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On Freedom of Association

by Charles W. Baird

Freedom of association is guaranteed by the First Amendment to the U.S. Constitution. The relevant portion states, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." Seems simple enough. We may assemble ourselves into whatever peaceful associations we choose, and the government is forbidden to interfere with those choices. But what does this really mean?

Note that the guarantee is in the form of a restriction on what government may do. The political philosophy of the authors of the Constitution and its Bill of Rights was that all individuals have fundamental human rights against which government is forbidden to trespass. Indeed, the most important function of any just government is to protect those rights for all individuals under its jurisdiction.

Logically, a fundamental human right is one that every individual possesses and can exercise in exactly the same sense at every point. If person A claims a right that, when exercised, denies exactly the same right to person B, the alleged right belongs only to A, not B. It should be called an A right, not a human right, for A and B are rivals in the exercise of the right. Genuine human rights are those which can be held and exercised nonrivalrously. The word "peaceably" in the Amendment has two meanings. The associations we choose to enter may not undertake violence to accomplish their ends, and within each association one person may not coerce another. Associations must be based on mutual consent.

That the Constitution guarantees freedom of association to each of us does not mean that we may each associate with anyone we choose. It means that we may associate with whoever also agrees to associate with us. If B is forced to accept A's offer of association, B is not free to choose his associations. Association would be a right of A, not B. It would not be a human right. Therefore, freedom of association, correctly understood, has both a positive and a negative component. We are free to associate with those who will accept us (positive), and we are free to abstain from associations of which we do not approve (negative).

The positive right of freedom of association is recognized by the United Nations and by the European Community. Article 20 of the U.N. Universal Declaration of Human Rights (1948) states:

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

Article 11 of the European Convention for the Protection of Human Rights and Funda-

Charles Baird (cbaird@bay.csuhayward.edu) is a professor of economics and the director of the Smith Center for Private Enterprise Studies at California State University at Hayward. He writes a quarterly column for Ideas on Liberty.

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mental Freedoms (1950) states, "Everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interest." Here, unlike in the U.N. Declaration, there is no explicit recognition of the correlative right to refrain from association. However, the European Court of Human Rights read Article 11 as implying a negative freedom of association in *Young, James and Webster v. United Kingdom* in 1981, a case that involved mandatory union membership imposed on employees of British Rail. The same Court made a similar ruling in a 1994 case, *Sigurjonsson v. Iceland*, which involved forced membership in an organization of taxi drivers. Negative freedom of association is recognized by American courts for some purposes, but not for all. Most notably, it is not recognized in the case of labor unions.

Freedom of association is often misused as a fundamental argument in support of the legal empowerment of labor unions by the National Labor Relations Act (NLRA). Actually the NLRA violates individual workers' and individual employers' freedom of association. It also violates the freedom of association of unions. The authors of the U.S. Constitution would have considered the NLRA unconstitutional on its face. The NLRA was accepted as constitutional by the Supreme Court in the *Jones & Laughlin Steel Co.* case in 1937 for purely political reasons, not on grounds of careful constitutional reasoning. The New Deal Court sacrificed freedom of association on the altar of political expediency.

Double Violation of Rights

The NLRA violates individual workers' freedom of association in two ways: forced representation and forced payment of agency fees. First, under the principle of exclusive (monopoly) representation, when a union has been approved as bargaining agent by a majority of workers on a job, that union also becomes the bargaining agent for those workers who voted against the union, as well as for those workers who didn't vote. Individual members are even forbidden to represent themselves. Other freedoms guaranteed by the First Amendment, such as freedom of religion and freedom of speech, are not subject to majority rule. Neither should freedom of association be subject to majority rule.

Second, not content to force numerical minorities to give up their individual right to freedom of association to numerical majorities through exclusive representation, the NLRA also forces many workers who are represented by unions against their will to pay those unions for the representation they do not want. This is called "union security," but it is forced association. No worker's fundamental human rights should be sacrificed simply to provide unions with financial security.

The NLRA also violates employers' freedom of association. It forces employers to recognize and bargain with unions that have been approved by majority votes. Bargaining, after all, is a very close form of association. In ordinary contract law and on the basis of freedom of association, any contract

between A and B that is the result of either A or B being forced to bargain with the other is null and void. The NLRA casts aside freedom of association when it forces parties to bargain with each other.

Unions also lose their freedom of association because they are forced to bargain with employers. Under the principle of mandatory good-faith bargaining, if either the union or the employer wants to bargain about an issue, the other side must agree to participate. Unions, of course, don't count this as a loss. They rely on forced association to accomplish their ends. The NLRA violates the unions' freedom of association in yet another way. Unions must accept as members any workers who want to join them.

What sort of unionism is consistent with every individual's freedom of association? In a word, *voluntary* unionism. Each worker would be free to choose which, if any, union from which he wished to obtain representation services.

Each union would be free to choose which of these willing workers it agreed to represent. It would represent its voluntary members and no one else.

No employer would be compelled to bargain with any union, and no union would be compelled to bargain with any employer. If a worker chose to be represented by a union that was willing to accept that association, any employer who wanted to bargain for the employee's services would have to bargain with the union chosen by the worker. But any employer would be free to decline to bargain for the services of any worker whether represented by a union or not. Individual employers could choose to settle the question of union representation by majority vote of its employees. Workers who were willing to go along with that process would accept employment with that employer, and other workers would not. Any employer would be free to decide to hire only union-free labor or only unionized labor. Workers who were amenable to that arrangement would accept such employment offers, and other workers would not.

To unions that have grown accustomed to the special privileges granted to them by the NLRA, truly voluntary unionism is anathema. They probably are convinced they cannot survive without the power to coerce others. But if they were forced to rely on the consent of others they might become quite innovative and actually put together packages of services that workers and employers would find genuinely useful. In any event, the welfare of unions is not a legitimate excuse for violating the freedom of association of anyone.

If Congress insists on giving unions special privileges of coercion, it should be honest and promulgate a constitutional amendment that says freedom of association does not apply in labor markets. Don't hold your breath. □

In a free society, labor unions, like other organizations, would be voluntary groups trying to advance the interests of their members. They would abide by the laws and seek no special privileges or immunities. Unions that offered employers the most competent and reliable workers, who were willing to work for competitive free-market wage rates, would grow and prosper.

—Percy L. Greaves, Jr.