

LABOR LAW AND THE FIRST AMENDMENT

Charles W. Baird

Lane Kirkland, the president of the AFL-CIO, recently claimed that the reason why labor unions are currently unpopular is "for the same reason journalists are unpopular. We both assert our First Amendment rights."¹ In a 1984 monograph² I argued that American labor unions enjoy more respectability than they deserve because most of the conventional wisdom regarding labor union history is in fact little more than myth. In this article I explain why I think Mr. Kirkland's suggestion that labor unions and the First Amendment go well together also claims more respectability for American unionism than the facts justify.

Two First Amendment freedoms are at issue: freedom of speech and freedom of association. The Labor Management Relations Act (LMRA), which is the original 1935 Wagner Act as amended by the 1947 Taft-Hartley Act, the 1926 Railway Labor Act as amended in 1951 (RLA), and state laws which affect government employees in their jurisdictions all have essentially the same anti-First Amendment provisions. The RLA governs unionism in railroads and airlines, the LMRA governs unionism in the rest of the private sector, and the state laws govern public sector unionism.

Cato Journal, Vol. 5, No. 1 (Spring/Summer 1985). Copyright © Cato Institute. All rights reserved.

The author is Professor of Economics at the California State University at Hayward. An early version of a portion of this paper was presented at the monthly Library Seminar at the Institute for Humane Studies. The author thanks the seminar participants for their helpful comments. He also wishes to thank Gregory Christansen for reading the penultimate draft and making several suggestions for improvement.

¹*San Francisco Examiner*, 31 March 1985, p. A12.

²*Opportunity or Privilege: Labor Legislation in America*, The Social Philosophy and Policy Center, Bowling Green State University, Bowling Green, Ohio, 1984.

Freedom of Speech

This basic freedom has been put in jeopardy by American labor law and its administration in at least two ways: the use of compulsory agency fees paid by nonmembers to propagate partisan and ideological views with which those nonmembers disagree, and the imposition of explicit restrictions on the speech of employers during certification elections.

Use of Nonmember Agency Fees

In 29 states under the LMRA, and in all states under the RLA, unions are permitted to negotiate with employers for the inclusion of union security clauses in collective bargaining contracts. One form of union security is called the agency shop wherein a worker does not have to join a union in order to continue to work, but he or she must pay "agency fees" or "service fees" in order to do so. Typically these fees have been nearly the same as the dues that regular union members pay.

Now it should not come as a surprise to anyone, especially in light of last year's presidential election campaign, that labor unions spend a fair amount of their revenue from dues and agency fees for partisan and ideological purposes. While dues money collected from voluntary members may, without any impairment of their First Amendment freedoms, be so spent, compulsory agency fees paid by nonmembers may not be. For example, if the faculty union at California State University had an agency shop collective bargaining contract (which it does not) I would have to pay money to the National Education Association (NEA) in order to keep my job (in spite of the fact that I have academic tenure). The NEA used its revenues to speak out forcefully in voice and print in favor of Walter Mondale's candidacy for president, a political endorsement I did not share. If any of that revenue came from compulsory agency fees extracted from me, my freedom to choose the political candidate of whom I wish to speak out in favor would be impaired.

Thomas Jefferson, with reference to the question of the establishment of a tax-supported religion, wrote: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."³ If compulsory agency fees had existed then Jefferson almost certainly would have said the same thing in regard to them.

³"Virginia Act for Establishing Religious Freedom" (1784) in *The Writings of Thomas Jefferson* (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), vol. 2, pp. 300-3.

The U.S. Supreme Court has for long recognized this threat to First Amendment freedoms, but until very recently it was practically impossible for nonmember agency fee payers to get relief from the use of their money by unions for partisan political and ideological advocacy.

The first Supreme Court case on this issue was *Machinists v. Street* [367 US 740 (1960)], wherein the Court unequivocally stated that the use of compulsory agency fees for partisan political or ideological purposes was an unconstitutional impairment of the freedom of speech. Revenue from compulsory fees could only be used for nonmembers' shares of the costs of collective bargaining, contract administration, and grievance adjustments. Unfortunately the Court did not specify any remedies available to aggrieved nonmembers. How much money should be refunded? How should that be determined? Would nonmembers have to pay amounts equal to regular dues and then apply for refunds, or should future collections from nonmembers be reduced to begin with? Since these and related questions were left unanswered, the Court's decision had little practical impact.

Then in *Railway Clerks V. Allen* [373 US 113 (1963)] the Court suggested a "practical decree" by which the proper reduction of agency fees below ordinary dues might be determined. This was only a suggestion, however, and the Court left it up to the parties involved to work out their own solutions. Again, very few people paid any attention to the problem.

The next Supreme Court case, *Abood v. Detroit Board of Education* [431 US 209 (1977)], involved a public sector union. One issue in the case was the constitutionality of an agency shop contract in public employment. The Court decided that, just as in the private sector, an agency shop in public employment is constitutionally permissible. (I will discuss this issue below.) The other issue in the case was the permissible uses of compulsory agency fees paid by nonmembers. Here the Court, consistent with both *Street* and *Allen*, declared that the teacher union could not use such fees for anything other than collective bargaining, contract administration, and grievance adjustment. The fact that government employment was involved did not change matters on this point. However, the teacher union had adopted an internal remedy whereby the aggrieved parties could seek restitution, so the Court deferred "further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute."⁴

⁴Case "Syllabus," p. III.

The most recent, and the most significant Supreme Court decision on this issue was announced on 25 April 1984. In *Ellis v. Railway Clerks* [No. 82-1150], the Court was very specific about the permissibility of certain uses of compulsory agency fees paid by nonmembers and about the propriety of rebate procedures available to aggrieved parties. It reiterated its judgment that the use of such fees for partisan political or ideological purposes of any sort was prohibited and that the use of such fees for collective bargaining, contract administration, and grievance adjustment was permitted. But the Court went on to consider six other uses of such fees: (1) a union's national convention, (2) litigation not involving collective bargaining or grievance settlement, (3) union publications, (4) social activities, (5) death benefits for employees, and (6) general organizing efforts.

The Court declared all expenditures in categories (2) and (6) to be impermissible. As examples of impermissible expenditures in category (2) the Court stated that:⁵

objecting [airline] employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the non-discrimination requirements of Title VII.

With regard to expenditures for general organizing efforts the justices said:⁶

Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.

Expenditures in category (1) unrelated to electing officers, establishing bargaining goals and priorities, and formulating overall union policy, as well as expenditures in category (3) related to political causes were also declared to be impermissible uses of agency fees. The only category in which all expenditures were declared to be permissible uses of such fees was category (4). The Court declared the issue moot with regard to category (5) since the respondent union was no longer the bargaining agent for the plaintiffs.

The Court went further. It declared that unions collecting compulsory agency fees had to set those fees below regular dues. A union can no longer collect amounts equal to regular dues from nonmembers and then give rebates, even if it pays interest on the amount to

⁵Slip opinion no. 82-1150, at 17.

⁶*Ibid.*, at 15-16.

be rebated. The Court stated that such a rebate scheme amounts to "an involuntary loan for purposes to which the employee objects."⁷

The final case of interest on this issue has not yet been heard by the Supreme Court. In *Beck v. Communications Workers of America* [112 LRRM 3069 (1983)] a U.S. District Court judge in Baltimore ruled that the union had to refund 79 percent of the fees collected from nonmembers between 1 January 1976 and 31 March 1983 because it had used that portion of the fees for impermissible purposes. The case is currently on appeal and may or may not eventually be heard by the Supreme Court. In light of the *Ellis* decision the union may decide to concede. However, since *Ellis* involved the RLA and *Beck* involves the LMRA that remains to be seen.

If Lane Kirkland's suggestion that the AFL-CIO approves of, supports, and acts upon the basis of First Amendment freedoms were true I would expect him to applaud the *Ellis* and *Beck* decisions. To no one's surprise he has not.

Restrictions on Employers' Speech in Certification Elections

It is commonly believed that prior to the passage of the original Wagner Act in 1935 most American workers were the helpless victims of their employers who tried every trick they could think of to prevent workers from forming unions. Thus one important aspect of the LMRA is its provisions which are designed to guarantee that employers will in no way prevent workers from voting to be represented by unions.

Section 7 of the LMRA 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. . . .

Section 8(a)(1) states:

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.

The courts and the National Labor Relations Board (NLRB) have interpreted this to mean that certification elections must be held under "laboratory-like" conditions so that the genuine free choice of workers will be revealed. Workers are assumed to have very fragile wills which can easily be thwarted even by the slightest hint of threat of reprisal or promise of benefit from employers trying to discourage

⁷*Ibid.*, at 7.

a pro-union vote. In spite of a definitive study published in 1976 that demonstrated, both logically and empirically, that workers are capable of weighing the merits of competing campaign claims by employers and unions,⁸ the NLRB and the courts continue to treat workers as children who must, even at the expense of First Amendment freedoms, be protected from “unfair” campaign speech from employers. Workers are assumed to be able to weigh the competing campaign claims of candidates for the Congress or for the presidency, but not those of employers and unions.

There are two Supreme Court decisions that guide the NLRB and lower courts in this matter. In *NLRB v. Exchange Parts Co.* [375 US 405 (1964)] the employer, during a certification election campaign, announced certain changes of policy that were beneficial to workers. Specifically the employer announced (1) the establishment of a new floating holiday which the workers could elect to take on their birthdays, (2) a new system for computing overtime during holiday weeks, and (3) a new vacation schedule.

The Court ruled that these announcements were violations of Section 8(a)(1) of the LMRA and set aside the anti-union election results. The Court explicitly recognized that First Amendment speech rights were involved, but asserted that the government’s interest in peaceful labor relations were overriding. In the words of the Court (at 409):

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

The second Supreme Court case was *NLRB v. Gissel Packing Co., Inc.* [395 US 575 (1969)]. This case involved a firm that had previously suffered a long strike which had closed down two plants for three months in 1952. The plants were subsequently reopened on a non-union basis. Then in 1965 the Teamsters began an organizing campaign among the employees. During that campaign the employer stated that employees who signed Teamster authorization cards were forgetting the lessons of the 1952 strike that had caused employees as well as the employer a lot of grief. The employer also stated that the firm was not financially strong and therefore any strike could result in a plant closing. Moreover, the employer went on to say,

⁸Julius G. Getman, Stephen B. Goldberg, and Jeanne B. Herman, *Union Representation Elections: Law and Reality* (New York: Russell Sage Foundation, 1976).

many employees, because of age and lack of education, would have a difficult time finding alternative employment.

The Court found that these statements by the employer also violated Section 8(a)(1) of the LMRA. The statements were merely "threats of reprisal" which are not protected by the First Amendment. Such threats of reprisal make it impossible for workers to exercise genuine free choice in making up their minds how to vote. Thus the Court ordered that the employer recognize the union as the exclusive bargaining agent of the employees even though the employees voted against such representation. This "bargaining order" was presumably imposed on the grounds that any subsequent election would be tainted by the threats of reprisal, and so would be invalid.

Since this seems to be such an obvious infringement of the employer's First Amendment rights and since the bargaining order remedy seems so coercive, it is worthwhile to consider the reasoning of the Court. In its words (at 617-18):

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus an employer's rights cannot outweigh the equal rights of the employees to associate freely. . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . .

Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

In my judgment the employees' equal right to associate freely was abridged by the bargaining order remedy imposed by the Court. The Court stripped the employees of their voting rights under the LMRA and forced them to associate with the union on the flimsy grounds that employees' "economic dependence" on the employer made it impossible for them to come to a reasoned judgment on their own.

This economic dependence argument betrays the Court's misunderstanding of the true nature of the relationship between employees and employers in the labor market—namely, a contractual relationship based on voluntary exchange. Employees and employers are economically dependent on each other. Moreover, to secure the services of an employee, an employer must make an employment offer that is at least as good as any alternative offer the employee may receive. To obtain employment with a particular employer, an employee must make an offer that is at least as good as those made by other potential employees seeking the same employment. Both parties are dependent on their alternatives for their bargaining leverage. The common belief that employers' alternatives are always better than those of employees is not borne out by the facts. Monopsony is extremely rare.

The distinction between carefully phrased predictions, based on objective facts beyond the employer's control, about the effects unionization will have on a company on the one hand, and suggestions that unionization may make the employer, for reasons known only to him and which are unrelated to "economic necessities" decide to close a plant on the other, is one of mind-slipping wetness. Is not the employer the sole legitimate judge of what economic circumstances are sufficient to cause him to close? Who is to decide what is or is not an "economic necessity"? The *Gissel* decision in practice makes it very hazardous for an employer to even suggest that unionization of a plant will result in its partial or complete closing, for a union can always argue that any reasons offered by the employer for such action are insufficient to constitute "economic necessity."

The *Exchange Parts* and *Gissel* decisions together grant unions a competitive advantage in organization campaigns and certification elections. It is these decisions that permit unions to argue that an employer (for example, J. P. Stevens & Co.) who speaks out against unionization, or who attempts to forestall unionization by offering his employees better terms and conditions of employment during an organizing campaign and/or a certification election, is guilty of "repeated violations of labor law." All such employers are really guilty of exercising their First Amendment rights. Not content with the Court-granted competitive advantage they already have, labor unions tried, but failed, to get even more advantages over employers and employees who want to stay away from unions by the so-called Labor Law Reform Bill of 1978.

Freedom of Association

Although the Supreme Court thinks that American labor law is aimed at assuring workers of their freedom of association and is,

therefore, to be put in the balance against employers' freedom of speech, I contend that some of the main provisions of American labor law, especially those of the LMRA, effectively deny freedom of association to many workers. I have four specific provisions in mind: exclusive representation, union security, the proscription of company unions, and mandatory bargaining.

Exclusive Representation

Section 9(a) of the LMRA provides that a union that wins a representation (certification) election is the exclusive bargaining agent for all of the workers in the bargaining unit. A union that wants to organize the workers at a plant begins by trying to secure the signatures of at least 30 percent of those workers on authorization cards. A person who signs such a card declares that he or she wants the representation services of the union. Once at least 30 percent of the workers have signed, the union then requests the NLRB to set up and administer a secret ballot representation election. If only one union is attempting to become the exclusive bargaining agent the ballot will be a choice between the union and "no representation" (that is, no union). The winner is that choice that gets 50 percent plus one or more of the votes cast. If more than one union is seeking to be the exclusive bargaining agent the ballot will be a choice between each of the unions in contention as well as no representation. The winner is again that choice (if any) that receives 50 percent plus one or more of the votes cast. Should there be no winner, there is a runoff between the two choices that received the most votes cast.

The union that becomes the exclusive bargaining agent gets to represent all the workers in the bargaining unit. It represents those who wish its representation services, and it represents those who do not want its services. The latter group consists of workers who want the representation services of other unions and those who do not want the representation services of any union. I claim that the freedom of association of this group is denied. Individuals therein are forced to associate with the winning union against their will. Surely the freedom of association includes the right to choose to abstain from associating with any particular person or group. Forced association is not free association.

Those who support the principle of exclusive representation do so by analogy with congressional elections. An exclusive representative to the House of Representatives is chosen by secret ballot elections in every congressional district. A winner has only to get a plurality of the votes cast in order to represent everyone in his or her district, including those who voted for losing candidates as well as those who

did not vote at all. The U.S. Constitution specifically provides that that is how things ought to be, and no one demurs. Since such a procedure is acceptable in the case of congressional elections, the argument goes, it must also be acceptable in the case of union representation elections. Anyone who does not approve of such a procedure must be anti-democratic.

But that argument is invalid. It is invalid because the government-union analogy is invalid. Unions are not governments. A government is a natural monopoly. Indeed, the definition of government is that it is the agency within a political jurisdiction that has a monopoly on the legal use of force. There cannot be competition between two or more governments in a political jurisdiction. The name for such competition is war. A union, on the other hand, is a private association of individuals. It is a club like the Rotary or the Lions. There is nothing natural about monopoly in the case of private clubs. Individuals are usually free to choose whether to associate with a private club at all, and that association cannot be compelled by any majority vote. Moreover, it is natural for private clubs to coexist and compete with each other for allegiance and members. An American who exercises the freedom to choose which, if any, private club with which to offer to associate, notwithstanding the *outcome of any voting among others*, is not being anti-democratic. He or she is merely exercising the freedom of association that our democratic *government* is elected to protect. The fact that the government took away that freedom when it adopted exclusive representation in the Wagner Act merely says that the democratically elected government acted unconstitutionally.

Of course, since *Marbury v. Madison* (1803) it is the Supreme Court that gets to decide what is and what is not constitutional, and in *NLRB v. Jones and Laughlin Steel Corporation* [301 US 1 (1937)], by a vote of five to four, the Court declared the Wagner Act was constitutional. But that decision, long referred to as the “switch in time that saved nine,” says more for the political astuteness of the Court than it does for its constitutional reasoning. Just one year earlier, in *Carter v. Carter* [298 US 238 (1936)] the Court unanimously threw out the Guffey Coal Act citing the exclusive representation features of that law as one of the reasons for its decision. But on 5 February 1937, four days before the Court heard oral arguments on the Wagner Act, President Roosevelt announced his infamous court-packing plan in which he would have increased the size of the Court by appointing new members who would be more amenable to such New Deal measures as the Wagner Act. Five justices were thereby induced into changing their views regarding the constitu-

tionality of compulsory exclusive representation applied to private associations.

Union Security

Section 8(a)(3) of the LMRA empowers labor unions that have exclusive bargaining agent status to negotiate with employers for the inclusion of union security provisions in collective bargaining contracts. Three types of union security arrangements are permitted: union shop, agency shop, and maintenance of membership. In a union shop the employer can hire anyone he or she chooses; but, after a 30-day probationary period, a new employee must join the union as a condition of continuing employment. In an agency shop employees do not have to join the union, but they have to pay service (agency) fees to the union as a condition of continuing employment. Under a maintenance of membership agreement an employee who is a member of the union at the inception of a collective bargaining contract must, as a condition of continuing employment, continue to be a member until that contract expires.

Compelling a person to pay dues or service fees to a private club as a condition of continuing to work is an egregious denial of the freedom of association. Association through the wallet is perhaps the most significant association of all. If a person is not free to choose to refrain from paying money to a private organization he is forced to associate with that organization. That organization gets a prior claim to income earned by the dissenting individual—that is, it gets the power to tax.

Supporters of union security arrangements justify them by the free rider argument. Since the LMRA requires an exclusive bargaining agent to represent all workers in the bargaining unit, it is only fair that all such workers pay their fair share of the costs of such services. Without a union security arrangement it would be possible for a worker to be a free rider—that is, to receive the benefits of union representation without paying anything for them. Simple justice requires that each person who receives the services must pay for them. A free rider would receive benefits at the expense of other workers who would have to pick up the free rider's fair share.

The obvious counterargument is that two wrongs do not make a right. While it is true that an exclusive bargaining agent must represent all workers, that provision of the law was not forced on unwilling unions. The unions fought a determined battle to get exclusive representation written into the law.⁹ The solution to the free rider

⁹*Opportunity or Privilege*, chaps. 2 and 3.

problem is to repeal exclusive representation. If unions represented only workers who freely chose on an individual basis to associate with them and support them, there could be no free riders.

If Lane Kirkland were really interested in supporting First Amendment freedoms for everyone he would work toward the repeal of exclusive representation. But because he is so wedded to the principle of exclusive representation he must fall back on union security to cope with free riders. Thus he uses one infringement of the freedom of association (exclusive representation) to justify a further infringement of that freedom (union security).

Not surprisingly, the U.S. Supreme Court does not agree that union security arrangements are egregious infringements of First Amendment freedoms. In *Railway Employees' Department v. Hanson* [351 US 225 (1956)] the Court disagreed with the Nebraska Supreme Court which argued that a union shop clause affecting Nebraskan railroad employees infringed the First Amendment of the U.S. Constitution as well as Nebraska's proscription of such arrangements within its borders. The U.S. Supreme Court recognized a valid First Amendment question, but declared (at 233):

Industrial peace . . . is a legitimate [legislative] objective; and Congress has great latitude in choosing the methods by which it is to be obtained. The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one.

The Court says the benefits of increased industrial peace are more than enough to compensate for the cost of the infringement of First Amendment freedoms. That proposition is debatable on the face of it, but when it is realized that the adoption of the original Wagner Act was the occasion for decreased industrial peace¹⁰ the Court is seen as justifying the imposition of a cost with which there is no associated benefit.

Proscription of Company Unions

Section 8(a)(2) of the LMRA states:

It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

This provision of the law is aimed at employer-sponsored unions which, according to conventional wisdom, were used by employers, prior to the adoption of the Wagner Act in 1935, to meet the requirements of Section 7(a) of the National Industrial Recovery Act (NIRA)

¹⁰Ibid, chap. 4.

while still denying their employees legitimate unionization rights. Under the NIRA workers were free to choose which sort of union, if any, with which to associate—an “independent” union such as the AFL, or an employer-sponsored union. The independent unions alleged that employer-sponsored unions (company unions) were simply fronts used by employers to mask their exploitation of workers. Workers who chose to associate with company unions were excoriated by the independent unions as cowards and lackeys.

Between 1933 and 1935 independent unions launched a large number of recognition strikes. The purpose of these strikes was to force employees to disassociate from company unions and join “real” unions. According to folklore these strikes were battles of workers against employers, but in fact they were battles between independent unions and workers who chose to join company unions or chose to abstain from unionism altogether. The typical tactic of an independent union was to get a few employees at a plant to join up and then call a strike. The great majority of workers who wanted to continue to work were then harassed by “flying squadrons” of non-employee pickets who were brought in from outside the local community to shut the plant down.

In any event, the Wagner Act settled the matter by proscribing company unions. A measure of “labor peace” was secured simply by denying one side of a dispute its rights to defend itself. This is the “peace” that comes from oppression.

It seems self-evident to me that freedom of association implies that if some workers find company unions to be superior to independent unions as devices for pursuing their goals, they ought to be free to choose to join company unions. And in fact, many employer-sponsored unions prior to 1935 were superior to independent unions in that way.

Those employer-sponsored unions were early forms of what we today call “quality circle” arrangements wherein employers and employees cooperated in the search for and implementation of improvements in production processes which enabled the firms involved to be more effective competitors. Company-sponsored unions were structured on the natural complementarity between workers and management. Cooperation was seen as the best way to serve the interests of both groups. Independent unions, on the other hand, have always been predicated upon an adversarial relationship between workers and management. They have promulgated the view that warfare (class warfare^p) best describes the natural state of affairs between labor and capital.

Today American smokestack industries are encouraged to emulate the Japanese style of labor-management relations in order to rescue themselves from extinction. If it had not been for the proscription of company unions in 1935, those early forms of quality circle arrangements could have evolved into effective forms of labor-management relations which even the Japanese would envy.

More important, Section 8(a)(2) is today standing in the way of needed changes in unionized American industries. In *NLRB v. Cabot Carbon Co.* [360 US 203 (1959)] the Supreme Court held that employer-created employee committees set up to confer with management on a regular basis on matters of mutual concern such as quality control, production innovation, and complaint settlement violated Section 8(a)(2) of the LMRA. This ruling stands to this day, and it has been interpreted very narrowly by the NLRB in its rulings. In a recent journal article the NLRB's position was stated in this way:¹¹

[T]he Board has been very consistent in its rather strict interpretation that Section 8(a)(2) prohibits all employer support which *could have* impinged upon employee free choice. There is no requirement that an *actual* interference be proven. More importantly, evidence that there was *no interference but merely cooperation* with employee free choice has seldom been successful to negate the Board's presumption that employer support is unlawful in all circumstances.

The most direct way to remove Section 8(a)(2) as a barrier to innovation is to eliminate it from the law. That would permit employees and employers to cooperate in experimenting with alternative production arrangements, and it would also permit company-sponsored employee organizations to compete directly with labor unions for membership and allegiance. The latter form of competition would encourage beneficial innovation in labor-management relations,¹² and it would restore some freedom of association to workers.

Mandatory Bargaining

Section 8(a)(5) of the LMRA states:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . .

¹¹Curtiss K. Behrens and James Sollenberger, "The National Labor Relations Act: A Potential Legal Constraint Upon Quality Circles and Other Employer-Sponsored Employee Committees," *Labor Law Journal*, December 1983, pp. 777-78 (emphasis in original).

¹²Charles W. Baird, "Labor Law and Entrepreneurial Discovery," *Austrian Economics Newsletter*, Summer 1985.

Section 8(d) states:

For purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

One aspect of the freedom of association is the right to engage in voluntary exchange contracting with others. But if a contract is based on voluntary exchange all parties thereto must consent to enter into bargaining to begin with. If I am told that I must bargain with some person or group, I am forced into the bargaining association. That is another self-evident infringement of First Amendment rights.

Whether an employer would choose to bargain with a labor union if he or she did not have to would depend on the economic circumstances of the moment. If good substitutes for the workers who are represented by the union that wants to bargain were readily available on terms the employer found attractive, the employer would probably not choose to bargain with the union. That is the way competition works—the party that offers the best terms wins. The employer is not responsible for the existing conditions in the labor market; he or she merely reacts to them as they are. If the law prevents the employer from accepting the terms offered by nonunion workers by insisting that the employer bargains with the union, the law exploits some workers at the behest of other workers. That violates the principle that the law is supposed to treat everyone equally. The terms offered by nonunion workers have just as much moral merit as the terms offered by union workers, even if the former are called “scabs.”

The duty to bargain has even been used to prevent a company from contracting out maintenance work after its existing collective bargaining contract with its unionized maintenance workers expired. In *Fibreboard Paper Products Corporation v. NLRB* [379 US 203 (1964)], the Supreme Court declared that contracting out was a mandatory subject of collective bargaining. This means that a firm cannot switch from in-house operations to outside contractors, even when the contract covering the in-house workers expires, without securing the consent of the union that represents those in-house workers. A contract for (say) two years gives union workers a legally enforced right to force employers to bargain regarding all future years.

Moreover, the duty to bargain “in good faith” has come in practice to mean that employers must make concessions to unions during collective bargaining sessions. An employer who steadfastly refuses to improve his offer is in jeopardy of being charged with an unfair labor practice. If a strike is subsequently called because of failure to

reach agreement the strike could be designated as an unfair labor practice strike rather than an economic strike. After an unfair labor practice strike is settled an employer is legally forced immediately to reinstate all strikers. Any replacement workers that were hired during the strike must be dismissed to make room for the returning strikers. (In the case of an economic strike, unless the settlement specifies otherwise, strikers merely have first claim on the jobs if and when replacement workers leave them.) The duty to bargain in good faith thus becomes in yet another way an impediment to the freedom of nonunion (replacement) workers to associate through contract with employers.

Conclusion

Folklore has it that the Wagner Act was a long overdue measure designed to guarantee to American workers their constitutional right of freedom to associate in labor unions. But that right had never been denied. Workers have always been free to form labor unions and collectively to pursue better terms and conditions of employment than they could get individually. The only restriction placed on such voluntary unions was they could not use force to compel employers to accept their demands or to prevent nonunion workers from working. In many ways the Wagner Act is more accurately viewed as an infringement of the freedom of association which grants private associations of some workers the legal use of force over other workers and employers.

In August 1984 Lane Kirkland, for entirely different reasons, said that it is perhaps time to repeal all but the "most basic" of American labor laws. I am not sure what he means by "most basic," but in my judgment the time has come, on First Amendment grounds, to give serious consideration to the repeal of the LMRA, the RLA, and all similar state legislation.