Toward Equality and Justice in Labor Markets

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> The Norris-LaGuardia and Wagner Acts will, I predict, come to be regarded by future historians as economic blunders of the first magnitude. They were worked for and acquiesced to under motivations of almost unparalleled sordidness and cynicism combined with the highest, misguided idealism.
>
> W. H. Hutt[1]

In the U.S. context, two necessary, but not sufficient, conditions for moving toward equality and justice in labor markets are repeal of all the 1932 Norris-LaGuardia Act (NLA) and most of the 1935 National Labor Relations Act, as amended (NLRA). While there is room in the free society for voluntary unionism, there is no room for the special privileges granted unions under the NLA and NLRA. To the extent that the U.S. is taken as a model for newly emerging, democratic, and market-based economies, this paper can be regarded as an essay on mistakes to be avoided.

In what follows I first define voluntary exchange, a concept that is fundamental to a correct understanding of equality and justice. Then I consider alternative meanings of equality and justice, and explain the sense in which I use those terms. Next, I explain the features of the NLA and NLRA that are inconsistent with a correct understanding of those principles. Finally, I propose an agenda for reform of American labor relations law that I also offer as a model for newly emerging market economies.

I. Voluntary Exchange

An exchange is a reciprocal giving and receiving of goods and services among two or more people. An exchange is voluntary if four

[1] Hutt, W. H., *The Strike-Threat System: The Economic Consequences of Collective Bargaining*, Arlington House, New Rochelle, NY, 1973, p. 23.

criteria are simultaneously met.[2]

a. *Entitlement*. All parties to the exchange must either own that which they are offering to exchange, or they must be acting as the authorized agent of the owner(s). There is no such thing as voluntary exchange of stolen property.
b. *Consent*. All parties to the exchange must agree to (i) enter into the exchange relationship – i.e., to bargain with each other – and (ii) the terms at which any actual exchange takes place – i.e., the final outcome of the bargaining. No forced bargaining can result in a voluntary exchange.
c. *Escape*. All parties to the exchange must be able to turn down any offers they do not like and walk away without losing anything to which they are entitled. This is really implicit in the consent criterion, but I state it as a separate criterion for emphasis.
d. *No misrepresentation*. No party to the exchange may defraud any other parties. That is, no one can tell a lie. This leaves room for honest error. I can make any claim that I believe to be true when I make it, even if it turns out later to be incorrect. Moreover, this criterion does not require the parties to tell all they know. It merely proscribes any person saying something he knows to be false.

Hayek often asserted that the primary responsibility of government in a free society (or liberal order) is to enforce the "universal rules of just conduct." I suggest that those rules are nothing more or less than the rules of voluntary exchange.

II. Equality and Justice

"Equality" and "justice" mean different things to different people. Hayek defines them as they were understood by the Framers of the U.S. Constitution. Today, most academicians, journalists and politicians, define them as they were understood by the authors of the NLA and the NLRA.

According to Hayek[3], equality means what the ancient Greeks

[2] See Baird, C. W., "The Varieties of 'Right to Work': An Essay in Honor of W. H. Hutt," *Managerial and Decision Economics*, Winter 1988, Special Issue, pp. 33-43.

[3] Hayek, F. A., *The Constitution of Liberty*, University of Chicago Press, Chicago, 1960, Part I.

meant by the word *isonomia* – equal treatment before the law. The U. S. Constitution embodies this view of equality in its "equal protection" and "due process" clauses. Thomas Jefferson embodied this view in the Declaration of Independence by declaring that "all men are created equal," and are "endowed by their Creator with certain unalienable rights." In other words, all individuals, irrespective of government, have exactly the same set of rights. Thus government must treat all people alike.

Robert Nozick[4] refers to this as "process equality." But it is not just any old process (or set of rules) to which all individually are subject. Rather, all individuals are identically subject to the universal rules of just conduct; or, as I like to put it, to the rules of voluntary exchange.

According to the *isonomia*, or process, view of equality, government may not grant special privileges to, or impose special burdens upon, any individual or group of individuals. All individuals and groups are constrained to obey the rules of voluntary exchange. Government is constrained to enforcing those rules. Government is forbidden to intervene in the voluntary exchange process to bring about particular end-state results. As Hayek[5] put it, "the basic postulate of a free society" is "the limitation of coercion by equal law." In other words, the limitation of involuntary exchange by equal law.

Nozick calls the contrary view of equality, the view embraced by the authors of the NLA and the NLRA, "end-state equality." According to this view, what matters is outcomes of human action. "Equality" among people is increased when the differences between their incomes or standards of living are decreased. Both Hayek and Nozick point out that this second idea of equality is not just different from the first, it is incompatible with the first. Voluntary exchange naturally results in unequal outcomes because, although all people are endowed with the same set of rights, they are not endowed with the same set of mental and physical abilities, luck, attitudes and alertness. If government intervenes in the process of voluntary exchange to bring about more equality in the second sense than

[4] Nozick, Robert, *Anarchy, State, and Utopia*, Basic Books, N.Y., 1974, Chapter 8.

[5] Ibid, p. 88.

would naturally occur, government must treat people with unequal voluntary exchange outcomes unequally. Government must discriminate against those with better voluntary exchange outcomes in favor of those with worse voluntary exchange outcomes.

Justice also has two meanings, and the distinction between its two meanings has the same basis as the distinction between the two meanings of equality. First of all, justice is a concept that applies only to human actions. A tree cannot be just or unjust. Moreover, justice refers to actions involving two or more people. An isolated person is neither just nor unjust if his actions do not affect any other people.

The Framers of the U. S. Constitution thought that justice exists when all interactions among people are based on voluntary exchange. What mattered to them was the *process* of interaction, not its outcomes. This is what the ancient Greeks referred to as "commutative justice." Nozick calls it "process justice."

The second definition of justice is what the Greeks called "distributive justice," and Nozick calls "end-state justice." There is more justice, or less injustice, in the second sense when there is more end-state equality.

Again, as Hayek and Nozick pointed out, the first and second definitions of justice are incompatible. Inasmuch as people are endowed with unequal intelligence, alertness, physical ability, interests and endurance, voluntary exchange will inevitably yield unjust, in the second sense, outcomes. This injustice can only be remedied by coercive transfers which are unjust in the first sense.

My evaluations of the NLA and the NLRA are based on the first definitions of equality and justice. The basic problem is that the authors of those Acts constructed them purposefully to pursue the second definitions of those principles.

III. The Norris-LaGuardia Act

A. *Historical Background*

The NLA was passed and signed into law by President Hoover in 1932. This, of course, was in the midst of the economic collapse of 1929-1933 that became the Great Depression. Hoover was desperate to do something about the crash, and he fell prey to the special interest pleading of the American Federation of Labor as well as the purchasing power fallacy of the time. That fallacy was the idea that

high wages were necessary in order for workers to have enough purchasing power to buy all the goods and services they help to produce. Actually, between 1929-1933, nominal wages were falling, but money prices of goods and services were falling even more, thus real wages, workers' purchasing power, were increasing.[6] Unfortunately, the purchasing power fallacy is still with us. Notwithstanding the valiant efforts by economists such as W. H. Hutt[7] to educate them, American unionists and benighted politicians use it all the time to justify the extension of compulsory unionism.

Starting in 1890, when the Sherman Antitrust Act was enacted, unions tried to be exempted from its provisions. They finally succeeded in 1932. The Sherman Act is based on the common law rule against combinations in restraint of trade.[8] Its actual application in U. S. history has tended to favor particular competitors rather than the process of competition.[9] Whatever the merits of antitrust legislation, process equality requires that if combinations of employers in restraint of trade are to be proscribed, combinations of employees in restraint of trade ought also to be proscribed.

In 1914 President Wilson thought he had arranged to exempt unions from prosecution for actions which restrained the voluntary exchange rights of others by signing the Clayton Act. But, in 1921, the U.S. Supreme Court, whose members then still believed in process equality and process justice, interpreted the Clayton Act to provide protection to unions only for their lawful acts. Illegal restraints of trade in, for example, secondary strikes and boycotts, and in situations involving threats and actual use of violence, were held to be actionable (*Duplex Printing Co. v. Deering*, 254 U.S. 443) .

[6] Vedder, Richard K. and Gallaway, Lowell E., *Out of Work: Unemployment and Government in Twentieth Century America*, The Independent Institute, Oakland, CA, 1993.

[7] Hutt, W. H., *The Theory of Collective Bargaining 1930-1975*, Cato Institute, Washington D.C., 1980, and *A Rehabilitation of Say's Law*, Ohio University Press, Athens, 1974.

[8] Petro, Sylvester, *The Labor Policy of the Free Society*, Ronald Press, New York, 1957.

[9] Armentano, Dominick T., *Antitrust and Monopoly: Anatomy of a Policy Failure*, John Wiley & Sons, New York, 1982.

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

B. *The Way It Ought to Be*

In a free society all workers are permitted to affiliate with any labor unions that are willing to receive them. Labor unions are private, voluntary associations of their members. As such they are subject to the same rules of voluntary exchange as everyone else. In a free society, government does nothing to coerce workers to join unions or to remain union-free. Government treats unionized and union-free workers exactly alike – i.e., government neither favors nor burdens either group. Similarly, the process notions of equality and justice imply that employers have a right, without force and fraud, to resist unionization or endorse unionization. Moreover, while workers are free to offer to bargain with employers collectively through unions, employers are free to decline such offers.

The process notion of equality requires that unionized and union-free workers receive equal protection of the laws. While any individual worker has a right to withhold his own labor if he doesn't like the terms of trade offered by an employer, and while a group of workers who each want to withhold their labor from a particular employer may do so together, no worker or group of workers has a right to withhold the labor of workers who are willing to do the job the strikers have refused to do. Insofar as a strike is merely a collective withholding of labor from an employer by like-minded workers, a strike is consistent with process equality and justice. Insofar as a strike also involves attempts, by actual and threatened acts of picket line violence, to prevent willing, union-free workers from entering into an employment relationship with an employer who is willing to hire them, a strike is inconsistent with process equality.

Any picketing by employees or strangers that impedes access of replacement workers, suppliers, and customers to the premises of the struck firm is a violation of the common law proscription of trespass

and is properly viewed as a combination in restraint of trade. That is why the Court, in the *Tri-City* case, limited pickets to one per entrance.

However, the one picket per entrance rule is subject to the objection that if the picket is located on the employer's property, and if the employer has not given permission for the picket to be there, that, too, is an act of trespass. The Court authorized one (even trespassing) picket per entrance to accommodate the Clayton Act that explicitly made peaceful picketing in primary strikes legal. The Court did not have the courage of its apparent common law convictions on the point.

The reason the Court prohibited picketing by strangers in the *Tri-City* case was that it recognized that with stranger picketing, third parties, who have no contractual relationship with target firms, could draft both employees and employers into combinations in restraint of trade designed to fix prices and/or wages in a whole industry. In other words, stranger picketing was seen by the Court as a cartelizing device.

The right of freedom of contract (recognized by pre-New Deal Courts as one of the "privileges and immunities" and part of the "liberty" guaranteed by the Constitution) implies that employers may make any voluntary exchange offers they wish to any workers who are willing to entertain such offers. (Recall the four criteria of voluntary exchange.) For example, an employer may make an offer of employment contingent on the job applicants' promise to refrain from any and all union activity. Such union-free agreements were legal and enforceable prior to 1932. They were called "yellow dog" contracts. Similarly, an employer may make a job offer contingent on the applicants' willingness to join a union either before or after employment begins. Some union-only contracts are legal today. They usually are called union shops. (However, the union-only contracts that are legal today are not voluntary exchange arrangements. I will discuss this issue in Section IV, Part E, below.)

C. *Provisions of the Act*

The NLA begins with a Declaration of Public Policy wherein it is asserted:

> [T]he individual unorganized worker is commonly helpless to

> exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment ....

This idea of the helpless worker who needs unions for self defense was the primary excuse used to pass both the NLA and the NLRA. It is a hoary myth. As W. H. Hutt[10] and, later, Morgan Reynolds[11] have demonstrated, data falsify the myth. In the nineteenth century, long before the existence of significant unionization in the U.S., real wages were on a strong upward trend, and worker-initiated job switching was frequent and became increasingly common. Contrary to the view that says large scale employers exploited unorganized workers, workers in large firms were paid more than workers in small firms. Contrary to the claim that employers had more bargaining power than unorganized workers because those workers had no assets to fall back on if they turned down poor job offers, workers with savings weren't able to bargain for better wages than workers with no saving. Finally, contrary to the conventional wisdom that unions were necessary to offset employer combinations designed to keep wages low, most employer associations were formed in self defense against unions that had already been formed to attempt to take wages out of competition.

Nevertheless, on the chimerical grounds of the helpless, unorganized worker, the NLA made five substantive changes in labor relations law which made it almost impossible for employers to oppose unionization. Of course, the authors of the Act thought they were acting in the interest of equality and justice – end state equality and justice. To do so they denied process equality and justice to employers and workers who wished to remain union-free.

First, the NLA made yellow dog, or, as they are more appropriately called, union-free, contracts unenforceable in federal courts. The voluntary exchange right of employers to enter into binding contracts with willing workers who promised to refrain from unionization was wiped out. Employers were effectively forbidden to

[10] Hutt, W.H., *The Strike Threat System*, op. cit.

[11] Reynolds, Morgan O., *Power and Privilege: Labor Unions in America*, Universe Books, New York, 1984.

boycott union labor. But unions were not forbidden to boycott nonunion labor. Moreover, workers who wanted to remain union free were denied an important means of achieving that end.[12]

Second, the NLA prohibited federal judges from issuing any injunctions to interrupt strikes, even violent strikes. Oh, of course the language was not that bald, but the conditions imposed on employers to prove violence were so onerous as to make unions immune to injunctions to stop violence.[13] If replacement workers were beaten, no federal judge could do anything about it. It was left to the, frequently outnumbered, local law enforcement agencies to worry about violence against persons and property. Section 7(c) of the NLA says that an injunction cannot be issued unless the court has taken testimony, with witnesses subject to cross examination, and has found "that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief." In other words, courts are forbidden to stop aggression unless the damage to the victim is larger than the damage suffered by the aggressor as a result of the order to stop the aggression. So much for the fundamental responsibility of government to protect the voluntary exchange rights of everyone while favoring no one. In America such egregious violations of common sense and process equality and justice can be found only in labor relations law. In America there is a genuine apartheid of labor law.[14] There is ordinary law for all other people and groups, but a very special law, set apart from ordinary law, for unions and unionized workers.

Third, the NLA gave blanket immunity to labor unions against prosecution under the antitrust laws. Nothing done by labor unions, even if violence were involved, could be enjoined as illegal

[12] As Morgan Reynolds, Ibid., has demonstrated, pp. 98-100, "yellow dog" contracts were sometimes initiated by employees who wished to use them as excuses for not talking with union organizers.

[13] Dickman, Howard, *Industrial Democracy in America*, Open Court, LaSalle, IL, 1987, pp. 238-241.

[14] This term was coined by Vieira, Edwin, "From the Oracles of the Temple of Janus: *Chicago Teachers Union v. Hudson*," *Government Union Review*, Summer 1986, pp. 1-37, at 35.

combinations in restraint of trade. Thus, to this day, General Motors, Ford and Chrysler are forbidden to form combinations to take the prices of automobiles out of competition, but the employees of those firms are actually encouraged to form combinations to take autoworkers' wages out of competition. There is clearly no such thing as equal protection of the laws when it comes to labor relations law.

Fourth, the NLA gave legal standing to strangers in labor disputes. Thus a company with 150 employees on strike and 700 employees that wish to continue to work can be forcibly shut down by 5000 picketers sent from union headquarters.[15] That intimidates many small firms into not resisting the blandishments of union organizers.

Fifth, the NLA insulated labor unions as organizations from any prosecution for any acts committed by any individual members and officers. Suppose that some picketers murder a replacement worker who crossed a picket line. The union could not be blamed. Even if the perpetrators were apprehended by local officials and convicted by local courts, no punishment could be imposed on the union. In other words, the common law doctrine of *respondeat superior*, or vicarious responsibility, was made inapplicable to unions. If I am driving a delivery truck for my employer, and I run down a pedestrian, I and my employer are held liable. But if I am walking a picket line at the behest of a union, even if I am not an employee of the struck firm, and I kill someone by hitting him over the head with a hammer, I am liable (if the local authorities are brave enough to oppose the union and enforce the law) but the union is not. Again, so much for process equality and justice.

The practical effects of the second, third, fourth and fifth items are well illustrated in the case of *Apex Hosiery Co. v. Leader*, 310 U.S. 409 (1940). The employer was operating on an open shop basis. The union wanted to force all 2500 employees to unionize. Eight employees who were union members, joined by members of the same union who were employed by *other* firms (i.e., strangers to Apex), undertook a sitdown strike. In other words, they occupied the premises of the employer, prevented willing employees from working,

[15] This happens all the time. For example, see Baird, C. W., "A Tale of Infamy: The Air Associates Strikes of 1941," *The Freeman*, April 1992, pp. 152-159.

and proceeded to destroy machinery on the shop floor. The company applied for an injunction against the union on Sherman Act grounds of a violent combination in restraint of trade including trespass on private property. In the end the U.S. Supreme Court denied the company any relief by claiming that the NLA protected unions from any antitrust prosecution. In the words of the Court, "Restraints not in the [Sherman] Act when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." There is neither equality nor justice in that story.

IV. The National Labor Relations Act

W. H. Hutt held that, "Lying preambles are all too common in acts of Congress and acts of Parliament."[16] The NLRA is a perfect example of Hutt's dictum. Its preamble says, in part, that:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Set aside, for purposes of this paper, the undisputed fact that since the adoption of the NLRA the incidence of strikes and other "obstructions to the free flow of commerce" has greatly increased. The NLRA does *not* "encourage" the practice of collective bargaining, it *compels* collective bargaining. It does *not* protect workers' "full freedom of association," it abrogates that freedom in egregious ways. It does *not* assure that workers are able to designate "representatives of their own choosing," it denies workers their individual freedom of choice. And the NLRA does all these things in the name of end-state equality (of course, its proponents just use the term "equality") and justice by extinguishing process equality and justice.

[16] Hutt, W. H., *The Strike Threat System*, op. cit, p. 286.

A. *Exclusive Representation*

Consider, first, the issues of freedom of association and choice of representatives. Section 9(a) of the NLRA creates "exclusive representation" as the cornerstone of labor relations law. Under this doctrine, 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 not only the workers who voted for it, but also 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." The United States and Canada (which copied the U.S.) are the only two advanced, industrial countries in the world with exclusive representation.

Unionists justify exclusive representation by saying that majority rule is "democratic." In a congressional election the winning candidate in a congressional district is the exclusive representative of all voters in the district. Even voters who voted against him 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 make all workers accept the representation services of a union selected by majority vote.

But the analogy is not apt. Unions are not governments. In classical liberal thought, democracy is an institution that developed as a means of limiting governments. 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. Compulsory submission by individuals to the will of a majority is justified only in constitutionally authorized governmental activities.

In the private sector, in contrast, individuals are free to make their own choices irrespective of what a majority of others may prefer. An individual is not forced to submit to the will of a majority in determining which attorney will represent him in court; but, under the principle of exclusive representation, an individual is forced to submit to the will of a majority in determining which agent will

represent him in the sale of his labor.

Moreover, unionists don't carry the analogy far enough. Politicians have to face regularly scheduled re-election. Unions do not. Once a union is certified as an exclusive bargaining agent by a majority vote in a certification election, it is presumed to have majority support indefinitely into the future. It never has to face a re-election even if all of the workers who originally voted for the union are no longer employees of the firm.

There is a decertification process, but there are no regularly scheduled re-elections. The decertification process requires that employees, and *only* employees initiate a petition requesting a vote on whether to decertify the union. The signatures must be collected on a face-to-face basis by employees. Employers are forbidden to have anything at all to do with the process. If enough signatures are collected (at least thirty percent), then there is a secret ballot on the question. It is as if Bill Clinton would be president forever unless a petition were circulated to call for an election on whether to fire him or not.

There is substantial process inequality between certification and decertification elections. In the former, unions and strangers (union organizers) may initiate and execute the whole process. In the latter, employers and strangers are forbidden to play any role whatsoever. Only employees may initiate and execute the process. Employers, or any agents of employers, are forbidden to participate. Many successful decertification elections have been set aside by the National Labor Relations Board (NLRB) because they were "tainted" by employer involvement.[17]

Exclusive representation is a violation of the entitlement condition for voluntary exchange. It is a denial that an individual owns his own labor. It is an assertion that a majority of fellow workers own his labor. Only they can bargain with the employer about the sale of his labor. He is forbidden to do so himself. If justice requires that people interact with each other only on the basis of voluntary exchange, exclusive representation is not just.

Nor is it consistent with the principle of equality. If all individuals are endowed with equal rights which it is the primary duty of

[17] See, for example, two 1992 NLRB decisions -- in *Caterair International* and in *Lee Lumber and Building Materials Corp.*

government to defend, all individuals must remain free to make their own choices regarding which offers to make and accept in the labor (and every other) market. If all individuals are equal, the choices of no group can take precedence over the choices of any individual (except insofar as the individual consents to defer to the group, as in private clubs). Unions can be regarded as private clubs, but they have been given the privilege of exclusive representation by force of law, not by the consent of each individual they represent.

Under exclusive representation workers are forced, under penalty of losing their jobs, to associate with unions supported by a majority of their fellow workers. I am "associated" with a union if that union represents me in the sale of my labor. If I do not consent to that representation, my freedom of association, another implication of equal rights, is denied. A unionist might say that I can escape this association by giving up my job, but that runs up against the escape condition for voluntary exchange which requires that I can turn down any offer of association I wish without losing anything to which I am entitled. If all individuals have equal rights, I have a right to an employment relationship with any willing employer notwithstanding the desires of third parties. If the only way I can escape the representation services of a union is to break my employment relationship with a willing employer, I am losing something to which I am entitled.

B. *Free Speech*

Section 8(c) of the NLRA states that during campaigns leading up to certification elections, unions and management have free speech rights except if the speech contains a "threat of reprisal or force or promise of benefit." Case law has determined that this means that employers cannot offer any benefits as an inducement for workers to vote against a union, but unions can promise benefits as an inducement for workers to vote for a union. The fig leaf that is used to cover this blatant process inequality is that the union is promising benefits that will come from the *employer* (e.g., higher wages), not directly from the union treasury.

C. *Company Unions*

There is a related issue, that is not mentioned in the preamble, but which will be important in Section V in which I make my

suggestions for reform. That is the issue of company unions. A company union is one formed and administered by an employer. In the 1920s several company unions were set up as a means of giving voice to workers in some decisionmaking. At the time, these company unions were considered very progressive, and employers who used this form of labor relations were considered enlightened. Goodyear Tire & Rubber Company, Filene Co., and the Colorado Fuel & Iron Co., for example, were pioneers in cooperative labor-management relations. In 1922, the Leeds & Northrup Cooperative Association, a company union, undertook the nation's first unemployment insurance plan.[18]

However, in 1933 the National Industrial Recovery Act (NIRA) was enacted. Section 7(a) of NIRA said that employers had (a) to allow their employees to join unions "of their own choosing" and (b) to bargain with those unions. To meet the requirements of 7(a), many employers formed company unions and bargained with them. Independent unions, such as the American Federation of Labor saw these newly formed company unions as "shams" that were set up just to prevent workers from joining independent unions. When the NLRA became law in 1935, it outlawed company unions. Section 8(a)2 of the NLRA forbids employers to form or support any labor organizations that deal with management on terms and conditions of employment. The NLRA was explicitly fashioned on the assumption that labor and management are natural enemies. It promotes adversarial labor-management relations.

Recently, under the pressure of global competition, American companies, both union and nonunion, have been forming labor-management cooperation committees to once again give employees more voice in decisionmaking. These committees are sometimes called "quality circles" or "employee involvement teams." In 1992, in the *Electromation* case, the NLRB declared these cooperation committees to be illegal company unions. Because of that decision, the law in the U. S. today is that labor-management cooperation

[18] Nelson, Daniel, "The Company Union Movement, 1900-1937: A Reexamination," *Business History Review*, Autumn, 1982, pp. 335-357.

which is not *union*-management cooperation is illegal.[19]

Obviously, I recommend repeal of Section 8(a)2, or at least modification of it to allow good faith efforts by management to elicit worker cooperation to improve efficiency, productivity and morale. But that is not the point for this paper. In Section V, I will explain the role of company unions in my proposals for reform based on equality and justice.

D. *Compulsory Bargaining*

Now, consider the claim in the NLRA's preamble that the Act is intended to "encourage" collective bargaining. Sections 8(a)5 and 8(b)3 impose on employers and unions, respectively, a *duty* to bargain. Section 8(d) adds that the duty is a requirement to bargain "in good faith." Case law has established that "good faith bargaining" means that each side must compromise with the other. Mandatory bargaining violates the consent condition for voluntary exchange. Justice requires that individuals and groups be free to choose whether to bargain with each other.

Moreover, equality requires that both sides be treated equally. Although Section 8(b)3 imposes a duty to bargain on unions, in practice it is almost always employers who are found to be in breach of their duty to bargain. For example in *NLRB v. General Electric Co.*, 418 F.(2d) 736 (1969), a federal appeals court ruled that General Electric had failed to bargain in good faith because it made its contract offer on the basis of a poll taken of the workers, and it refused to alter any of the terms in its initial offer. The decision included the following bit of process inequality:

> General Electric chose to rely entirely on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible.... The aim, in a word, was to deal with the union through the employees rather than with the employees through the union.

In other words, General Electric should not have tried to

[19] Baird, C.W., "Are Quality Circles Illegal? Global Competition Meets the New Deal," *Cato Institute Briefing Papers*, February 10, 1993.

discover what its employees wanted and then tried to get the union to agree to what the employees wanted. Instead, the union should decide what it wanted and then try to get General Electric to agree to that. The union, of course, *was* free to poll workers, but it did not do so. Ever since the *General Electric* decision, no take-it-or-leave-it bargaining has been permitted. The only reliable defense an employer can use against a charge of failure to bargain is a record of compromises. Not to put too fine a point one it, unions have a defacto property right to receive concessions from employers during collective bargaining.

E. *Union Security*

Because of exclusive representation, unions have been granted the power to force workers they represent to join them, or, at least, to pay unions dues. Section 8(a)3 of the NLRA states that it is an unfair labor practice for an employer

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [except the employer may] require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment....

That is *exactly right*. Employers may not encourage or discourage membership, they may only agree with a union to require it.

Unions justify compulsory membership and/or dues paying on the grounds that under exclusive representation they are required (forced) to represent all workers in their respective bargaining units; hence, it is only fair that every worker pay for the representation services. Otherwise, some workers would be free riders. They would receive union-generated benefits without helping to pay for the costs of generating those benefits.

First, it is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation. Now they say because they have the privilege, workers should be forced to pay for representation they do not want. The free rider problem could be eliminated simply by repealing exclusive representation. If unions bargained only for their voluntary members

and no one else, there could be no free riders.

Second, the free rider problem is faced by all cartels. In fact, it a principle reason why most economists say that cartels are inherently unstable. Combinations to eliminate competition naturally disintegrate unless government does something to support them. Here is a fine example of unequal protection of the laws. Labor cartels are protected from natural disintegration , and employer cartels are not. Here, there should be an equal *non*protection of the laws.

There is no justice in forcing people who do not want to be represented by a union to pay tribute to a union as a condition for entering employment contracts with willing employers. The situation is not ameliorated because, under the NLRA, employers have to "agree" with unions to require membership and/or dues paying. Employers are forced to bargain with certified unions on the issue of union security, notwithstanding the desires of individual workers. Union security agreements under the NLRA are not voluntary exchange agreements. They are based on privileges granted to unions, and to no one else, by the law.

Yellow dog and union security contracts are consistent with process equality and justice only if (a) employers freely choose to bargain with workers (yellow dog) and unions (union security) on the issues, (b) workers and unions also freely agree to bargain with employers on the issues, (c) all union members are voluntary members and (d) all parties can turn down any offers they do not like without losing anything to which they are entitled. It is a question of property rights – who owns what? Workers own their labor, employers own the jobs, and unions own whatever workers, on an individual basis, are willing to delegate to them. With those entitlements, let closed shops, union shops, open shops, and union-free shops bloom.

V. An Agenda for Reform

For classical liberals the appropriate reforms are clear. Those who accept the principles of voluntary exchange and process equality and justice as the guidelines according to which labor relations law ought to be (re)constructed must advocate the complete repeal of the NLA. There is not one whit of equal, just process in the whole Act. It is special privilege, and only special privilege, legislation.

Picket line, or any union-related, violence ought to be enjoined

even if to do so would harm the aggressor more than the continued violence would harm the victim. The common law of contract, tort, and trespass ought to apply equally to everyone, even peaceful primary strikers. Workers, employers, and the general public ought to be defended from coercion from all sources. If we are to have antitrust laws, they ought to apply equally to all combinations in restraint of trade whether by employers or workers. Strangers should not have any standing at all in labor relations disputes. If Ford has no legal standing in a suit brought by Chrysler against General Motors, why should unionized employees of Ford, or unemployed union members, have legal standing in a dispute between Safeway and its unionized employees?

The dirty little secret of American labor relations law is that individuals, acting under the auspices of a union, have almost no chance of being successfully prosecuted for acts of violence against other individuals and property. Worse, the unions that put them up to the violence have *zero* chance of being prosecuted as institutions. The principle of vicarious responsibility ought to be resurrected for unions.

All of these goals can be accomplished without any new legislation. Repealing the NLA, one of the best examples of bad legislation, would be sufficient. Moreover, I think the general electorate can me made to see the justice of such a move.

The NLA is very much like the British Trade Disputes Act of 1906 which also granted unconscionable special privileges to unions. Margaret Thatcher and Norman Tebbit, with significant assistance from The Institute for Economic Affairs which made the thinking of A.V. Dicey, F.A. Hayek, and W.H. Hutt part of the public debate, were able effectively to repeal the 1906 Act in the 1980s. If the British can do it in eighty years, the Americans should be able to do the same by the end of this century.

However, when it comes to the NLRA repeal would be more difficult to sell. Well entrenched conventional wisdom in the U.S. holds that repealing the NLRA amounts to making unions illegal. Unions have depended on special privileges for so long that most people expect they cannot survive without those special privileges. Therefore, although the common law of contract, tort and trespass are sufficient to delimit acceptable conduct in labor relations, I think it would be useful for Congress to codify the rules of voluntary

unionism. For their part, unions are so used to their government-granted special privileges that they probably really don't understand how voluntary unionism would work and what their responsibilities in such a regime would be.

Congressman Dick Armey (R, TX) submitted H.R. 1341 in the 103rd Congress, the one before Newt Gingrich became Speaker of the House. It does away with exclusive representation. In its place is a system of voluntary representation. Specifically, the Armey bill says that if a union has a majority of workers as voluntary members, the union will bargain for its members and as many individual nonmembers as choose to accept the union's representation services. It allows compulsory dues to be assessed on all individual nonmembers who elect to be represented by the union. Thus, the Armey bill renders the free speech issue moot – there will be no certification elections – and eliminates forced dues – any individual can escape paying dues by choosing not to be represented by the union. However, the bill does nothing to address the issues of mandatory bargaining and company unions.

The Armey bill would be an improvement over the status quo, but I have a different suggestion. I would replace exclusive representation with proportional representation, make bargaining voluntary for both sides, and eliminate the proscription of company unions. I have already explained the latter two issues and my positions on them. It remains to explain and defend proportional representation, and the role of company unions therein.

Under a system of proportional representation a union bargains for its voluntary members, and for no one else. Workers are actually allowed individually to designate representatives "of their own choosing." Workers are also allowed individually to choose to represent themselves. Suppose there is a firm with 1000 assembly line workers who would, under exclusive representation, all be in the same bargaining unit. Under proportional representation each worker chooses which union, if any, will represent him. For example, 400 workers could be represented by Union A; 300, by Union B; 100, by union C; and 200 could choose to represent themselves.

Such a system could work with or without compulsory bargaining. Suppose, for example, that the law required an employer to bargain with all unions selected by his employees providing that a majority of workers joined some union or another. Collective bargaining would

most likely be done by a committee of unions made up of representatives in proportion to their respective voluntary memberships. Alternatively, the law could require employers to bargain with any union that has any voluntary members who are employees. This latter system existed under Section 7(a) of the NIRA (1933).

On grounds of process equality and justice, I advocate proportional representation with voluntary bargaining. In this case employers (as well as unions) could bargain with their opposite parties if they chose to. That choice would, presumably, depend on labor market conditions. In periods of excess supply of workers capable of doing the job, employers may choose not to bargain. In periods of excess demand for such workers, employers may think they have to bargain to get the quantity and quality of labor they wish to employ. Unions would probably want to bargain most of the time, since that is their principal reason for existing. However, a union may occasionally refuse to bargain with an employer who wants to bargain in order to discipline the employer who earlier, under different circumstances, had refused to bargain.

President Franklin Roosevelt, who signed the NLRA into law on July 6, 1935, opposed exclusive representation just one year earlier. In March 1934 the United Auto Workers (UAW) threatened to shut down the auto industry unless the auto companies recognized the UAW as the exclusive bargaining agent for all industry production workers. In order to avoid the strike, Roosevelt intervened in the dispute and settled it on the basis of proportional representation. That is, the UAW represented only its own members. Other unions, *including company unions*, represented their voluntary members. Individuals who chose to be union-free represented themselves. Roosevelt declared that such an arrangement was called for by Section 7(a) of NIRA. More importantly, he asserted on national radio that proportional representation was the only form of union representation consistent with American principles of liberty.

Note that under Roosevelt's Auto Settlement, workers could choose to be represented by company unions. In a free society an employer ought to be allowed to undertake any worker-management interaction processes it wishes, including a company union. If workers are free to decide whether to be represented by company unions there is no justice in legislation that proscribes them.

Should employers be free to say that they will bargain *only* with company unions? Of course, why not? Whether they can get the quantity and quality of labor they want by doing so depends on conditions in the labor market. In periods of excess demand for labor, employers may have to resort to bargaining with independent unions that represent the workers they need and cannot get elsewhere. In periods of excess supply of labor, perhaps employers could refuse to employ workers who are not willing to join company unions. Most likely, in order to establish a reliable workforce, most employers would settle down to long term bargaining relationships with several, including company, unions.

Senator Robert Wagner (D, NY), the author of the NLRA which Roosevelt signed in 1935, proposed almost identical legislation, based on exclusive representation, in 1934. Roosevelt opposed the 1934 version of Wagner's bill on precisely the same grounds he defended proportional representation in the March 1934 Auto Settlement. He was in favor of voluntary, not compulsory, unionism. The reason he changed his mind and supported the 1935 Wagner bill is another story.[20]

Perhaps the policy alternatives available to writers of labor relations legislation can be clarified by the following 2 X 2 taxonomy. The columns depict the alternatives with regard to bargaining – compulsory and voluntary. The rows depict the alternatives with regard to representation – exclusive and proportional.

	BARGAINING	
	compulsory	**voluntary**
	exclusive NLRA	null
REPRESENTATION		
	proportional : Section 7(a) of NIRA	free society

Box I is the status quo in the United States. I do not recommend

[20] See Baird, C.W., *Opportunity or Privilege: Labor Legislation in America*, Social Philosophy and Policy Center, Bowling Green, Ohio, 1984, Chapters 2-3.

it for any newly emerging, democratic, market economies. I know of no real world examples in Box II. Box III, into which Section 7(a) of NIRA fits, also, with minor adjustments, describes Armey's proposal. (His representation is voluntary, but not proportional, because only one bargaining union can function at a time, but individual workers can opt out of the representation.) On grounds of process equality and justice, Box III is clearly preferable to Box I, but it is still blemished by coercion. Box IV describes the only kind of labor relations legislation that is fully consistent with the free society, one based on process equality and justice.

VI. In Conclusion

In 1957 Sylvester Petro published *The Labor Policy of the Free Society*.[21] In which he argued in favor of voluntary bargaining and repeal of the special privileges of the Norris-LaGuardia Act. However, he expressed no reservations about exclusive representation. As a result, he had to advocate repeal of union security arrangements while keeping exclusive representation. With proportional representation, union security is moot and representation is voluntary. My proposal is more radical than his, and, I think, more consistent with the principles of the free society.

Nevertheless, Petro did a superb job of putting the history of unionism in the U.S. in proper perspective:

> The labor relations legislation of the ... 1930s did not create the legal right of employees to form and join trade unions; that right was recognized by the common law, prior to the enactment of the labor relations legislation. Accurately stated, the effect of the labor relations legislation was to extinguish another right recognized by the common law: the right of employers to resist and discourage employee organization by means of the peaceful exercise of their own property and contract rights.[22]

I would add that the labor relations legislation extinguished yet another right recognized by the common law: the right of workers

[21] Petro, Sylvester, *The Labor Policy of the Free Society*. op. cit.

[22] Ibid, p. 138.

individually to refrain from associating with unions. My proposals would remedy the injustices recognized by Petro as well as the injustices he overlooked.

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An Introduction to the Theory of Privatization

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The concept of "privatization" has not been yet clarified in both theory and practice (Bailey, 1987; Kolderie, 1986; Kay and Thompson, 1986). As noted by R.W. Bailey, "one of the concepts in vogue is privatization. Although the concept itself is unclear, it might be tentatively defined as a general effort to relieve the disincentives toward efficiency in public organizations by subjecting them to the incentives of the private market. There are in fact several different concepts of privatization" (Bailey, 1987; 138).

J.A. Kay and D.J. Thompson also agree with Bailey by noting "privatization is a term which is used to cover several distinct, and possibly alternative means of changing the relationships between the government and private seetor" (Kay and Thompson, 1986; 18).

Privatization is frequently to refer to the sale of a Publicly Owned Enterprise's (POE's) assets or shares to individuals or private firms. However, this definition gives only a narrow meaning to privatization. In a broader meaning, it refers to restrictions on government's role and to some methods or policies that seek to strengthen a free market economy. The former meaning of privatization, i.e. the sale of a POE's assets or shares to the private sector, is mostly called "denationalization." These two terms – privatization and denationalization – are mostly confused and sometimes used interchangeably in the literature. As a matter of fact, denationalization is just one method of privatization. Government's role and functions can also be reduced or can be wholly terminated by implementing some other methods. In this article, I shall explain, first, the narrow meaning of privatization and, after that, shall explore the broad meaning of privatization, which encompasses the methods or policies that aim to strengthen a free market economy and to

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