Roger C. Hartley, *Fulfilling the Pledge: Securing Industrial Democracy for American Workers in a Digital Economy*. Cambridge, Massachusetts, London England, The MIT Press, 2023, pp. x + 296, ISBN: 97802062547130, US $45.00 (paperback)

> It is hereby declared to be the policy of the United States to . . . encourage[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
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> Section 1, National Labor Relations Act (1935).

Roger C. Hartley's *Fulfilling the Pledge* provides a meticulous examination of how the *National Labor Relations Act* has been used to thwart its ostensible policy of 'protecting' the 'freedom of association' of workers and the 'practice' of collective bargaining. To be clear, the 'practice and procedure of collective bargaining' is dependent on employers and unions being prepared and willing to participate in collective bargaining. If either, or both, parties are disinclined to participate, then collective bargaining, ipso facto, will not occur. This is what has happened in the United States. The overwhelming majority of employers and/or corporations have not wanted to collectively bargain with unions. The history of American industrial relations, both before and after the passage of the *National Labor Relations Act 1935*, has been one of employers/corporations resisting the formation of unions, ignoring them if and when formed and being unwilling to bargain with unions and their members.

As of January 2023, only 10 per cent of the American workforce (private sector 6.0 per cent, public sector 32.5 per cent) were members of unions (Bureau of Labor Statistics 2024). In 1935, when the *National Labor Relations Act* was passed, 6.9 per cent of the workforce were unionised (Gitlow 1963, 70). While the ostensible 'policy' of the United States has been/is one of collective bargaining, its 'practice' has been the antithesis of collective bargaining; an admixture of *laissez faire,* individual bargaining, monopsony, unilateral determination by corporations/employers and neoliberalism. Given this, it is difficult to escape the conclusion that the *National Labor Relations Act* which has been in operation for almost 90 years has been a failure; some may say, a complete failure.

Roger C. Hartley's *Fulfilling the Pledge* provides a thorough examination of how corporations/employers have thwarted the objects of the *National Labor Relations Act* and canvasses recommendations to overcome these weaknesses/problems (also see Gould 2022). Corporations/employers have used a variety of tactics to undermine the legislation. They have convinced Congress to alter the legislation and have Republican administrations appoint persons to the National Labor Relations Board (NLRB), which administers the Act, to make rulings which hamper the ability of unions to operate and enter into collective agreements. One of the constant themes raised by Hartley is that changes in administrations swing 'the labour law pendulum' one way and then the other in aiding/reducing the ability of unions and corporations/employers to pursue their goals.

Corporations/employers have also convinced courts and regulatory agencies to operate in their favour and to drag out proceedings with lengthy hearings and delays. They have used 'unfair labor practices' – such as dismissing leading union activists – and/or simply defying decisions not to their liking. The point of dragging out proceedings, which can last up to three or more years, is to lower the morale of workers seeking to unionise and obtain a collective deal. Whatever momentum the union developed in initiating its organizing campaign dissipates, with the workforce losing confidence in the ability of the union to obtain improvements to their wages and working conditions. The major strength of Hartley's *Fulfilling the Pledge* is his detailed forensic examination of how the *National Labor*

Relations Act has been used to thwart its ostensible policy of 'protecting' the 'freedom of association' of workers and the 'practice' of collective bargaining.

Fulfilling the Pledge is organised into three broad sections. The first is a general discussion of the current low levels of unionization in America, coupled with a broad history of American industrial relations incorporating the opposition of 'bosses' to unions and collective bargaining. This is followed by an extensive analysis of how the *National Labor Relations Act* creates obstacles to workers' desire to form unions and to their ability to negotiate collective agreements, respectively. He provides extensive analysis of the twists and turns in changes to legislation and the decisions of the NLRB and the courts. His notes and bibliography run to over 80 pages and provide an invaluable source for those who would wish to pursue these issues in greater detail.

Fulfilling the Pledge includes an Appendix, *Protecting the Right to Organize Act of 2021* (pp. 191-201), which is designed to overcome problems with the *National Labor Relations Act*. The Act failed to receive endorsement in the United States Senate (p. 204). It is recommended that it should be read first as it provides a more than useful introduction to the material contained in *Fulfilling the Pledge.* Given the extent, breadth, and complexity of the issues examined by Hartley, only three will be considered here to illustrate his approach to American labour law. They are the definition of an employee, 'captive audiences', and 'replacement workers'.

The *National Labor Relations Act* of 1935 excluded agricultural workers and domestic servants from the definition of persons who could be regarded as employees and hence from its protections (NLRA 1935, sec 2 (3)). These types of work were/are mainly performed by persons of colour and women, especially domestic work. Hartley says that these exclusions were needed to gain the support of Southern members of Congress to secure passage of the Act. He adds, this 'legacy of racism undergirding the NLRA's original exclusions continues today' (p. 64; for an examination of agricultural work see Saxton 2021). He singles out home care workers, who number somewhere between 700,000 and 1.5 million, mainly women of colour who are poorly paid, rarely provided with health insurance, retirement, and related benefits because they were/are denied coverage under the Act.

In 1947, the Act was amended to exclude independent contractors and supervisors from coverage (NLRA 1947, sec 2 (3)). Hartley points to approximately 1.8 million child care workers who are classified as independent contractors who have suffered much the same fate as home care workers (p. 65). The 1947 legislation has provided a powerful incentive to classify workers as independent contractors. Somewhere between 10 and 20 million workers are classified this way (pp. 68-69). Unsurprisingly, the issue has been highly litigated with extensive discussions, especially following the rise of platform economy companies with their penchant for outsourcing work, associated with the traditional 'power indices' used to distinguish employees from independent contractors.

Hartley endorses the 'ABC test' contained in *Protecting the Right to Organize Act of 2021.* It states that the definition of employee should to amended '

> . . . to clarify that an individual performing any service is an employee and not an independent contractor unless
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> (A) the individual is free from the employer's control in connection with the performance of the service, both under the contract for the performance of the service and, in fact,
> (B) the service is performed outside the usual course of the business of the employer, and
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the surface performed (p. 76).

Employers of nurses have sought to avoid coverage of the *National Labor Relations Act* by classifying them as supervisors. It is claimed that a nurse who may perform a small part of their workload in a supervisory role – for as little as one hour of their shift – is a supervisor; a view which has been endorsed by the NLRB (Oakwood Healthcare 2006). Hartley reports this decision not only negatively impacts on nurses, one of the professions with high levels of employment growth, but potentially up to 30 per cent of the workforce. (p.83). He recommends that Congress should change the definition of supervisor to where such 'activities must be executed for a majority of the individual's work time' (p. 84; NLRA 1947, sec 2 (11)).

The NLRB holds elections to determine whether or not a majority of employees in a bargaining unit wish to be represented by a union (NLRA 1935, sec 9). The legislation has been so interpreted to allow employers to participate in these elections by the use of 'captive audience meetings' (and one-on-one interviews of employees by supervisors) to persuade employees to vote no in such elections. Workers who do not attend such meetings during paid work time, leave the meeting, and 'who insist on participating by asking questions or manifesting disagreement with views being force-fed to them' can be dismissed (p. 130; Litton Systems Inc 1968; NLRB v Prescott Industrial Products Company 1974: J P Stevens & Co. Inc 1975: J P Stevens & Co. v Textile Workers Union 1976; Prescott Industrial Products Company 1973; F W Woolworth Co. 1980; Bonwit Teller Inc 1959). Hartley says

> It is not unprecedented for an employer to lock all the exits at the workplace during a captive audience meeting and physically restrain those attempting to leave . . . The NLRB and the courts have found nothing incongruous between such forced anti-union indoctrination at the workplace and our national labor policy's commitment to employees free choice regarding union representation (p. 130).

He recommends legislation should be enacted to stop employers from compelling employees to attend such meetings. To the extent that employees may wish to express their views on the union election they can communicate such information through other channels such as emails, texts, letters to employees' homes, newspaper advertisements, and so on (p. 131).

Section 7 of the National Labor Relations Act states

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively* through representatives of their own choosing and to *engage in other concerted activities for the purpose of collective bargaining* or other mutual aid or protection (emphasis added, NLRA 1935, sec 7).

Section 8 states

> (a) It shall be an unfair labor practice for an employer – to interfere with, restrain or *coerce* employees in the exercise of the rights guaranteed in section 7 (emphasis added, NLRA 1935, sec 8).

And Section 13 states

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right (NLRA, Section 13).

Very early after the passage of *The National Labor Relations Act*, the Supreme Court upended the ability of unions to use strikes as a means to obtain collective bargaining agreements

and/or concessions. In *Mackay Radio*, a decision handed down in 1938, the Supreme Court enabled employers to permanently replace workers who participate in a strike (NLRB v Mackay Radio & Telegraph Co. 1938; also see Getman 2016). This decision has had a chilling effect on both strikes with employees fearing the *permanent* loss of their employment and on collective bargaining as unions and employees are denied the ability to use, or threaten to use, strikes as a weapon to gain improvements to wages and other entitlements. Hartley recommends legislation should be passed to deny employers the ability to replace striking employees (p.166).

Roger C Hartley's *Fulfilling the Pledge: Securing Industrial Democracy for American Workers in a Digital Economy* provides a detailed and clear analysis of a wide range of legal issues associated with the operation of labour law and industrial relations in the United States. He is in command of both the case law and secondary literature on these issues. It constitutes an example of outstanding legal scholarship and is not only recommended for those with an interest in issues germane to the United States but also those with a broader interest in the linkages between law and the world of work.

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Funding statement. The author received no financial support for the research, authorship, and/or publication of this book review.

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