

# Union 'Representation' Is Foisted On Workers -- Not Vice-Versa



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**NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH**

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# Union 'Representation' Is Foisted On Workers -- Not Vice Versa

Big Labor propoganda against Right to Work laws and legislation often implies, and sometimes claims flat out, that federal labor law "forces" union officials to negotiate contract terms for employees who choose not to join a union.

For example, a one-page anti-Right to Work screed that was recently published in the AFL-CIO's national newsletter brazenly contends:

"By [federal] law, unions must represent all workers – members and nonmembers – in contract negotiations and other workplace issues."<sup>1</sup>

On its face, this claim is simply false.

As *Roberts' Dictionary of Industrial Relations*, a basic reference book for any student of U.S. labor law, shows clearly, nothing in federal law prevents union officials and employers from negotiating contracts in which "the employer recognizes the union for its members only."

Under the entry: "Bargaining Agent, for Members Only," *Roberts' Dictionary* even offers a sample members-only contract clause: "The employer recognizes the union as the collective bargaining agency for all of its employees who are members of the union on all matters affecting those employees who are members."<sup>2</sup>

## **Former Pro-Big Labor NLRB Chairman Admits: The Law 'Permits 'Members-Only' Bargaining'**

In his 1993 book *Agenda For Reform*, Stanford law professor and former union lawyer William Gould, who went on to serve for four years as the Clinton-appointed Chairman of the National Labor Relations Board (NLRB),

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<sup>1</sup> "'Right to Work' States Are Really Restricted Rights States," [America@Work](#) (AFL-CIO), February 2003, p. 21.

<sup>2</sup> Harold S. Roberts, *Roberts' Dictionary of Industrial Relations: Revised Edition*, Bureau of National Affairs, Washington, D.C., 1971, p. 45.

acknowledged that federal law "permits 'members-only' bargaining without regard to majority rule or an appropriate unit and without regard to exclusivity."<sup>3</sup>

The permissibility of members-only bargaining does not rest solely on the expert testimony of Roberts and Gould. The U.S. Supreme Court has repeatedly recognized members-only contracts as legal and binding.

For example, in delivering the opinion of the court for the 1938 case *Consolidated Edison Co. v. NLRB*,<sup>4</sup> Chief Justice Charles Evans Hughes was crystal clear:

Under Section 7 [of the National Labor Relations Act] the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the [International] Brotherhood [of Electrical Workers union] and its locals had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining.

On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. . . . Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were in the minority, clearly had the right to make their own choice.

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<sup>3</sup> William Gould, *Agenda for Reform: The Future of Employment Relationship and the Law*, MIT Press, Cambridge, Mass., 1993, p. 164.

<sup>4</sup> 305 U.S. 197.

Twenty-three years later, the Supreme Court resoundingly confirmed that members-only bargaining has remained permissible under the National Labor Relations Act (NLRA) since the substantial amendments of 1947 and 1959.

In 1961's *International Ladies' Garment Workers' Union v. NLRB*,<sup>5</sup> the Court found that recognizing a minority union as an exclusive representative violated the NLRA as amended by 1947's Taft-Hartley Act, but also found that bargaining with a members-only union would not violate the amended NLRA if there were no exclusive representative.

The following year, Justice William Brennan voiced the opinion of the unanimous Court in *Retail Clerks v. Lion Dry Goods*<sup>6</sup> that members-only contracts are enforceable in federal court:

Section 301(a) of the Labor Management Relations [Taft-Hartley] Act, 1947, which confers on federal district courts jurisdiction over suits "for violation of contracts between an employer and a labor organization representing employees in an industry affecting" interstate commerce, applies to a suit to enforce a strike settlement agreement between an employer in an industry affecting interstate commerce and local labor unions representing some, but not a majority, of its employees.

The term "labor organization representing employees," as used in 301(a), is not limited to labor organizations which are entitled to recognition as exclusive bargaining agents of employees.

The precedents are very plain that, contrary to union officials' claims, federal law entitles them to negotiate members-only contracts.

So why is it that in recent decades union officials have ceased to bargain contracts covering only union members, and instead demand that every contract

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<sup>5</sup> 366 U.S. 731.

<sup>6</sup> 369 U.S. 17.

with an employer recognize one union as the "exclusive" bargaining agent for members and nonmembers alike?

The fact is that monopoly-bargaining privileges, which are granted to union officials by federal law and often euphemistically referred to by them as "exclusive" representation, are something they deeply covet.

"Exclusive" representation gives union officials uncontested power to negotiate over pay, promotions, work rules, and layoffs for all workers in a bureaucratically-determined "unit."

Under "exclusive" representation, union nonmembers cannot bypass the union and bargain on their own behalf, even if they have good reason to believe they could get a better contract that way.

The Supreme Court acknowledged in the 1944 *J.I. Case* decision<sup>7</sup> that many workers could get better pay and benefits by bargaining individually, but found that federal labor law would not permit such bargaining without union officials' consent. The "practice and philosophy of collective [monopoly] bargaining looks with suspicion on such individual advantages," explained the Court opinion.

Even where an "exclusive" bargaining contract does not include any provision authorizing the forced collection of dues from nonmembers, or where such provisions are out-and-out forbidden by a state Right to Work law, "exclusivity" is an effective tool for corralling employees into a union.

But the fact that the law empowers union officials to seek and obtain monopoly-bargaining privileges in no way means that a union may not alternatively seek to be recognized as the bargaining agent only for its members employed at a particular enterprise. Moreover, there is nothing in the law to prevent a union that already has an "exclusive" bargaining contract to renounce that privilege and seek to bargain for its members only.

At least since the 1960's, union officials have apparently never taken advantage of these options, because a monopoly is what they have decided they want.

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<sup>7</sup> 321 U.S. 332 (1944).

## Repealing Government-Authorized 'Exclusive' Bargaining Helped Boost Economies of New Zealand, Australia

For the past seven decades, U.S. labor law has exhibited such a profound bias in favor of union monopoly, and so thoroughly reinforced union officials' self-serving claims that monopoly unionism is the only kind of unionism talked about, that the very idea of members-only bargaining may seem odd to some Americans.

However, in recent years even some pro-Big Labor academics and retired union officials have admitted they doubt whether workers benefit from the monopoly-bargaining system.

Writing in the normally rabidly pro-forced unionism journal *WorkingUSA*, law professor James Pope, former local textile workers union boss Peter Kellman, and former electricians union national organizing director Ed Bruno acknowledged that monopoly bargaining constricts workers' freedom:

Under Section 9 of the NLRA, . . . [t]he presence of a majority union extinguishes the right of dissenters to bargain as individuals or to form their own, minority unions. . . . [T]houghtful, pro-union . . . analysts contend that when a majority union is insulated against competition, its officers may tend to ignore the interests of minorities. . . .

[T]he fact that the overwhelming majority of industrial countries reject exclusive representation . . . should give us pause. At a minimum, we should reassess our commitment to the principle, and consider possible alternatives and modifications that might better serve labor freedom.<sup>8</sup>

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<sup>8</sup> James Pope, Peter Kellman, and Ed Bruno, "Toward a New Labor Rights Movement," *WorkingUSA*, Spring 2001, pp. 8-33.

At least since the collapse of the Soviet Empire more than a decade ago, members-only bargaining has in fact been by far the predominant form of unionism on the world scene.

And since 1991, at least two Free World countries that formerly authorized "exclusive" bargaining, New Zealand and Australia, have switched to systems in which individual workers may bargain for themselves. Both countries enjoyed above-average growth in production, productivity, and personal income in the years after they made the change.<sup>9</sup>

Even without a legal change similar to those experienced by New Zealand and Australia, U.S. union officials could engage in members-only bargaining now if that were what they wanted. International experience shows that it is a viable alternative.

**'Aims of the Unions Do Not  
Justify Their Exemption from  
The General Rules of Law'**

Therefore, union officials' argument that state Right to Work laws allow union nonmembers a so-called "free ride," and unions have no choice but to bargain on such nonmembers' behalf, is simply phony.

In fact, under America's biased labor law the millions of union-"represented" workers who are not union members, or have joined only under the duress of a compulsory-unionism contract clause, are best described as "captive passengers." No matter how deeply convinced such workers are that union monopoly bargaining is to them a detriment, not a benefit, they cannot refuse it without also giving up their jobs.

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<sup>9</sup> For information on New Zealand, see, e.g., Wolfgang Kasper, "Free to Work: The Liberalization of Labor Markets in New Zealand," on pp. 149-214 in *Unions and Right to Work Laws: The Global Evidence of Their Impact on Employment*, edited by Fazil Mihlar, The Frazer Institute, Vancouver, Canada, 1997. In 2000, a pro-Big Labor government revised New Zealand's labor law, but retained protection for the individual employee's freedom to negotiate his or her own contract even in a unionized workplace.

The Australian Workplace Relations Act of 1996 banned compulsory unionism and also empowered individual employees to opt out of Big Labor-dictated contracts and instead negotiate directly with their employer.

For concise information on Australia's economy after 1996, see Australian Department of Transport and Regional Services, "Stronger Regions, a Stronger Australia: Our Work So Far," last updated September 20, 2002, ([http://www.dotars.gov.au/regional/statement/our\\_work.htm](http://www.dotars.gov.au/regional/statement/our_work.htm)).



Existing federal labor policy was not designed to be even-handed.

It is based on the premise that the public interest is best served by collectivizing working people – by forcibly organizing them into unions. As a result, labor law is written to place the power of government on the side of the union organizer and against the independent citizen.

In *The Constitution of Liberty*, the late Nobel Laureate economist Friedrich von Hayek tersely summed up union bosses' privileged status since the New Deal: "The present coercive powers of unions thus rest chiefly on the use of methods which would not be tolerated for any other purpose and which are opposed to the protection of the individual's private sphere."<sup>10</sup>

Removing the federal sanction for monopoly bargaining while safeguarding employees' freedom to form unions that represent their members only would subject union officials to the same rules that already apply to officers of other private groups and return personal freedom to the workplace.

In a truly free society, the individual bargaining that takes place in nonunion workplaces and members-only union bargaining would compete on a level playing field, and each employee could determine which system is best suited to his or her needs. But there would be no place at all for government-authorized monopoly bargaining.

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<sup>10</sup> F.A. von Hayek, *The Constitution of Liberty*, University of Chicago, Chicago, 1960, p. 274.

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### THE PROBLEM

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Organized labor has had a profound economic and political impact on the institutions of American power. Yet the far-reaching ramifications of that impact are largely unknown to the public. Academic interest in labor unions and labor relations is at its lowest point in decades.

While there has been a notable proliferation of private interest groups in recent years, none has exposed the excesses of America's union establishment from an academic perspective. Consequently, not enough light has been shed on one of the few remaining forms of tyranny left in America: compulsory unionism.

### THE NEED

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Labor policy in America has not reflected the will of its citizenry for decades because Big Labor's support in the academic community has allowed it to control debate. As a result, labor unions have not been subjected to the same degree of scrutiny as their counterparts in the corporate world.

In many cases, the interests and concerns of Americans who support the right to work without compulsion are ignored for lack of an academic support structure. Freedom of association has diminished because its proponents frequently are without the analysis and research necessary to effectively make their case.

Obviously, there is an urgent need for an organization that will draw together scholars and economists to perform objective and revealing research into the practices of America's labor unions. The National Institute for Labor Relations Research is such an organization.

### THE PROGRAM

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1. The Institute's primary function will be to act as a research facility for the general public, scholars and students. It will provide the supplementary analysis and research necessary to expose the inequities of compulsory unionism.

2. It will publish monographs, brochures and briefing papers designed to stimulate research and discussion with easy-to-read summaries of current events. The Institute will also conduct nonpartisan analysis and study for the benefit of the general public.

3. It will render aid gratuitously to individuals suffering from government over-regulation of labor relations and will provide educational assistance to those individuals who have proved themselves worthy thereof.

It is high time that self-interested union officials be confronted with the facts on how their brand of unionism has failed to improve general conditions for workers. With an intensive program of study and education, the National Institute for Labor Relations Research intends to do just that.

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