



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

The Authoritarianism of American Labor Law

by George C. Leef

American labor law is a dank miasma of special-interest legislation that tramples on the rights of some citizens in order to advance the interests of others. The main beneficiaries are labor-union officials who lobbied for and received extraordinary and unique powers from compliant politicians. The victims are business owners and workers who prefer to have nothing to do with unions.

Even with their powers, however, union officials have seen a steady decline in the popularity of their “product” ever since the 1950s. The percentage of workers in the private sector who are unionized has fallen from 36 percent in 1953 to less than 8 percent today. (Unionization among government employees has, however, grown considerably over time. That shouldn’t be surprising, since government agencies don’t have to worry about inefficiency and competition.) Naturally, union officials have decided to look to politics for salvation. This year, they spent lavishly in an effort to get Congress to pass a bill with the exceptionally misleading title “Employee Free Choice Act.”

That effort was defeated in the Senate last year, but the bill will undoubtedly be introduced again and again by politicians who wish to curry favor with Big Labor.

Since most people know little about labor law, it’s worth taking some time to examine it and the proposed changes and to compare both with what the ideal law regarding labor unions would be — ideal, that is, from the libertarian standpoint of protecting the rights of all people equally.

The National Labor Relations Act

The key piece of legislation controlling unionization is the National Labor Relations Act (NLRA). It was passed in 1935 as a favor to organized labor for its electoral support of Franklin D. Roosevelt and the Democratic Party. The new law wiped out all state laws covering unionization

in the private sector and instituted a federal system based on the notion that collective bargaining was a good thing for the nation and should therefore be facilitated by government power.

Crucially, unionization was made to be a matter of collective decision rather than individual choice. Under the NLRA, if enough workers express a desire for an election to decide whether the workplace will be unionized, a federal agency, the National Labor Relations Board (NLRB), conducts such an election under rules that are supposed to ensure “fairness.” For example, it’s illegal for the employer to promise benefits to the workers if they vote not to unionize. That interference with freedom of speech and contract is just one of the many coercive aspects of the law.

In union elections, eligible workers vote by secret ballot either for representation by a particular union or to have no union representation. The NLRB counts the ballots and if the union receives a majority of the votes, it is then certified as the exclusive bargaining representative for all the employees in the “bargaining unit.” And here we uncover another of the coercive features of the law. All of the workers must accept the union’s representation, even those who don’t want it. The law prohibits individual bargaining between workers and the company. Freedom of contract thus takes a beating in order for the government to help union officials and the workers who want their services achieve their objectives. A specious concept of collective rights triumphs over the true rights of people to contract according to their own desires.

One more feature of the NLRA deserves mention here. Once a union has been certified, the management of the firm is under a legal obligation to bargain “in good faith.” In a free society, no one is compelled to bargain with anyone else. Under the neutral principles of contract law, no contract is valid unless it has the assent of both parties. When one party is forced to the bargaining table and faces legal sanctions unless it negotiates “in good faith,” we don’t have true assent. With the NLRA legal neutrality is discarded in favor of promoting the interests of some people at the expense of the freedom of others.

The Employee Free Choice Act

Despite the authoritarianism of the NLRA, unions have been steadily slipping in their numbers. For the last several years, Big Labor has suffered net losses in dues payers. (I say “dues payers” rather than “members” because individual workers have the right to refuse to become union members, but in order to keep their jobs they are often required to pay the union a fee that is nearly as high as the dues.) In an effort to remedy that decline, union officials and their political allies put on a full-court press in favor of a bill called the “Employee Free Choice Act” (EFCA).

The secret-ballot elections under the NLRA at least have the virtue of shielding individual workers from reprisals for going “the wrong way.” Union officials have found what they regard as a better method of determining whether a majority want their services. It’s called the “card check” system. If a majority of workers sign a card saying that they want a union to represent them, then that should suffice for the NLRB to declare the union to be the exclusive bargaining representative, without resort to an election. Naturally, it’s easier for union organizers to get signatures on cards — using tactics that can include misrepresentation and harassment — than to get workers to vote for them in an election after the airing of arguments for and against the union.

Under the NLRA, however, employers have the right to insist on a secret-ballot election no matter how many cards might be signed. The Employee Free Choice Act would take that away and require the NLRB to certify unions simply on the basis of signed cards.

Furthermore, the EFCA would ratchet up the coercion regarding contract negotiations. The current law is bad enough in compelling “good faith” bargaining, but the proposed new law would allow government officials to arbitrate the terms of the initial union contract. That is to say, if management and the union can’t arrive at a mutually agreeable labor contract, the federal government will impose one. That additional dollop of federal coercion is said by supporters to be necessary to effectuate the workers’ “right to bargain.” In a free society, though, there is no “right to bargain” with people who don’t want to bargain with you, and a fortiori there is no right to have the government dictate the terms of that “bargaining.”

Union officials were licking their chops at the prospect of using the EFCA to dragoon thousands of new workers into their ranks, but the bill has died in Congress. It will be resurrected in the future and we will again hear supporters making claims of why we need its new coercive features. We will also hear opponents arguing that we should stick with the good old status quo. What I think we really need is a discussion about the proper approach to labor law in a free society.

An ideal labor law

If we could fashion a new and morally proper law for unionization, what would it be like?

First of all, it should not be federal law. The Constitution does not give Congress any authority to legislate with respect to labor-management relations. The Supreme Court’s decision upholding the NLRA in 1937, *NLRB v. Jones and Laughlin Steel*, was wrongly decided, with the majority relying on a tortured conception of the Interstate Commerce Clause to find that Congress had the power to pass the law. Ideally, Congress should simply repeal the NLRA in its entirety.

Second, any law regarding unions should be neutral. That is, the law should not be intended to help (or hinder) unions or, for that matter, businesses from achieving their objectives.

The proper functions of government do not include the use of power to help any persons or groups get what they want.

Why not?

The answer is that the legitimate role of government is to protect the rights of *all* citizens. When government takes the position that some person or group is entitled to its assistance, that necessarily means the use of coercion against others. Government should attempt to uphold the right of all to attempt to achieve their goals through peaceful means. When it goes further and attacks the liberty of some to tip the scales in favor of those whom the state favors, government loses its legitimacy. If you understand why, in Orwell's *Animal Farm*, there was a problem once the sign went up to proclaim, "All animals are equal — but some are more equal than others," you'll understand this point.

But how would we know if the law was not neutral? Advocates for unions often say that although the law might seem to favor them, it is actually just "evening things up" because employers have "unfair" advantages. Since, however, there is no objective standard for deciding what is or isn't "fair," this approach won't do. Instead, we must insist on laws that do not entail the use (or threat) of coercion against people who have done nothing to violate the rights of others.

Let's apply that standard to some of the current features of U.S. labor law. We have seen, for example, that the NLRA gives certified unions the power of exclusive representation over all the workers. So imagine that a company and any unionized worker should ignore the union (and the law) and separately negotiate a contract. Under the law, the government would declare that contract void and mete out punishment to the firm if it proceeded to deal with the worker under its terms. Negotiating and abiding by a contract does not initiate force against the union and the workers who desire its services and therefore the government should not interfere with it. As much as union officials and pro-union workers might want to have a monopoly, obtaining it through government coercion destroys the neutrality of the law.

Or consider the mandatory-bargaining rule. Suppose that a group of workers employed at ABC Enterprises designates the American Workers' Union as their bargaining representative. The head of the AWU duly calls on the president of ABC Enterprises and says, "I'm here to negotiate a labor contract on behalf of your workers." The president of the company replies, "Sorry, but I choose to have nothing to do with you. I'll continue to deal with my employees individually, but if any of them is unwilling to tolerate that, he's free to quit." What will happen next is that the AWU will call upon the NLRB to enforce the law and *compel* ABC's president to negotiate under threat of legal punishment.

Is that law neutral? No. People should be free to decide for themselves whether they want to deal with others or not, and the law respects that freedom in other settings. The mandatory-bargaining rule cannot be defended because it necessitates the use of force against people just

because they have chosen not to do something — to bargain with an organization favored by the government.

If you take away all of the provisions of the NLRA that are not neutral, what you end up with is the common law of contracts, crimes, torts, and property. Neither management nor union should have legal cover for doing anything that would violate the precepts of those common-law fields. If we were to return to neutral common-law principles, governmentally approved coercion would disappear from labor-relations law. That's what everyone who advocates freedom and civil society should want.

Finally, the law must respect individual rights to contract and associate voluntarily. This point necessarily follows from the requirement of neutrality, but it is worth spelling out separately. The law must not force collective decisions on any party. If 51 percent — or 49 percent or 99 percent — of the workers think they want union representation, they are free to seek it and then ask for collective bargaining to cover them. Businesses are then free to accept or reject it. The law must not force those who don't want collective bargaining to surrender their freedom and become subject to the union's dues and rules. When individual rights are respected, unions cease to have quasi-governmental power and have exactly the same legal status as all other private associations.

George C. Leef is the director of the Pope Center for Higher Education Policy in Raleigh, North Carolina, and book review editor of [The Freeman](#).

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