 1 ERNZ at 597.

235. *Id.* at 601.

236. Angela Foulkes, *The Culture of Tripartism: Can European Models be Adapted for New Zealand Use?*, 18 N.Z. J. IND. REL. 185, 187 (1993).

237. *Id.*

238. Kohler, *supra* note 18, at 226.

purpose of the ECA been "to encourage the formation of unions and to facilitate the settlement of industrial disputes . . . as in the 1894 IC&A Act, there should have been radically different judgements delivered from identical sets of facts" ²³⁹

This article's exploration of how the ECA and NLRA have handled impasse suggests that Foulkes is wrong when she claims that had legislators enacted the ECA with a different purpose courts would have reached different outcomes. Both the ECA and NLRA are clear in their purposes, and their purposes are quite different. Despite this, the courts have interpreted the respective laws to permit the same behavior at impasse. Furthermore, in the case of the ECA, even though the purpose of the statute did not change, the court interpreted it in radically different ways within a very short period of time.

One explanation for this anomaly is that when the courts interpreted the statutes, the judges did so without taking into consideration the stated purposes of either statute. Thus, interpretations of impasse under both statutes demonstrate that even when the legislation sets out a clear purpose, there is no guarantee that judges will conform their interpretations to the law's purpose. As a result, legislators' expressly stating their purpose is no guarantee that courts will reach the outcome the legislators desire. When judges do not use well-established methods of statutory interpretation, then they are more likely to fall prey to prejudices and social pressures which are not supposed to influence them.

The NLRA provides among its purposes the ends of promoting the formation of unions and equalizing bargaining power. Certainly, it does not operate in this way, and one is hard put to find decisions in which the judiciary has resorted to the NLRA's purposes to guide it in its interpretation even when those purposes are on point.²⁴⁰ As a result, the courts have made impasse and implementation so easily available that only a very unusual employer would resist the temptation to force impasse by refusing to compose differences so that it could exercise complete control over the workplace. It is difficult to see how such an outcome promotes the formation of unions and equalizing bargaining power.

The ECA provides that its purpose is to "promote an efficient labour market," yet it is being interpreted without reference to that purpose and

239. Foulkes, *supra* note 236, at 187.

240. In *National Labor Relations Board v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995), the Supreme Court spent some time restating the proper method for legislative interpretation. *Id.* at 454-57.

in ways that ignore it even when it is clearly applicable, as in *Culhane v. Ports of Auckland Ltd.*²⁴¹ In *Culhane*, the employer claimed the right to replace those employees unwilling to accept the offered terms with employees willing to accept these terms.²⁴² This right would allow the efficient ordering of the labor market by permitting changes in accord with market conditions. This would also permit free contracting for labor. Nothing in the ECA's structure²⁴³ or legislative history²⁴⁴ appears to prevent this. The Employment Court refused to accept this argument, and it seems few, if any, employers actually attempted to replace their work forces.²⁴⁵

If legislative purpose means anything, the NLRA and the ECA should have radically different means of resolving impasse. However, the treatment of impasse under the NLRA and ECA belies this common wisdom. Rather than reaching different outcomes, both statutes achieved virtually identical treatment of bargaining impasses by allowing the employer to impose its terms. In coming to this outcome, both betrayed their legislative purposes. The courts betrayed the NLRA's purpose because Congress designed the NLRA to promote bargaining, and implementation denigrates bargaining. The Employment Courts betrayed the ECA's purpose because, rather than a straightforward interpretation that would allow one party to say to the other - if you won't accept my offer I will find someone who will - it tried to reach that end with sophistry, which quickly collapsed.²⁴⁶

241. [1991] 3 ERNZ 497 (1991).

242. *Id.*

243. See *supra* notes 90-101 and accompanying text.

244. See *supra* notes 113-119.

245. The problem with a take it or leave it situation in the labor system is that, while the "take it" part is easy to effect, the "or leave it" aspect is not. Most workers will be unable to leave and thus to exert reverse pressure on the employer to soften its position, even though both know the employer really cannot survive if enough employees were to leave. The workers' needs are more pressing and the negative consequences of leaving more immediate. In other words, if one party is allowed to say "take it" in workplace bargaining, "or leave it" drops out or has no meaning. The dominant party knows that the weaker party—unable to resist or leave—will take it. However, ECA thought assumed the opposite. BROOK, *supra* note 143, at 108; Epstein, *supra* note 143, at 966-67.

246. In certain instances, particularly in the case of duress, the Court was willing to make a more forthright interpretation. Judge Goddard stated:

Many people who enter into contracts are under some pressure to do so arising from a need, real or perceived, to enter into the particular contract or from an irresistible desire to do so Usually where parties enter into contracts with

The disjuncture between legislative intent and bargaining procedure is even greater than permitting two ostensibly different statutes to reach virtually identical processes for dealing with the problem of impasse. Should the ECA's interpretation continue in the trajectory sketched by recent decisions, it may protect the bargaining process better than the NLRA. If the Employment Court finds no substitute for the partial lock-out, New Zealand will have a legal interpretation less hospitable to permitting the employer to impose its will than is the case in the United States. These results seem anomalous and counter-intuitive.

These ironies or failures call into question these anomalous results. One suggestion indicates that convergence of outcomes is likely to occur:

in democratic industrialized nations [because] the institutions subject to legal control, public or private, share basic economic imperatives; if they are to perform their social functions, legal controls must be compatible with those imperatives. Hence the 'null hypothesis,' regardless of national differences in legal methods, demands for security and for economic competitiveness will produce at least rough convergence in outcomes. If convergence is lacking, it should be attributable to cross-national differences in economic resources and constraints.²⁴⁷

This suggests that all laws are rarely an exclusive force.²⁴⁸ Once enacted, labor and employment laws evolve to reflect a broad array of socio-political concerns and law, in terms of statute, is not the sole determinant of labor market outcomes.²⁴⁹

their eyes open as to the consequences of doing so and conscious of their right to refuse there is not only no reason for the courts to intervene but it would be wrong for them to do so.

Adams v. Alliance Textiles Ltd., [1992] 1 ERNZ 982, 1039 (1991), *appeal sub nom. Eketone v. Alliance Textiles (NZ) Ltd., dis'd as moot*, [1993] 2 ERNZ 783 (Ct. App. 1993). Judge Palmer pointed out that the ECA allows employers to negotiate contracts directly with their employees; thus it contemplated each side would seek its own advantage. *Adams*, [1992] 1 ERNZ at 1083-85.

247. Kagan, *supra* note 9, at 37.

248. MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 8 (1994).

249. See Clive H.J. Gilson & Terry Wagar, *The U.S./Canada Convergence Thesis: Contrary Evidence From Nova Scotia*, 50 *RELATIONS INDUSTRIELLES* 66, 66-67 (1995); cf. P.K. Edwards, et al., *Introduction: The Workplace and Labor Regulation in Comparative Perspective*, in *WORKPLACE INDUSTRIAL RELATIONS AND THE GLOBAL CHALLENGE* 3 (Jacques Belanger et al. eds., 1994).

This is not a new insight. In 1935, when Congress first considered the NLRA, it recognized that the strength of a right depended upon the power relationships of those affected by the right and upon the insights and prejudices of those who interpret the right.²⁵⁰ "[S]ome rights in our economic system [are meaningless] unless those to whom the rights belong have the economic power to enforce them."²⁵¹ Inescapably, then, labor law can not be separated from the fabric of its society and from distinctive attitudes towards workers, unions, employers, and the proper means of ordering the workplace.²⁵² "Like family law (from which it developed), labor law deals with messy things like personal relationships and seemingly mundane day-to-day issues."²⁵³ This further suggests that those comparativists who are attracted by discrete features of foreign systems exercise extreme caution. Even painstaking care to import the precise operations of those structures may not yield the same harvest in foreign soil.

Under the ECA, the impact of these social forces on court interpretations has been intriguing, especially given the rapidity with which the Employment Court swung from one interpretation to its opposite and then back again. Speculation suggests several possibilities. The Court may have been sensitive to the severe criticisms made by powerful forces on the Right, particularly the New Zealand Employers Federation and the New Zealand Business Roundtable. It is not possible to know if these influenced the Court in its decision-making. Certainly, the two groups attempted to achieve this end.²⁵⁴

In addition, extra-judicial events starting in late 1993 created pressure to lessen the harshness of the ECA and, perhaps implicitly, its interpretation. On September 21, 1993, the Labour Select Committee issued an assessment of the ECA which admitted to the need for change in certain areas.²⁵⁵ The National Party suffered a serious erosion of power, retaining its majority by one vote. In March 1994, the International Labor Organization found New Zealand to be in violation of Conventions No.

250. For an analysis of these forces on the NLRA, see generally ATLESON, *supra* note 62.

251. NLRB LEG. HISTORY, *supra* note 35, at 315-16.

252. See Fahlbeck, *supra* note 6.

253. Kohler, *supra* note 18, at 224-26.

254. A study of the Labour-Employment Court i (New Zealand Bus. Roundtable & New Zealand Employers Fed'n eds., 1992).

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

87 on the freedom of association and protection of the right to organize and No. 98 on the right to organize and bargain collectively.²⁵⁶ In addition, community values, a century-long tradition of collective bargaining, and habitual ways of thinking about relationships in the workplace may gradually have influenced the judges. Law shapes society. At this time, the laws which preceded the ECA shaped the judges interpreting the ECA; thus, the legal conventions the judges grew up with fundamentally influenced the very terms of their understanding.

The NLRA and ECA help us see how to improve the drafting of labor statutes. One way to ensure divergence from the statutory purpose is for the legislature not to provide processes to resolve problems likely to arise in collective bargaining. Both the ECA and NLRA demonstrate that labor laws must provide explicit means for dealing with the problem of bargaining impasses. Without distorting its fundamental nature, the NLRA can easily borrow procedures from similar systems, including fact finding, conciliation, mediation or interest arbitration. The ECA does not have other systems to turn to because it is so novel. The impasse resolution method which seems to flow from the ECA would be to permit employers to replace workers or workers to replace an employer who is unwilling to agree to the terms offered. The problem with this, as five years' experience demonstrates, is that employers and employees try to avoid this result as much as possible.

In both the United States and New Zealand, even those actively involved in labor issues often fail to appreciate the interplay and roles of statutory and common law. This failure has potentially serious consequences. It is not uncommon to hear trade unionists and their supporters argue that it is statutory law which fetters them and prevents them from being the powerful organizations they otherwise might be. For example, Richard Trumka (now vice-president of the AFL-CIO) testified before Congress, stating:

I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to the gulag of section seven rights—the Reagan NLRB. Unions will no longer foster the false expectations attendant to the use of the Board processes and will be compelled to make more fundamental appeals to workers. These appeals will inevitably have social and political dimensions beyond the workplace. That is the price we pay, as a society,

256. INTERNATIONAL LABOUR ORGANIZATION, 292ND REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, Case No. 1698, ¶¶ 724-740 (Mar. 1994).

for perverting the dream of the progressives and abandoning the rule of law in labor relations. I have a profound faith in the judiciary and jury system as it exists at common law. It has been the enduring bulwark against biased decision making by 'experts.'²⁵⁷

One who had examined the development and impact of the doctrine of impasse and implementation would have been a little less eager to turn to the judiciary. It is the courts, the ones in whom Trumka places his faith, whose interpretations created the doctrine and thus subverted the NLRA's support for collective bargaining. Advocating a repeal of the NLRA so that the courts can reinvigorate unions thus is a dangerous delusion, a failure to face realities of law.²⁵⁸

Unions and their supporters must face the pivotal and distorting role played by impasse and implementation in collective bargaining. Until an employer's ability to implement at impasse is removed, United States labor will continue to decline. Such a change will not be easy. Not only must labor fundamentally revise its own thinking in this area, it must contend with powerful arguments in support of the doctrine. For everyone who believes that implementation upon impasse cannot be justified as a functional part of collective bargaining, there are those who accept it as playing a key role in promoting balance in bargaining.²⁵⁹

For those in New Zealand, the issue of impasse is currently undeveloped and little studied. At this time, many may rejoice that the Employment Court decides cases in a more humane way and with greater allegiance to the traditions of the country. However, as the ILO noted in the report it issued after visiting New Zealand to consider the impact of the ECA, the basic structure of the statute is fundamentally unfriendly to

257. Trumka, *supra* note 39, at 871.

258. The conclusion, rarely stated, but which must be manifest is "that history shows the dependence of unions on the legal environment for their success. For example, private sector unions did not become a generally powerful source in the economy until the Wagner Act was passed and evidence suggests that legal rules substantially affect the economic success of unions." John Delaney & Marick Masters, *Unions and Political Action*, in *THE STATE OF THE UNIONS* 313, 340-41 (George Strauss et al. eds., 1991).

259. See, e.g., *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, ___ U.S. ___, 116 S.Ct. 2116 (1996) which descends from a long line of thought that the natural state of the workplace is for management to manage and that anything which prevents this is dangerous. See Northrup, *supra* note 152, at 118. Northrup views Boulwarism as a benign practice. He saw as positive the provision in section 8(d) which freed management from the requirement to make counter-proposals, as opposed to just listening to union demands. *Id.* at 109.

collective bargaining.²⁶⁰ Even if the ECA demonstrates that a statute can survive an interpretation at odds with its basic purposes, it does not demonstrate that this leads to happy results.

CONCLUSION

When people examine the problem of impasse, as it is interpreted by the judiciary and applied in practice, it becomes easy to see that trying to understand a system by looking only at statutory language is at best a sterile exercise. Legislation, such as the ECA or NLRA, appears functional on paper. However, over time, they developed in such a way that their operation reveals a collapse in their most fundamental principles. In the cases of the ECA and NLRA, judicial interpretations of their bargaining provisions offer intriguing insights into the “negotiation of disagreement” and, in each case, drive home the lesson that law cannot be separated from its full social and judicial contexts.

260. The ILO's Committee on Freedom of Association found the ECA's failure to promote collective bargaining was incompatible with ILO principles. INTERNATIONAL LABOUR OFFICE, 295TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, Case No. 1698, ¶¶ 254-255 (Nov. 1994).