The Journal of Private Enterprise 28(2), 2013, 1–21

American Unionism and Freedom of Association

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Abstract
Correctly understood, Person A's freedom of association is the right to associate with any other person (or group of persons) *who is willing to associate with Person A*. Any association not based on mutual consent is a forced association.

Many union apologists speak of "labor rights" rather than human rights, and include in labor rights, rights that other humans do not have. Moreover, in their understanding, labor rights and "union rights" are the same. They are wrong on both counts.

Two federal laws—the Norris LaGuardia Act (NLA, 1932) and the National Labor Relations Act (NLRA, 1935, amended 1947)—violate both workers' and employers' freedom of association. One way the NLA does so is by banning union-free hiring contracts. The principal way the NLRA does so is by imposing exclusive representation rules on American employers and workers. Another is its imposition of mandatory good faith bargaining. (There are other examples, but I will not discuss them here.)

Actions taken by unions under the NLRA go further to abrogate both worker and employer freedom of association. Especially important here are constant attempt by unions to force employers into "neutrality" agreements through "corporate campaigns." It is all an illicit effort to silence employers during union organization campaigns.

Some academic union apologists claim that the NLRA is too weak to protect workers' freedom of association. To do so, they assert, US law must comport with Article 20 of the UN Declaration of Human Rights and International Labor Organization Conventions 87 and 98. But a correct understanding of those documents belies their claims.

The 2011 Employee Rights Act now in committee in both houses of Congress would ameliorate some of the trespasses against freedom of association in American union law, but it does not go far enough. The best parts of New Zealand's 1991 Employment Contracts Act point to more effective defenses of freedom of association.

JEL Codes: J41, J58, J83
Keywords: Freedom of association; Voluntary exchange; Forced unionism

I. Freedom of Association and Labor Rights

A. What Is Freedom of Association?

Freedom of association is a fundamental human right, "fundamental" because it doesn't come from government or any international agreements. All persons are endowed with freedom of association by virtue of their humanity. It is an unalienable right, a birthright of all people.

Logically, because all persons are endowed with freedom of association, its application in practice must have two parts. Person A is free to associate with any other person (Person B) or group of persons. This is often called the "positive" aspect of freedom of association. But suppose Person B does not want to associate with Person A. If Person A's positive freedom of association confers on Person B the duty to associate with Person A, Person B does not have freedom of association. Person B's association is compelled. Correctly understood, Person A's positive freedom of association is the right to associate with any other person (or group of persons) *who is willing to associate with Person A*.

Both Person A and Person B have a right to decline association with each other and with anyone else. This is often called the "negative" aspect of freedom of association. It gives each person the right to say "no." *Free association requires mutual consent*.

There are not two freedoms of association, one positive the other negative. Rather, there is one freedom of association that, to make sense, must include the right to accept and the right to reject association. Logically, no person can legitimately hold that there is a positive freedom of association but that there is no negative freedom of association.

B. Human Rights and Labor Rights

There are no fundamental labor rights apart from the fundamental (birthright) human rights possessed by all persons. In societies based on status or castes, some humans are granted rights that are denied to other humans, and some groups are granted rights that are denied to other groups. But, in the United States, our rights as individuals or in groups do not depend on who we are or how we make a living. When it comes to interacting with each other, the fundamental rights of labor (including freedom of association) are the same as the fundamental rights of entrepreneurs, investors, suppliers, and customers. Those rights are best encapsulated in the rules of

voluntary exchange: all legitimate interactions are based on mutual consent in the absence of force and fraud. Any voluntary exchange between Person A and Person B that does not trespass against the equal rights of any third party is legitimate, no matter what any third party (e.g., a union apologist) may think.

Those who write about "fundamental labor rights" in labor markets as something different from the rights that all persons have in their market interactions with each other often do so on the spurious grounds that labor is not a commodity. They argue that buying and selling of dead fish under the rules of voluntary exchange is okay because a dead fish is a commodity. But, they continue, "labor" is people, and, therefore, the ordinary buying and selling of labor must be circumscribed by special rules.

But "labor" is not people. In the labor market people are not bought and sold. Rather, labor—the services performed by people on the basis of the skills, knowledge, experience, attitudes, and aptitudes (human capital) they possess—are bought and sold. Buyers of such services are called employers, and sellers of those services are called employees. There is no reason at all to step outside the rules of voluntary exchange in labor markets.

Craig Becker, the former Associate General Counsel of the Service Employees International Union and in 2011 a Member of the National Labor Relations Board by virtue of a recess appointment, opines that workers should not be free to choose not to be represented by a union (Becker, 1993). To him the only labor rights that any worker can have are those that are exercised on his behalf by a labor union. He is simply wrong. Forced association is inconsistent with free association. Freedom of association, correctly understood with both its positive and negative aspects, demands that all workers be free to choose whether to exercise their labor market rights through union representation or through abstention from association with labor unions.

II. The Norris-LaGuardia Act (NLA) and the National Labor Relations Act (NLRA) on Freedom of Association

A. The Norris-LaGuardia Act

In *American Steel Foundries v. Tri-City Central Trades Council* [257 U.S. 184 (1921)], the Court held that (a) mass picketing, even in primary strikes, and even if peaceful, was inherently intimidating, so picketing must be limited to one picket per entrance; (b) pickets had

to be actual employees on strike; they could not be strangers sent from union headquarters or anywhere else; and (c) the right to conduct a business is a property right, entitled to the same protection against trespass as any other property right. This decision was made on statutory grounds (interpreting the 1914 Clayton Act), so Congress could reverse it simply by adopting another statute or amending an existing one. Unions tried to get Congress do so throughout the 1920s. They were not successful until1932, when Herbert Hoover, trying frantically and fecklessly to do something about the beginning of the Great Depression, made yet another colossal blunder by signing the NLA.

One important feature of the NLA with respect to freedom of association is its declaration that union-free (yellow-dog) hiring contracts were henceforth to be unenforceable in federal courts. A union-free contract is an agreement between an employer and a worker that, as a condition of obtaining and continuing employment, the worker will abstain from any involvement with a labor union. Unions, of course, abhor such hiring contracts. They coined the term "yellow-dog" to imply that any worker who entered into such an agreement was cowardly and a traitor to the working class. But a worker who agrees with an employer to enter into a union-free hiring contract is simply exercising his freedom of association.

Under the rules of voluntary exchange—mutual consent in the absence of force and/or fraud—an employer can make any job offer to any worker who is willing to listen. A job offer consists of terms of compensation and a job description. The job description includes the time, place, and manner rules in accordance with which the worker works. These rules include what must be done and what must not be done. A rule that requires a worker to remain union-free is merely part of the job description. As long as there is no misrepresentation and the worker is free to accept or reject the job offer, no one's human rights are violated. This is true even if there are no competing job offers for the worker to consider. A worker may count the union-free requirement as a negative, but if he accepts the job offer, it must be that he is willing to trade that negative off against other components of the job offer he finds attractive.

In fact, as revealed by the record in *Hitchman Coal and Coke Co. v. Mitchell* [245 U.S. 229 (1917)], sometimes employees themselves asked their employers for union-free agreements as a way of insulating themselves from union harassment. In its decision the Court wrote,

"[T]he employer is as free to make non-membership in a union a condition of employment, as the workingman is free to join the union, and … this is a part of the constitutional rights of personal liberty and private property…." [at 251]. This was when the Court still enforced the understanding of rights as enunciated in the *Declaration of Independence*—that rights are antecedent to government and it is the duty of government to enforce those rights rather than to create new privileges for some to coerce others.

B. The National Labor Relations Act

1. Union-Free Contracts

In 1935 the NLRA compounded the yellow-dog error by making union-free contracts illegal. Section 8(3) [which became Section 8(a)3 in the 1947 amendments] forbids employers to refuse to hire any worker simply because he is a union member. That would be illegal "discrimination."

A union apologist would argue that when an employer refuses to hire a worker who is a union member, that worker's freedom of association is denied. But workers have no human rights that employers do not have. Workers are free to associate with other workers in unions. But no worker, whether unionized or not, has the right to force an employer to associate with him in any way, including the form of association we call a hiring contract. Free association among two or more people can emerge only through mutual consent. Employers and employees alike should be free to choose whether to work on a union-free, union-only, or open shop basis.

2. Exclusive Representation

The most egregious trespass against freedom of association in the NLRA is imposed by Section 9(a), which mandates that employers must recognize a union as the "exclusive bargaining agent" of all workers in a "bargaining unit" if a majority of such workers vote in favor of such representation. Exclusive representation violates the freedom of association of employers and employees alike.

Employers are people, and workers are people. Both have the same unalienable right to freedom of association. People are free to associate with other people who are willing to associate with them. An employer is free to choose to recognize a union as the bargaining agent for all of its voluntary members, but he cannot legitimately be forced to do so. Forced association is not free association.

Exclusive representation also violates workers' freedom of association. If, in a certification election, a majority of workers in a bargaining unit vote to be represented by Union A, then all the workers who were eligible to vote must submit to those representation services. Union A, by force of law, represents the workers who voted for it, but it also represents the workers who voted for another union, the workers who voted to remain union-free, and the workers who did not vote. It is a winner-take-all election rule. Individuals are prohibited even from representing themselves on terms and conditions of employment and other matters that come under "the scope of collective bargaining." Employers may not deal directly with individual workers. Individual workers have no voice. Only a certified union may speak. Except in the case of unanimity among workers in favor of being represented by a union, exclusive representation forces workers into associations.

Unionists justify exclusive representation by analogy to elections of politicians. In a congressional election, the winning candidate is the exclusive representative of all voters in the district. Those who voted against her and those who didn't vote must accept the winning candidate as their exclusive representative in the House of Representatives. By analogy, unionists argue, it is proper to force all workers to accept the representation services of a union selected by majority vote. It is simply "workplace democracy." Curiously, once a union is certified it never has to stand for re-election. Some democracy! I will have more to say about this below.

Unions are not governments. The Framers of the Constitution drew a bright line separating rules for decision-making in government and rules for decision-making in the private sphere of human action. Governments are natural monopolists of the legal use of force in their respective jurisdictions. Like all monopolists, they are prone to abuse their power. Democracy is a means by which the governed have some (very imperfect) control over those who wield governmental power. According to the Framers, it is legitimate to override individual preferences by majority rule only with respect to the enumerated, limited powers of government. Everything else should be left to individuals to decide irrespective of what a majority of others may prefer. An individual is not forced to submit to the will of a majority in the choice of religion, nor should he be in the choice of a representative in the sale of his labor services.

Exclusive representation means that the percent of workers who are union members is always less than the percent of workers who are covered by union contracts. The top line in Figure 1 indicates the percentage of private-sector workers who are covered. The bottom line shows the percent of private sector workers who are union members. The vertical difference between the two lines is a measure of this sort of forced association. This is one, imperfect, measure of one type of forced association in American unionism. It may overstate forced association because many non-members may indeed favor union representation but prefer not to become members. On the other hand, it may understate forced association because many who are members are forced into membership through intimidation and peer pressure. This is especially true in the private sector. Figure 2 shows the same measure of forced association among government employees over the same years.

If we divide the percent of all workers who are covered by a union contract by the percent of all workers who are members of a union in each year, we get the percent by which coverage exceeds membership—the relative significance of forced association. For example, in 2011 the percent covered in the private sector was 7.6%. The percent membership in the private sector was 6.9%. Dividing the former by the latter we get 1.11. The relative significance of forced

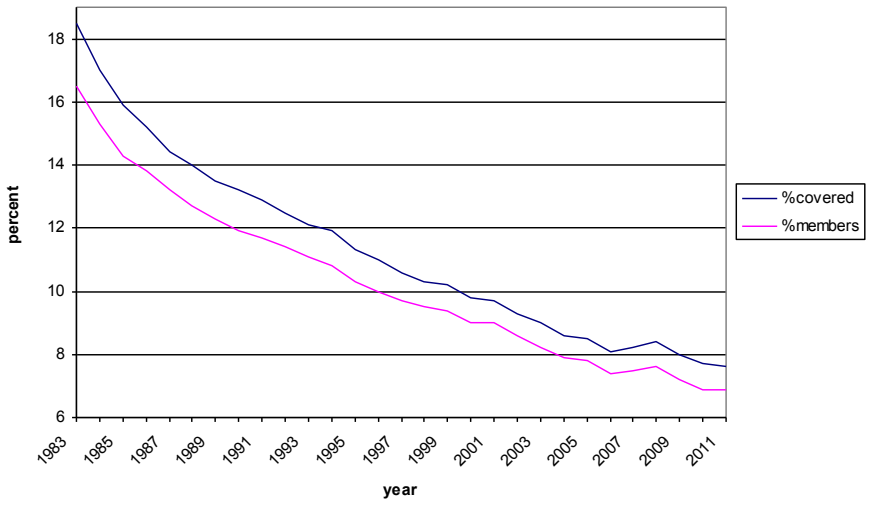

Figure 1: Private forced association, 1983–2011. Source: Hirsch and Macpherson (2012), http://www.unionstats.com.

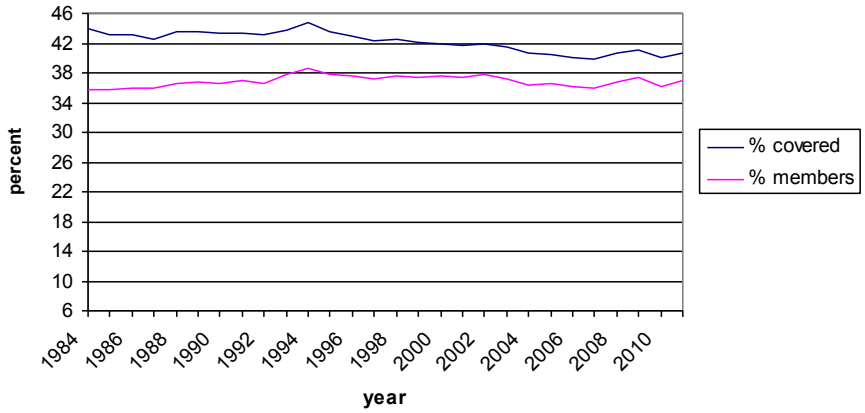

Figure 2: Government forced association, 1983–2011. Source: Hirsch and Macpherson (2012), http://www.unionstats.com.

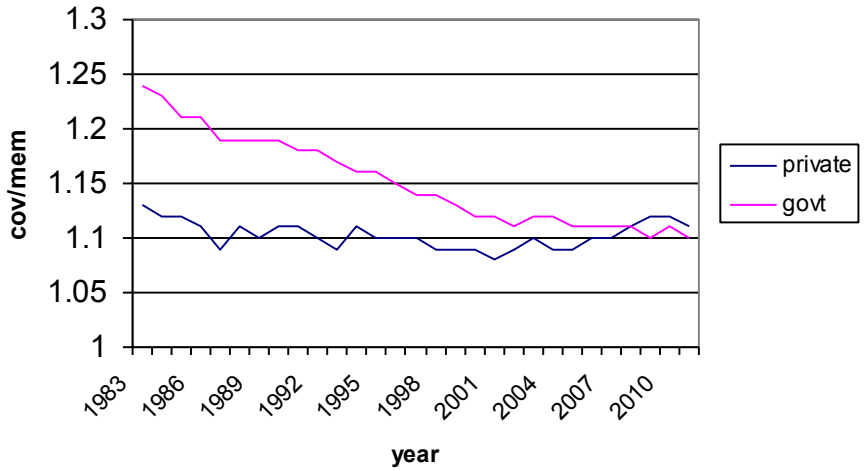

Figure 3: Relative significance of forced association, 1983–2011.

association among workers represented by unions in the private sector was 11 percent. Figure 3 displays those ratios from 1983 through 2011 in both sectors. We see that forced association used to be much more significant in the government sector than in the private sector over most of the years, but since 2008 that is no longer true. My guess is that government-sector unions have, by imitation of private-sector unions, become better at applying intimidation against non-members to become members. This, as I mentioned above, understates my measure of forced association.

3. Union Security

Because of exclusive representation it is possible for some who are represented by a certified union not to be union members. The unions argue that unless they can force non-members to pay union dues, non-members would receive the benefits of union representation for free. They would be free riders. Of course, the best way to eliminate free riders is to have members-only bargaining. Unions would bargain for their voluntary members and no one else.

Section 9(a) of the NLRA creates exclusive representation and therefore creates the possibility of free riders. Section 8(a)3 of the NLRA allows unions to agree with employers to force non-members to pay union dues. It allows unions to capture the alleged free riders.

With respect to unions, a free rider is one who receives benefits from union representation without paying for them. But non-members who are forced to pay union dues could be forced riders. A forced rider in this context is one who doesn't place a positive value (and may even place a negative value) on being represented by an unwanted union, but who is forced to pay tribute to the union. This is an egregious form of forced association.

Section 14(b) of the NLRA allows states to prohibit such forced dues. In 2012 Indiana became the twenty-third state to do so. Such state laws are called right-to-work (RTW) laws.

Although forced association with unions by forced union dues can be eliminated by RTW laws, unions still get to represent people who do not want such representation. Forced association through forced representation can be eliminated only by repealing exclusive representation itself.

4. Mandatory Good-Faith Bargaining

Sections 8(a)5 and 8(b)3 of the NLRA impose on employers and unions, respectively, a duty to bargain with each other. In *NLRB v. Borg-Warner* [356 US 342 (1958)] the Supreme Court said this means that all wages, salaries, and other terms and conditions of employment are mandatory subjects of bargaining. If one side wants to bargain about an issue—e.g., union security or work rules—the other side must bargain. There are some issues—e.g., whether an employer will purchase strike insurance—for which bargaining is permitted but not required. No bargaining is permitted on whether to undertake illegal actions.

Section 8(d) adds that the duty is to bargain "in good faith." Case law [e.g., *NLRB v. General Electric* 418 F. (2d) 736 (1969)] has established that, in practice, "good-faith bargaining" means that each side must compromise with the other. No take-it-or-leave-it offers may be made. Bargaining is a form of association. Mandatory bargaining is an obvious form of forced association. Under ordinary contract law, if any party to the contract is forced to bargain, the contract is null and void because it lacks mutual consent (Epstein, 1983). Every contract reached under the forced-bargaining rules of the NLRA is an example of forced association.

What would collective bargaining consistent with freedom of association look like? Any union, representing only its voluntary members, would bargain on behalf of its members with an employer who agrees to bargain with the union. Both sides would be able simply to say "no" and walk away. The ordinary common law of contract would apply.

III. Employer Free Speech in Representation Elections

It is bad enough that the NLRA imposes forced association on workers and employers in the ways discussed above. But unions have gone further to abrogate freedom of association within the provisions of the NLRA. Given those provisions, workers can be forced into representation (certification) elections they do not want. If workers are to have any modicum of freedom of association in unwanted representation elections, they must be able to cast an informed vote. Workers must have access to both pro- and anti-unionization arguments. We can count on union organizers vigorously to present pro-unionization arguments. They start doing so long before any representation election is scheduled because they must get 30 percent of eligible workers to sign cards requesting unionization before the National Labor Relations Board (NLRB) will order an election.

We usually can count on employers vigorously to present anti-unionization arguments, but they have less time than union organizers have to make their case. They often don't know about union organizing efforts until the union has collected the requisite signatures. The time between the NLRB's order to have an election and the actual election is crucial if workers are to be able to hear the employer's side of the story and thus be able to make an informed choice about how to vote.

In 1947, Congress amended Section 7 of the NLRA to make explicit the right of workers to refrain from unionization. To give effect to that right, Congress added Section 8(c), which affirmed the right of employers to engage in free speech during election campaigns. Congress wanted workers to hear both sides of the debate over whether to unionize so that those workers could make informed, uncoerced decisions on how to vote.

In 1948, the NLRB endorsed this intent of Congress by declaring, in *General Shoe Corp.* (77 NLRB 124), that its primary duty under the new law was to support workers' right to "make a free and untrammeled choice" (at 126) on the question of whether to unionize. The Board's metaphor of "laboratory conditions" in certification elections underscores the importance of workers hearing both sides of the debate.

In *Excelsior Underwear* [156 NLRB 1236 (1966)], the Board stated that US labor law seeks to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation" (at 1241). It also asserted that "Among the factors that undoubtedly tend to impede free choice is lack of information with respect to one of the choices available. An employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice" (at 1240). This passage was quoted and affirmed by the 2007 Board in *Dana Corp.* (351 NLRB 434 at 439 n. 21).

In *Linn v. United Plant Guard Workers* [383 US 53 (1966)], the Supreme Court noted approvingly that the NLRB does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements" (at 60). The Court went on to affirm that "debate…should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" (at 62).

Notwithstanding the clear intent of the 1947 Congress as well as the strong endorsement of that intent by the NLRB in 1948, 1966, and 2007 and by the 1966 Supreme Court, the present, Obama-recess-appointed NLRB demurs. It takes its orders from unions, and unions seek to silence employer speech.

The failed card check bill would have silenced employer speech because it would have forced an employer to recognize a union as the exclusive bargaining agent over his employees if it collects the signatures of at least fifty percent of them on cards requesting such recognition. There would be no election campaign during which employers could give their side of the debate.

Union cronies in Congress failed to deliver on card check, but on August 26, 2011, the pro-union NLRB troika—Mark G. Pearce, Craig Becker, and Wilma B. Liebman—created a limited form of card check by regulatory fiat. In its *Lamons Gasket* (357 NLRB No. 72) decision the troika overturned the Board's 2007 decision in *Dana Corp*. (cited above).

The NLRA permits an employer voluntarily to recognize a union as the exclusive bargaining agent over his employees if the union collects the signatures of at least thirty percent of them on cards that request such recognition. In *Dana Corp.* the NLRB ruled that when an employer chooses to grant recognition to a union without first letting the employees vote on whether to be subjected to union rule, the affected employees could immediately demand an election to challenge the employer's voluntary recognition.

In *Lamons Gasket*, the troika declared that the affected employees would have to wait for at least six months, and in some cases up to one year, before they could hold a challenge election. This means that union rule over workers, lasting at least six months, can be achieved by a thirty-percent card check rule.

In another attack on employer campaign speech, in November 2011 the NLRB troika voted to cut the representation election process from its present median of 38 days to 10 days. With less time to speak, employers will speak less. On May 14, 2012, a federal district court blocked the NLRB's ruling on the grounds that it was made without the required quorum of Board members.

On November 30, 2011, the US House of Representatives passed the Workplace Democracy and Fairness Act (H.R. 3094), which would assure employers and employees of sufficient time to make and consider arguments against unionization during representation elections. Of course, the 2011–2012 US Senate ignored the bill.

A more recent attack from the NLRB against workers' freedom of association was announced on January 27, 2012. Mark Pearce, the chairman of the Board, declared that he and his recess-appointed accomplices intended to change the rules to force employers to turn

over the home telephone numbers and the personal email addresses of their employees to the union bosses attempting to unionize any work site. Existing regulation requires employers to disclose only their employees' home addresses. Under this rule employees can simply refuse to answer the knocks of union organizers on their doors (although that can be dangerous). The planned new rule would allow union organizers to harass workers by phone and email.

IV. Corporate Campaigns

Why would an employer choose to turn his workers over to union rule without a secret ballot election? Because he fears a "corporate campaign." Following Saul Alinsky's *Rules for Radicals* (1971), a union picks a target enterprise to unionize and demands that the target surrender. If the target chooses to defend itself and its workers against unionization, the union forms coalitions with leftist community-activist groups to try to destroy the target's standing in the community and its relationships with lenders, suppliers, and customers. The union and its allies smear the target and its officials as monsters who want to take away their employees' freedom of association. The union and its allies, often including benighted clergy, claim the moral high ground. But employers who choose not to surrender really occupy the moral high ground because in doing so they defend their employees' freedom of association.

Corporate campaigns often claim overwhelming public sympathy for unions and the workers who long to join them. In fact, public support for unions is waning. A Rasmussen poll (Rasmussen, 2011) reported that "Half of American adults (48%) think labor unions have outlasted their usefulness…." Only 30 percent think that unions are still useful. A Gallup poll (Gallup, 2011a) (Figure 4) also shows that union popularity is significantly less than universal. The percent of people who disapprove of unions is increasing. In 1960 only 14 percent disapproved. In August 2011, that figure was 42 percent. I expect public opinion to continue to turn against unions, especially those in the government sector. Constantly increasing government deficits and attempts to raise taxes at all levels (federal, state, and local) are making more and more people aware of the predatory nature of unions.

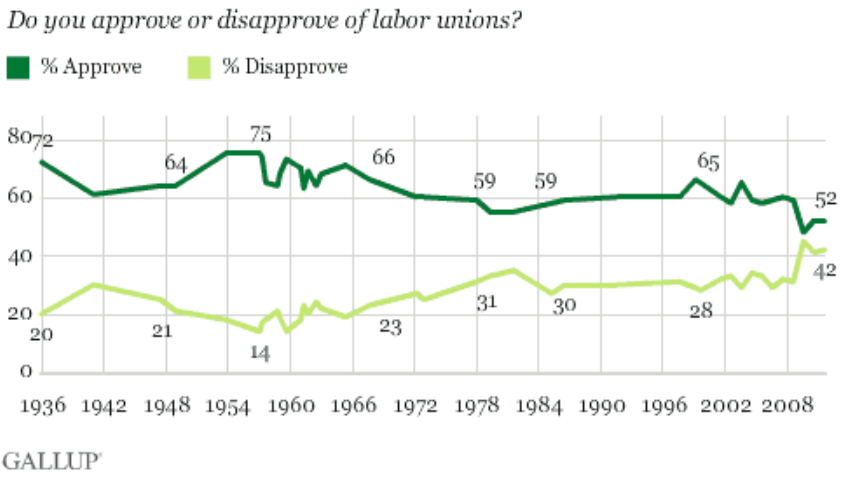

Figure 4: Gallup poll. Source: Gallup (August 2011), http://tinyurl.com/6vt6lj8.

V. Why Do Most Workers Prefer to Be Union-Free?

Unions and their apologists have adopted an unspoken, fatal, false assumption: They assume that almost all workers in all places and at all times really, really want to unionize. They seem incapable of thinking otherwise. Lenin used to argue that any worker who did not support communism had to be the victim of a "false consciousness" inculcated by some oppressive apologist for capitalism. Unions and their apologists implicitly argue that any worker who does not want to unionize must be the victim of a false consciousness inculcated by a nefarious employer or labor relations consultant. This assumption is clearly falsified by the same Rasmussen poll cited above:

> Among working Americans who do not belong to a union, just 13% would like to join a labor union where they work. That's up slightly from nine percent in March 2009. Seventy-eight percent (78%) would not like to join a union.

There are several reasons for workers to choose to be union free. For example, union-free enterprises offer more job security than their union-impaired counterparts because the latter are too sclerotic to adapt quickly to frequently changing global market conditions. Union-free firms can reward workers on the basis of productivity. In union-impaired firms pay is based on job classifications and seniority.

Union-free workers are free to excel, whereas union-impaired workers are chained to a contract. A union contract wage is both a ceiling and a floor. In a union-free environment the only ceiling on a worker's wage is his productivity. Unions promote an adversarial relationship between workers and employers, while union-free employers are free to enlist workers as partners in building durable and growing value.

The table in Figure 5, produced by Gallup (Gallup, 2011b), shows that workers rate union-free workplaces more highly than unionized ones. Unions are based on conflict, and conflict is not conducive to a happy work environment.

Work Environment Index: Unionized vs. Nonunionized U.S. Workers (2010 Results)

(Controlling for age, income, gender, education, marital status, race, and state)

	Nonunion	Union	Difference
Federal government employees	45.0	35.6	9.4
State government employees	51.6	45.3	6.3
Local government employees	50.2	45.4	4.8
Nongovernment employees	52.1	41.9	10.2

Jan. 2-Dec. 29, 2010
Gallup-Healthways Well-Being Index

GALLUP

Figure 5: Gallup poll. Source: Gallup (March 2011), http://tinyurl.com/7bzvxsp.

VI. The United Nations and the International Labor Organization on Freedom of Association

Two union apologists in particular—Lance A. Compa (2010) at Cornell University and John Logan (2006) at San Francisco State University —claim that the NLRA is too weak to protect workers' freedom of association. They assert that to protect workers' freedom of association, US law must comport with Article 20 of the UN Declaration of Human Rights (1948) and International Labor Organization Conventions 87 (1948) and 98 (1949). But a correct understanding of Article 20 and Convention 87 gives the lie to their claims. Moreover, Convention 98 is an open denial of freedom of association.

Article 20 of the UN Declaration states:

(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Note that Article 20 explicitly acknowledges the negative aspect of freedom of association.

Compa and Logan ignore Part 2 of Article 20 and use Part 1 to support their argument that employer participation in the debate concerning the decision to unionize is illegitimate. But, their argument is disingenuous and misleading. Compa and Logan completely ignore the critically important Article 19 of the UN Declaration, which states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

It is difficult to imagine a more direct refutation of Compa's and Logan's arguments that employers and labor relations consultants who speak on behalf of employers should be denied these rights.

The UN General Assembly amplified the above in Article 19 of its International Covenant on Civil and Political Rights (1966):

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In both Articles 19 of the UN Declaration and the Covenant on Civil and Political Rights, the UN endorses free speech and open debate with all sides being heard. But Compa and Logan simply ignore these provisions when making their argument that employers should not be able to present their side of the story in debates about unionization. Compa's and Logan's preferred model requires employers to be neutral on questions of unionization. As shown above, such an approach simply is untenable, as it is directly contrary

to the fundamental right of freedom of association and the relevant international documents.

Compa and Logan also imply that the conventions of the ILO support their claim for diminished rights for those that may hold opinions contrary to theirs. However, the ILO is an agency of the UN, and, as such, is bound by the standards set by both Articles 19 discussed above. The relevant part of ILO Convention 87 is its Article 2, which states:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

Although Convention 87 does not explicitly acknowledge the negative aspect of freedom of association, the term "of their own choosing" implies it. Free association requires the ability to accept or reject association. Moreover, in 1993 the European Court of Human Rights, in *Sigurdur A. Sigurjónsson v. Iceland*, incorporated the negative aspect of freedom of association into Article 11 of the European Convention on Human Rights, which, like ILO Convention 87, does not explicitly acknowledge the negative aspect of freedom of association. The same court reaffirmed this decision in 1999 in *Chassagnou et al. v. France*.

Article 1 of ILO Convention 98 states:

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to–
   (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
   (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Part 1 suffers from the ambiguity of "acts of anti-union discrimination." Compa and Logan include therein any employer

speech (except surrender) during representation elections. Parts 2 (a) and 2(b) preclude union-free hiring contracts. Thus, as discussed above, they violate freedom of association. True freedom of association permits any sort of hiring contracts to which all parties individually consent.

Article 4 of ILO Convention 98 says:

> Measures appropriate to national conditions shall be taken…to encourage and promote…voluntary negotiation between employers…and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The word "voluntary" suggests that US mandatory good faith bargaining rules are contrary to Convention 98. However, the ILO's Declaration of Philadelphia (1944) declares that all member states should take steps to assure the "effective" recognition of the right of collective bargaining. Again, in the ILO's Declaration on Fundamental Principles and Rights at Work (1998) the emphasis is on "effective" collective bargaining. The ILO's Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies (2000) makes clear that the word "effective" means mandatory good faith bargaining that is, nevertheless, "voluntary." Who knew?

Compa and Logan argue that US labor law is "weak" because it affords employers too big a role in the unionization process. In this respect they want the United States to become more like Europe. But US labor law is superior to its European counterparts precisely because it better protects workers' freedom of association. It allows workers more opportunities to choose to avoid unionization.

VII. The Employee Rights Act of 2011

A lot needs to be done to protect workers' freedom of association in America. In August 2011 a bill called the Employee Rights Act (ERA) was introduced in the Senate (S. 1507, by Orrin Hatch) and the House (H.R. 2810, by Tim Scott). The ERA would, if enacted, make seven significant changes to American union law.

First, it would make secret-ballot elections the only way for unions to be certified as exclusive bargaining agents over any workers. All forms of card check certification would be eliminated.

No employer would any longer be able to recognize a union without a secret-ballot election.

Second, the ERA would assure that in a certification election all parties would have at least 40 days to make their arguments. This would eliminate the Obama-NLRB's quickie elections to inhibit employer speech.

Third, currently once a union has been certified as the monopoly bargaining agent over a group of workers, it is presumed to continue to have majority support among the workers indefinitely. There is no regularly scheduled reelection to determine whether the union continues to be supported by the workers. There is a decertification election process, but its rules severely handicap any workers who want to get rid of the monopoly bargaining agent. Individual workers have to declare publically that they want to decertify the union and seek out like-minded colleagues. Intimidating face-to-face encounters with union bosses cannot be avoided. Employers are forbidden to help. It is as if President Obama's election in 2008 entitled him to be president for life unless individual citizens could get enough signatures on a petition for a recall election. Because of this quirk in the law, only ten percent of the workers who are represented by an exclusive bargaining agent actually voted for that union (Hatch, 2011). The ERA would require that once a union is certified as a monopoly bargaining agent it would have to stand for reelection every three years.

Fourth, the ERA would substantially increase the ease with which workers could vote to decertify their monopoly bargaining agents. It would be better to eliminate exclusive representation from the law, but increasing the ease with which monopoly bargaining agents can be removed is a step in the right direction.

Fifth, except in the twenty-three states that prohibit it, workers who are represented by an exclusive bargaining agent can be forced to pay union dues or agency fees as a condition of continued employment. Those forced payments are, to a large extent, turned over by unions to politicians who promote compulsory unionism. Many dues payers do not support the political candidates who are favored by union bosses. The ERA would protect them against involuntary political contributions.

Sixth, in *U.S. v. Enmons* [410 US 396 (1973)] the Supreme Court ruled that acts of violence by a union, if they promote legitimate union purposes in a labor dispute, do not violate the federal anti-

racketeering Hobbs Act. This is one of the most egregious end-justifies-the-means rulings of the Court. The ERA would reverse that error.

Seventh, present law leaves it up to individual unions to decide if they can call a strike without taking a vote among the workers to determine whether those workers approve of the strike. The ERA would make a secret-ballot election among all workers represented by a union, not just its members, mandatory before any strike could commence.

The ERA does not go far enough to restore freedom of association in labor relations, but it is a good start.

VIII. In Conclusion

There is a form of unionism that would be consistent with freedom of association for workers, employers, and unions. Each worker would be free to choose, individually not collectively, whether to be represented by a union that was willing to represent him. Each union would be free to choose whether it would represent any worker that sought such representation.

There would be no mandatory good-faith bargaining. If a worker signed on for a union to represent him, only the chosen union could do so. But an employer would be free to choose whether or not to bargain with the chosen union for that worker's services. Any employer could refuse to bargain with any union, and any union could refuse to bargain with any employer. Any employer and any union in bargaining with each other would be free to just say "no" and terminate the bargaining process. The ordinary law of contract would be restored.

Employers would be able to choose to hire on a union-only basis, a union-free basis, or an open-shop basis. The last is a work site where one or more unions represent some of the workers and the other workers represent themselves or choose be represented by other third parties (e.g., labor relations consultants) who were willing to represent them.

This may seem to be politically impossible. However, the best features of New Zealand's Employment Contracts Act (ECA, 1991) came very close to defending freedom of association for all parties who participate in the labor market. I have discussed the ECA in some detail elsewhere (Baird, 2010). Notwithstanding that the ECA

was repealed in 2000 by a resurgent Labour Party, it remains a good model to follow.

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