
Should Professors Be Allowed to Unionize?

BY GEORGE C. LEEF

A current dispute at a liberal-arts college in Wisconsin prompts me to ask whether professors should be allowed to unionize. For many years I have been interested in questions of labor law and probably would have been interested in this dispute even if it did not happen to involve my alma mater.

Carroll College is a typical Midwestern liberal-arts college, located in the southeastern Wisconsin city of Waukesha. It is nominally affiliated with the Presbyterian Church, but that affiliation was nearly invisible during my student days in the early 1970s and is certainly no stronger today. An administrative decision to create separate schools of liberal arts and professional studies in 2001 led to bitter feelings among a significant number of the approximately 120 faculty members. Some concluded that unionization and collective bargaining would serve their interests and began a drive to establish the United Auto Workers as their bargaining representative.

A sufficient number of faculty members signed cards saying that they wanted a union election, so the National Labor Relations Board (NLRB), which regulates such matters, called for an election. The college administration protested that, under various NLRB and Supreme Court precedents, the faculty was outside the jurisdiction of the NLRB and therefore no union election could legally bind it. The regional NLRB director decided otherwise, however, holding that Carroll's professors were more like "employees," who may unionize

under the law, than like "managers," who may not. The election was held in January 2004, but the ballots were left uncounted pending an appeal by Carroll's administration to the NLRB in Washington. Early last September the NLRB upheld the decision of the regional director. The ballots were then counted, resulting in a 57–39 vote in favor of unionization.

The school can now appeal to federal court to block enforcement of the NLRB's ruling that it must bargain

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with the UAW. However the case ultimately turns out, it throws light on some crucial features of American labor-relations law—features that run entirely contrary to the concept of individual liberty. The controlling statute here, the National Labor Relations Act, is one of the most authoritarian pieces of special-interest legislation ever to take up pages in the United States Code.

First, once a union has been certified by the NLRB as representing the workers, it becomes the *exclusive* representative of all those in the "bargaining unit." If any dissenting professor wants

to handle his own disputes or contract negotiations with the administration, that's too bad because it isn't allowed. In 1944 the Supreme Court faced that issue in *J. I. Case v. NLRB* and held that it was illegal for an employer to engage in individual bargaining with willing employees once a union had been established, saying that "advan-

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tages to individuals” might prove to be “disruptive of industrial peace” and that “increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group.”

Thus individuals are denied the freedom to bargain and represent their own interests owing to the belief that it’s more important to protect group solidarity than liberty. Nowhere else in American law is a person compelled to accept another as his representative contrary to his wishes, but the NLRA saddles millions of people with union representation they have never chosen. There is no justification for preventing professors (or other workers) from seeking union representation just because of a bureaucratic decision that they are too “managerial,” but neither is there any justification for requiring those who want no union or a different union to abide by the will of the majority.

Surprisingly, even some adamant unionists agree that exclusive representation is undesirable. James Pope, Peter Kellman, and Ed Bruno, writing in the pro-union publication *WorkingUSA* (Spring, 2001), say, “[T]he presence of a majority union extinguishes the right of dissenters to bargain as individuals or to form their own, minority unions. . . . [P]ro-union analysts contend that when a majority union is insulated against competition, its officers may tend to ignore the interests of minorities. . . . [T]he fact that the overwhelming majority of industrial countries reject exclusive representation . . . should give us pause.”

They’re correct. Exclusive representation is a bad policy and should be scrapped.

Second, the law mandates that the employer bargain “in good faith” with a certified union. Before the enactment of the NLRA, an employer faced with a request for collective bargaining from some or all of his employees could legally do what anyone else can do when confronted with a contractual offer that’s of no interest to him—reject it. Under the common law of contracts, no one is compelled to negotiate with anyone else, much less come to any terms. But the NLRA makes it an unfair labor practice for an employer to decline to bar-

gain “in good faith.” Nowhere else in American law does anyone face legal sanctions for simply saying no to an offer from a private organization.

Just as exclusive representation is designed to strengthen the union hand, so is mandatory bargaining. The question, however, is why the government should abandon legal neutrality to assist unions. In the NLRA we find the tendentious assertion that in the absence of collective bargaining, workers don’t possess “full freedom of contract.” But that is simply untrue. It was untrue in 1935, when the law was passed, and it is emphatically untrue today, when workers of all kinds have many options.

Mandatory bargaining under the NLRA is a deviation from the sound idea that the law should apply equally to all individuals and organizations. If Carroll College or any other employer does not want to engage in collective bargaining, the law should not penalize it. Mandatory bargaining should also be scrapped.

The Function of Law

If mandatory bargaining were repealed, however, couldn’t employers just ignore the desire of a majority of its workers for collective bargaining through a chosen union? Wouldn’t unions be rendered ineffectual? There are two responses to that objection.

First, fulfilling people’s desires isn’t a proper function of the law. Second, if the unhappy professors and their union agents were told that there would be no collective bargaining, they are not without noncoercive means of fighting back. Rather than going to the NLRB to penalize the school for its refusal, the professors and union can threaten a strike or threaten to unleash adverse publicity over the school’s intransigence. Such actions could be taken in the event that collective bargaining did not lead to satisfactory results, and there is no reason why they couldn’t be used in an attempt to get the college to agree to collective bargaining in the first place.

Years before the enactment of the NLRA, unions existed and collective bargaining took place, but without the coercive provisions of the law discussed here. Those

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provisions should be repealed. If any number of college professors or other workers want union representation, nothing in the law should stand in their way. Equally, however, nothing in the law should force union representation on those who don't want it or mandate that an employer negotiate with a union against its will.

Actually, there is much more in the NLRA that is objectionable than the two provisions I have discussed. The entire statute should be repealed. Under the Tenth Amendment, states could then enact whatever law regarding labor relations they wanted, subject to the limits of the U.S. and state constitutions. When the NLRA's constitutionality was challenged in 1937 in *Jones & Laughlin Steel v. NLRB*, four members of the Court wanted to declare it unconstitutional on the grounds

that Congress only has authority to regulate *interstate commerce* and that doesn't encompass the details of the employment relationship. Under the Court's Commerce Clause precedents, the case should easily have been decided against the law. It was only President Roosevelt's threat to "pack" the Court that caused two justices to switch from positions they had taken just a year earlier and uphold it.

To answer the question posed in the title, college professors should be allowed to unionize. Those who don't want to should also be free to represent themselves. And schools should have the right to decide whether they will engage in collective bargaining. If we are ever going to return to freedom all around, we must get rid of the authoritarian National Labor Relations Act. 

The Ideal University

Some day, possibly, we shall see State-owned education disappear as we have seen a State-owned Church disappear. The relations between the State and education are as immoral and monstrous as those between the State and religion; and some day they will be so seen. In the Middle Ages, some man of learning and ability, with a gift for teaching, like Peter Abelard or William of Champeaux or John of Scotland, emerged into repute; and people went to him from here and there, camped down on him and made him talk about such subjects as they wanted to hear discussed—and this was the university. The university was, as we say, "run" by the students. If they got what they wanted, they remained; if not, they moved on. Meanwhile, they lived as they pleased and as they could, quite on their own responsibility.

The nearer we revert to that notion, the nearer we will come to establishing in this country some "serious higher education." A university run by the students, with only the loosest and most informal organization, with little property, no examinations, no arbitrary graduations, no president, no trustees! A university that would not hold out the slightest inducement to any but those who really wanted to be put in the way of learning something, and who knew what they wanted to learn; a university that imposed no condition but absolute freedom—freedom of thought, of expression and of discussion!

—ALBERT JAY NOCK, "The Vanishing University"