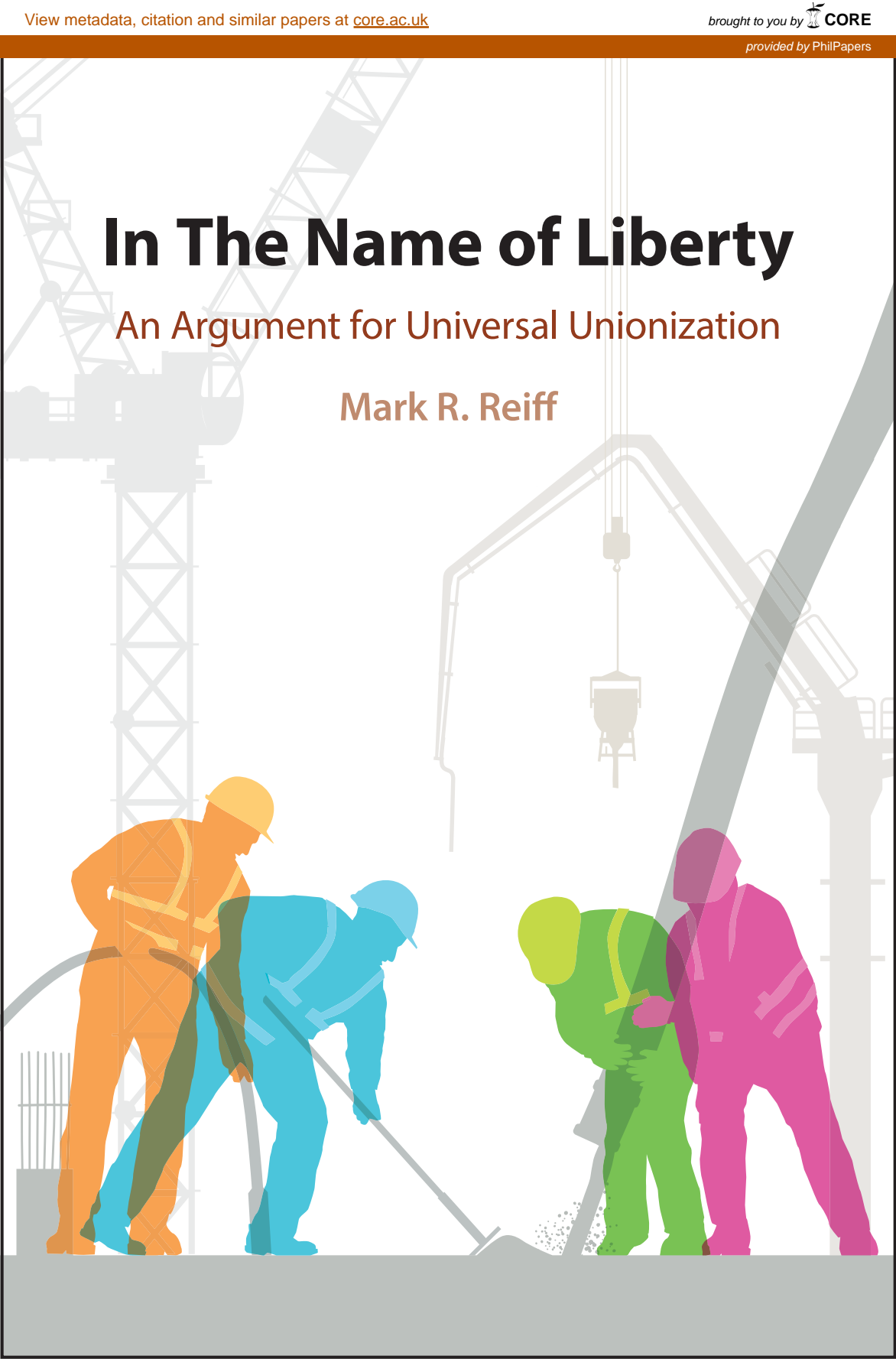


# In The Name of Liberty

An Argument for Universal Unionization

Mark R. Reiff



## In the Name of Liberty

For years now, unionization has been under vigorous attack. Union membership has been steadily declining, and as a result, unions have lost much of their bargaining power and a great deal of their significance as a political force. If these trends continue – and at this point we have no reason to believe that they will not – it may not be long before unions lose whatever remains of their ability to protect working people from economic and personal abuse. *In the Name of Liberty* responds to this worrying state of affairs by presenting a new argument for unionization, one that does not depend on disputed claims that unionization has good effects, but instead derives a right to universal unionization in both the private and the public sector from concepts of liberty that we already accept. In short, *In the Name of Liberty* reclaims the argument from liberty from the political right and shows how liberty not only requires the unionization of every workplace but also how it supports a wide variety of other progressive policies that are also now the subject of frequent attack.

Mark R. Reiff is the author of four previous books: *On Unemployment*, Volumes I and II (Palgrave Macmillan, 2015); *Exploitation and Economic Justice in the Liberal Capitalist State* (Oxford University Press, 2013); and *Punishment, Compensation, and Law* (Cambridge, 2005).

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*To all those who have helped advance the union movement  
with wisdom, skill, and determination  
and  
grace, too*

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## Introduction

For some time now, union membership has been steadily declining. After reaching a peak of 33 percent in the United States in 1953, unionization hit 10.7 percent in 2016, its lowest level in one hundred years, and it shows no sign of rising.<sup>1</sup> In the United Kingdom, union membership is now half of what it was in 1979, or about the level it was just after World War II.<sup>2</sup> In many other liberal capitalist democracies, unionization rates have been falling steadily as well.<sup>3</sup> In part this decline is due to the success that unions have had in establishing a more just baseline for the treatment of all workers, for this makes joining a union seem less necessary for current employees. In part the decline is due to shifts in the nature of the relevant economies, in which large numbers of union jobs in heavy manufacturing have been shifted to less-unionized countries and replaced by jobs in industries that are more difficult to unionize. In part it is due to local outsourcing of what were high-paying unionized jobs to smaller, exploitive, currently nonunionized contractors who are also more difficult to organize. And in part this decline results from technological advances that have allowed many previously unionized jobs to be performed by robots.<sup>4</sup> But especially in the United States, this decline is also in large part the result of continuous attacks made against the very idea of unionization over the last thirty-plus years,<sup>5</sup> attacks that have been increasing in both frequency and vigor for some time now<sup>6</sup> and which are increasing even further under the administration of President Trump.<sup>7</sup> In any event, regardless of the cause of this decline, union membership is now becoming sufficiently small that unions may soon lose their ability to adequately protect workers from economic and personal abuse (if they haven't already) and may even lose their significance as a political force.<sup>8</sup>

Not surprisingly, this decline in unionization has been accompanied by a dramatic rise in the share of income going to the top one percent, a lengthy stagnation in real wages for everybody else, a steep rise in unemployment followed by

the replacement of high-paying permanent jobs providing good benefits with low-paying temporary ones providing no benefits as the unemployment rate has come down, and various other negative turns in the economic situation of masses of Americans, as well as the citizens of many other liberal capitalist democracies.<sup>9</sup> Of course, this sorry state of economic affairs is the product of many causes, not just one, and identifying all the contributing causes much less the precise contribution of each is a difficult exercise – indeed, the exact causal story behind this negative turn in so many measures of economic well-being may never be entirely clear. But as we shall see, there is strong evidence that many of our current economic problems here in the United States and, by contagion, in other parts of the liberal capitalist world have at least been partially caused by the decline in unionization.<sup>10</sup>

In two previous books, I have discussed these rising economic problems (and particularly the economic problems of inequality and unemployment) and proposed new ways of assessing and implementing our moral obligation to address them.<sup>11</sup> In this book, I turn to the problem of unionization. But the idea is not simply to propose reversing the decline in unionization as an (additional) remedy to the economic problems of inequality and unemployment. Indeed, because it makes wages higher than they would otherwise be, unionization is sometimes claimed to be a cause of unemployment, for employers will hire fewer workers if they are more expensive. Unionization is also sometimes claimed to be a cause of inequality, for if fewer workers have jobs, more people will be poorer, even if the income gap between those who are working and the rich is somewhat smaller.<sup>12</sup> There is a great deal of empirical evidence showing that neither of these consequentialist claims are true (more on this later), but whether they are true is irrelevant to the argument I will be making here. In this book, I will be arguing for unionization in its own right – that is, I will be presenting a moral argument for unionization that does not depend on the effects of unionization on inequality or unemployment, although I shall do my best to outline these effects whenever possible. Instead, I shall be arguing that unionization is required not because it is good, but because it is right. This, after all, is exactly what those who have been arguing against unionization have been doing all these years – defusing the argument that unions raise wages and benefits, create job security, and improve working conditions by claiming that unionization, and especially what they derogatively refer to as “compulsory” unionization, is an infringement of liberty; therefore, the effects of unionization on the good of workers, or even the common good, are morally irrelevant because liberty cannot be justifiably infringed for any of these reasons.

Of course, the anti-union argument from liberty can take a variety of forms. Sometimes it is expressed as a straightforward argument derived from a supposed general right to liberty.<sup>13</sup> As we shall see, however, the concept of liberty is not at all as straightforward as those who make this argument pretend, and those who raise this objection to unionization rarely acknowledge

that various versions of liberty might be involved here or clarify which version they are referring to when they refer to liberty. Sometimes the argument from liberty is expressed as a more particularized argument regarding freedom of association. Here the claim is that even if voluntary unionization may accord with freedom of association (the liberty to associate with whomever we wish), compulsory unionization is contrary to it, and therefore workers cannot be compelled to join a union or pay dues even if they benefit from the activities of the union.<sup>14</sup> In the public sector, the argument from liberty is also sometimes expressed as an argument for free speech (the liberty to speak our mind), the claim being that under the First Amendment, public sector workers cannot be compelled to pay union dues if this compels them to pay for speech with which they do not agree or, even more nefariously, if such a payment would actually *constitute* speech with which they disagree.<sup>15</sup> And finally, in the public sector once again, the argument from liberty is sometimes expressed as a claim that unionization is leading to the runaway growth of government, bankrupting us, and otherwise undermining our democracy, which is said to be the ultimate assurance of our liberty. I shall say much more about each of these arguments from liberty in the pages that follow. But for now, I simply want to point out what all these arguments have in common: because liberty, either in general or in one or more of its constituent parts, is a right, the argument goes, it renders consequentialist arguments for the common good irrelevant, for rights cannot be overridden by consequentialist concerns.

Indeed, this latter argument – the argument that rights cannot be infringed even if the consequences of doing so would be better in some sense than not doing so – enjoys wide support on both sides of the political spectrum. For example, Robert Nozick, one of the leading libertarian theorists of the twentieth century, describes rights as “side-constraints,” meaning they may not be justifiably infringed for consequentialist reasons even if this would make rights violations in general or violations of the specific right in question less common.<sup>16</sup> And on the other side of the political spectrum, John Rawls, one of the leading liberal egalitarians of the twentieth century, and one of the most influential liberal voices on equality and distributive justice ever, criticizes utilitarianism extensively for putting the good before the right and argues that the right must instead be put before the good.<sup>17</sup> So the anti-union argument from liberty, if sound, presents a formidable rebuttal to any consequentialist arguments presented by the union movement.

Note that the anti-union argument from liberty, while not usually denying that workers have a moral right to join unions and that unions therefore have a right to exist, effectively makes these rights largely worthless by blocking compulsory unionization and eliminating mandatory dues and, in the public sector, by barring unions from bargaining collectively. The latter prevents unions from delivering one of the primary benefits that unionization is designed to provide, therefore dramatically reducing the attraction of becoming a member of the union, and the former does the same in both the public and the private sector

by depriving unions of the financial resources necessary to organize workers and effectively advance their interests with employers and with the government more generally.<sup>18</sup> The idea behind limiting what unions can do is to “corral the beast”; the idea behind depriving unions of the ability to collect dues from all those who benefit from union services even if they are not members is to “starve the beast,” a tactic that has already been used by those on the right for some time with much success in an attempt to cut government programs that they don’t like but which are too popular to be attacked directly.<sup>19</sup> Both tactics are designed to ensure that the rate of unionization will drop and remain low in both the private and the public sector and that union influence will become and remain politically inconsequential.<sup>20</sup>

One of the reasons why this anti-union strategy has been so successful is that while there has of course been much pro-union material generated over the years by those in the union movement and those who are sympathetic to it, the overwhelming majority of the positive arguments for unionization have almost all been presented in purely consequentialist terms. In other words, the argument for unionization typically proceeds by making empirical claims about the positive effects of unionization in both the private and the public sector and then by making the moral claim that these empirical effects promote the good of workers and in turn the common good.<sup>21</sup> Sometimes, of course, the typical argument for unionization also relies in part on an argument from right and not just an argument from consequences, these rights being the right to freedom of association and the right to equality. Freedom of association, however, does not turn out to do much work, for despite the fact that it is widely acknowledged to give workers the right to voluntarily form associations if they want to, it does not give these associations the right to *do* anything, such as bargain collectively, strike, or even collect dues. In any event, the dramatic decline in unionization demonstrates that the minimal protection provided by the right of free association alone is not having much of an effect. The right to equality, in turn, is more of a concept than a right – it is difficult to show how the right to equality should be cashed out. At best, it merely provides a connection between the equalizing effects of unionization on economic inequality and the non-consequentialist moral claim that economic inequality is a moral bad. So while the argument from equality is an argument from right, it is an argument from right that is nevertheless dependent on controversial consequentialist claims.

More importantly, perhaps, those who claim that economic inequality is a moral bad are rarely strict egalitarians – that is, few people claim that economic inequality is *always* a moral bad. Most people are liberal egalitarians – that is, they claim that economic inequality is sometimes a moral bad and sometimes not, and they offer “sorting principles” designed to help us tell the difference. Rawls’s difference principle is one such principle, the various principles offered by those who are collectively described as “luck egalitarians” are another, and there are others still.<sup>22</sup> Under the difference principle, in order to determine

whether a particular form of economic inequality is unjust, we must determine whether it works to the advantage of the worst-off members of society.<sup>23</sup> Under luck egalitarianism, we must determine whether the economic inequality at issue is a product of luck or choice.<sup>24</sup> Whether we are trying to predict the effect on an inequality on the worst off, or trying to determine whether an inequality is caused by luck or choice, however, the relevant borderlines are subject to a great deal of indeterminacy; there is a lot to argue about before we can come to any firm conclusion under either theory about the injustice of any particular inequality. This makes both theories amenable to being hijacked by the anti-egalitarian right through restrictive interpretations of the key working concepts that these theories each employ.<sup>25</sup> Modestly and highly egalitarian interpretations of these theories are, of course, also possible, but the arguments for any particular interpretation is controversial given the indeterminacy inherent in each principle. Even if unionization does reduce economic inequality, this does not by itself establish that the economic inequality that would otherwise prevail is an injustice under either of these theories – this has to be argued for separately. And under either of these theories, the road from the general concept of equality to the applied conclusion that anti-union legislation is unjust because it supports inequality is lengthy and complex.<sup>26</sup>

There is yet another problem with the argument from equality. The argument from equality is not an argument from right in the same way as the argument from liberty, at least when the inequality at issue is economic inequality. Unlike violations of equality such as those that result from various kinds of invidious discrimination based on race, ethnicity, age, religion, or the like, restrictions on unionization would be a *distributive* injustice and not a *commutative* injustice even if they do produce or exacerbate unjust economic inequality. In other words, the injustice here would be a social problem that we as a society have a moral duty to remedy in some broad sense but not one that necessarily imposed a duty on some individual or entity to cease engaging in the conduct that contributed to this problem and remedy past violations. Individuals have a duty to cease committing an injustice and to remedy injustices they significantly contributed to creating only when they commit commutative violations of individual rights. This makes the argument from equality, at least in its economic form, a potentially weaker argument than the argument from liberty, for the latter purports to be an argument from *individual* right – that is, from commutative injustice.<sup>27</sup> It is usually very clear what could be done to prevent a commutative injustice from arising; what could be done to prevent a distributive injustice from arising is much more open to debate. There are probably a variety of possible remedies here, and it is probably the case that no one of these is unquestionably better than the others, leaving the possibility that even if restrictions on unionization contribute to distributive injustice, they may still be able to remain intact because the resulting injustice can be dealt with in some other way.

The argument from liberty, in contrast, is much more simple, direct, and quick. Whereas the argument from equality arguably takes the utilitarian conception of the common good and puts a controversial conception of equality in its place, the argument from liberty seems to depend on empirical claims (to the extent it depends on empirical claims at all) that are far easier to understand and not controversial at all. That is, while the argument from equality is an argument from right, the right here depends on a conception of what equality is with inherently controversial empirical contentions built into it. The argument from liberty, in contrast, is far less controversial, for it seems to be relatively clear what liberty is and is not, and in any event, the assertion that liberty is infringed does not seem to depend on disputed empirical claims to the same extent. Many people no doubt find this appealing, which is why the argument from liberty is so often used to attack progressive proposals based on the argument from equality, no matter what the subject matter of those proposals may be.<sup>28</sup> But for present purposes, the most important feature of the argument from liberty is that it constitutes a direct argument against unionization in general and against the mandatory payment of the dues even if some form of unionization is allowed. None of the arguments for unionization that I have mentioned so far – not the argument from consequences nor the argument from freedom of association nor the argument from equality – constitute an argument for the contrary position.

I should note, however, that my own theory of exploitation does present a more determinate conception economic inequality and defines exploitation as both a distributive and commutative injustice, so not all conceptions of economic inequality suffer from the disadvantages I have outlined above.<sup>29</sup> But my point here is not that the argument from equality is inherently disadvantageous, merely that the currently most used arguments from equality have problems that are difficult to uncontroversially overcome. And while I could derive an argument for unionization and even for the mandatory payment of dues from my theory of exploitation, perhaps one that is even more direct than the usual arguments from equality, I will not attempt to do so here because, even if I did so, all the only thing this would establish in the eyes of most of those who are anti-union is that, in this instance, equality and liberty happen to conflict.

Establishing such a conflict has long been a tactic of the right,<sup>30</sup> and it has been a mistake by those on the left to cede the argument from liberty to those on the other side. For if equality and liberty do conflict, it is difficult to explain why equality and not liberty should be given priority in our moral deliberations. Even Rawls concedes that liberty – or at least certain “basic” kinds of liberty – has priority over equality.<sup>31</sup> In fact, Rawls goes even further than this, for he contends that protecting basic liberty from infringement has *lexical* priority over addressing economic inequality, meaning that *no* amount of basic liberty, no matter how small, may be traded off for an improvement in economic inequality, no matter how large.<sup>32</sup> Moreover, even if we were to

reject the Rawlsian position and claim that all forms of equality and all forms of liberty are to be given equal weight, it would still be difficult to explain why the argument from equality should be treated as decisive in determining what we should do. At most, relying on the argument from equality and the consequentialist claims on which it is effectively, although not expressly, based to counteract an argument from liberty produces a moral standoff. Such a lack of moral clarity is simply not sufficient if we are going to convince anyone whose mind may still be open that supporting unionization is a moral imperative in the circumstances in which we now find ourselves.

Accordingly, my objective in this book is to reclaim the argument from liberty from the anti-union movement. This means that my main focus in this book is the right to liberty and the various subsidiary rights that the right to liberty is said to generate. I will, of course, be talking about the right to equality too, as well as exploring the usual consequentialist claims about the effects of unionization and the relationship between these effects and the good of workers and the common good. But the primary focus of each of the essays in this book is the right to liberty and how we might derive a right to unionization from it. And when I speak of a right to unionization, I mean a right to *universal* unionization, not merely a right to unionization when certain contingencies are met. That is, I will be arguing that justice, and especially that component of justice that protects liberty, requires all private and all public sector workers to be unionized – this is not something that is open to resolution by majority vote of either workers or the electorate at large and does not depend on whether the employer has agreed to this as part of the collective bargaining process once a workplace has been unionized.

Given my objectives, it is important to understand that this book is a work of political theory. Although there is an enormous amount of literature available on unionization, and there is obviously a very strong connection between unionization and political activism and various aspects of public policy, very little of the literature available on unionization consist of works of political theory, at least among liberal political theorists (and by “liberal” here I mean all political theorists who draw their inspiration from the Enlightenment, including those on the moderate right as well as the moderate left).<sup>33</sup> Instead, liberal political theorists mostly treat unionization as a specialty reserved for those in other disciplines, such as industrial relations or labor economics. There is certainly much about unionization that these specialties can explore and help us to explain, and I will rely on a great deal of this literature in making my argument in this book. But given the direct relevance of both equality and liberty (two of the principal concerns of political theory) to unionization and vice versa, we have reason to be concerned that there is relevant expertise here that has not been sufficiently brought to bear, especially because the specialties of industrial relations and labor economics are each driven primarily by empirical questions and not by questions of justice, equality, and liberty. These latter questions have empirical elements too, of course, but they



also require a sophisticated understanding of how to reason about political morality and how questions about these various aspects of political morality should be understood. Much confusion has been generated and continues to persist as a result of the general neglect of the issue of unionization by liberal political theorists. As I will attempt to show in this book, there is much that the approach and techniques of political theory can contribute to an understanding of unionization on both the theoretical and the practical level, and without such contributions, it is unlikely that any society will ever have enough information and understanding to get the issue correct.

Given my approach, it may be helpful to say a little more at this point about the role that empirical arguments will play in the essays in this book. I have said that I will primarily be making an argument from right – the right to liberty – rather than an argument from consequences, when arguing for universal unionization. But I am not suggesting that we can distinguish between acts and omissions that are morally right and those that are morally wrong completely independent of their actual, expected, or possible effects. Consequences always matter. As Rawls noted in the course of articulating his own argument from right, “All ethical doctrines worth our consideration take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>34</sup> Indeed, it is difficult to imagine how one could even think, much less derive an ethical position, without some consideration of how the available courses of action might affect the existing state of affairs, and to consider this, it requires not only an understanding of human nature and circumstances but also an understanding of the principles of causation and how those principles might operate in the particular case at hand. The difference between an argument from right and an argument from consequences is therefore not that one considers consequences and the other doesn’t – it is simply that, in an argument from right, the expected consequences are not the *only* factor to be considered. Certain pre-existing principles matter too. An argument from right will therefore sometimes recommend we do or refrain from doing something even though we are fairly certain some other course of action would, in some sense, produce “better” consequences.

Nevertheless, it is also important to realize that rights are not *a priori* conceptions that exist independently of facts about the world. If we are to determine whether a right has been infringed, for example, we must take into account various facts about causation, about human nature, and about the state of the world. But one of the most important benefits of employing an argument from right is that even when questions about these various empirical matters are vigorously disputed and these disputes are not likely to be resolved to a reasonable degree of certainty anytime soon, an argument from right can still provide categorical recommendations on what to do. In other words, arguments from right can give us recommendations on what to do under what game theorists call “conditions of risk and uncertainty,” whereas arguments from consequences can only do this when the relevant probabilities of the



various possible outcomes – that is, the consequences – are not themselves reasonably disputed.<sup>35</sup> When these are reasonably disputed, basing a recommendation for action or belief on an argument from right may make it seem like consequences do not matter, but they do matter. They are still taken into consideration, they are simply not treated as determinative. Whatever argumentative power they may have or would have if they could be resolved one way or the other is accordingly supplemented and, in certain cases, overcome by an argument derived through some other method.<sup>36</sup>

One such other method (there might be others still) involves beginning with something we embrace as what we might call a fundamental presupposition – something that establishes the framework for moral reasoning to take place rather than something that is derived by using that framework once it is in place.<sup>37</sup> All moral argument has to begin somewhere, but this starting point cannot be argued for morally, it can merely be accepted, for at this point there are no moral arguments to make. Liberty is such a fundamental presupposition, one that is accepted by both the pro-union left and the anti-union right. The argument from liberty therefore provides a basis on which each side can meaningfully engage the other. Of course, fundamental presuppositions are general concepts, not detailed conceptions,<sup>38</sup> and therefore need to be given further specificity to be operationalized; that is, they need to be further refined before they will generate recommendations as to what we should actually do about the problems that confront us in the real world. This can often if not always and perhaps even almost always be done in various ways. We therefore need to know more about what the concept means and what our understanding of its demands entails before we apply it. And this, in turn, means we often have to make judgments about the effect of certain kinds of acts and omissions on certain aspects of our lives. This is another sense, then, in which even an argument from right, like the argument from liberty, must contain elements of an argument from consequences. But once again, this does not make the two forms of argument equivalent. In an argument from consequences, we have to assemble our conception of the common good from a great many components of that good. What to include in this assemblage and how to prioritize different elements of it when they happen to conflict is often highly controversial. In an argument from right, we have only one particular aspect of individual life in mind. We call this an individual right because we judge it important enough to pursue regardless of the effect of this on the common good. While empirical matters may be relevant when deciding whether this right is being infringed or whether something further must be done to protect it, this does not make the underlying grounds of the argument consequentialist. Accordingly, saying that I am making an argument from right does not mean that I have strayed from this approach whenever I consider empirical matters, especially those that are not reasonably disputable, in constructing that argument or defending it from attack. Facts of this nature are indeed commonly included in arguments from right of all sorts.

I also want to say something about the distinction between what is called “ideal” and “non-ideal” theory, for this also has an effect on the extent to which empirical matters are relevant to my argument. All moral theories, whether they are arguments from right or arguments from consequences, have to consider basic facts about human nature, circumstances, and the methods of human reasoning. These include a scarcity of resources, the fact that we tend to care more about ourselves than other people (usually referred to as “limited altruism”), our tendency to rely on certain irrational heuristics and to harbor certain biases when evaluating our reasons for action or belief, and the resulting difficulty this all presents for successfully organizing collective action and producing public goods. These basic facts about human nature, circumstances, and reasoning are in some sense contingent; that is, they could be different if humans were to transform their basic nature or circumstances or methods of reasoning. Sometimes such a transformation might be possible, at least in small ways, without making us into different kinds of beings living in a different kind of world altogether. Because of this, philosophers often do what they call “ideal theory,” that is, they assume some kind of transformation has or at least could take place. Sometimes this kind of theory is entirely unrealistic given where we are now and therefore provides no real guidance as to how we should behave in or what we should believe about the world in which we currently live. But sometimes we can derive important insights into our world from considering what would happen if we or our world were more ideal in certain ways.<sup>39</sup> In these cases, the ideal does not have to be attainable; it is simply used to clarify our thinking on certain problems that present themselves to us in the real world. The first essay in this volume is an attempt to derive such insights from a hypothetical thought experiment about a world that does not exist and is not likely to exist anytime soon, which makes it, I suppose, an exercise in ideal theory. The other two, in contrast, are exercises in “non-ideal” theory; that is, they take the world as we find it. Describing how the world operates is accordingly more important in these later essays, but that does not make the arguments presented in them any less arguments from right – the unfortunate judgmental overtones of the label “non-ideal” notwithstanding. Each of these essays looks at fundamental principles to which we claim to be committed and derives what I believe are feasible and practical recommendations as to how we should think about universal unionization. Consequences matter in these essays, and it is important to get our understanding of these correct, but this is not the only thing that matters. Therefore, the arguments presented in these latter essays are still arguments from right that are meant to have real purchase even if some of the connections between the right to liberty and various kinds of conduct raise empirical questions. In cases where the answers to these empirical questions are not reasonably disputable, however, there is nothing about taking these facts as given that transforms an argument otherwise based on right into something else. What I avoid in these essays is relying on consequentialist

factual assertions that remain highly controversial and unresolved, the kind of factual assertions that typically make up a great part of an argument about the common good.

Also note that my argument proceeds on what we might call the institutional level. By this I mean that it is about whether unions are a kind of association essential to ensure background justice in our society. I shall say much more about this later, but briefly the idea is that unionization and therefore the core functions that an association must perform to be a union are not open for prohibition the way noncore functions are. Of course, both core and non-core functions may be regulated, but I will make no attempt here to develop a fine-tuned set of regulations dictating what unions should and should not be allowed to do or even discuss how their core functions might be regulated once universal unionization is recognized as an essential principle of justice in a particular liberal capitalist democracy. I shall stop once the institutional argument is complete. Details such as the nature and extent of appropriate post-institutional regulation are simply to be decided according to the political preferences of the electorate once the basic elements of unionization are established and protected from direct or indirect attack.<sup>40</sup> What I argue for in this book is the right for unions to exist, in both the private and the public sector, to bargain collectively for their members, to represent their members in disputes with management, to lobby government for legislation in their members' interests, and to negotiate for and fully enforce what are commonly called union shop agreements – agreements that require all employees to join the union upon being hired and pay dues designed to cover the costs of the various services that the union ultimately provides.

But beyond this, and subject to certain feasibility constraints, I also argue that every firm *must* have a union, and every government employer too, and that such unions are to be treated as a basic institution that we all bear an obligation to provide rather than something that employees bear the initial burden of organizing before it may come into existence. After all, even the “Powell Memo,” the 1971 document that is frequently characterized as setting forth the blueprint for the conservative right's subsequent attack on a wide variety of economic regulations and progressive policies and institutions in the name of freedom (then a Richmond, Virginia corporate lawyer, Lewis F. Powell, Jr. would later ascend to the Supreme Court following nomination by President Nixon), describes labor unions and collective bargaining as among our “essential freedoms.”<sup>41</sup> Extending Powell's argument only a little bit, I simply contend that in order to ensure that these essential freedoms (which are themselves necessary guarantors of other essential freedoms) are not as a practical matter rendered illusory or toothless, unionization must be universal – that is, all employees, private and public, must be represented by a union, whether they would prefer to act exclusively on their own or not – for universal unionization is a necessary element of the background circumstances that every liberal capitalist society must provide in order for it to be just.

Obviously, the argument for universal unionization takes us quite a ways beyond the current status quo in which unions are permitted in the workplace (if at all) only after a certain percentage of the workforce votes for them and, in right-to-work states, collectively negotiated agreements that require all employees to join the relevant union are impermissible even so. Indeed, even some of those who are sympathetic to my objectives may worry that I am arguing for changes that are politically unachievable under current conditions. But if this is what morality requires, then saying that achieving this will be difficult is not a counter to my argument. Although the ultimate claim I present in this book is that universal unionization is morally required, this does not mean that my argument is irrelevant to beginning that journey by struggling first toward less ambitious short-term goals such as the elimination of right-to-work laws and restrictions on what can be the subject of collective bargaining agreements. On the contrary, my argument should provide a more effective basis for challenging these union-suppressing laws. The long-term goal of requiring all firms of at least a certain size to have a unionized workforce is also not as unachievable as some may think, for as we shall see, something very close to this is already in place in many liberal capitalist European states.

To make my argument, I proceed by presenting three separate essays, each of which is conceived of as being able to stand on its own, but each of which also establishes an essential part of my overall claim. The essays can be read in any order, although the order they are offered here seems to me to be the most effective when viewed from the perspective of the whole. In any event, taken together these essays provide a comprehensive defense of my principle of universal unionization of both the private and the public sector. In the first essay, I deal with the question of whether universal unionization violates what are commonly thought of as libertarian rights. This argument is primarily directed at those who think of themselves as political libertarians or economic neoliberals or, as is most commonly the case, both. The idea is to show that even in a libertarian utopia, where liberty is given priority over everything else, unions would arise in both the private and the public sector and would eventually negotiate agreements with the relevant employers requiring all new hires to join the union and pay dues as a condition of their continued employment. This essay is designed to establish that unionization – even when it leads to such agreements – is not a violation of anyone's right to liberty, and that such agreements would naturally arise out of free market transactions in any society that ensured that this market was indeed free.

In the second essay, which is longer and more complex, I move beyond the argument that unions would only arise naturally in a free market society and should be able to negotiate union shop agreements if they wish. Here, I argue that at least in the private sector, the union is a basic institution in a liberal capitalist democracy. That is, in a society in which the basic form of business organization is the firm, unionization in the private sector is not simply optional – it is one of the background circumstances necessary for a

liberal capitalist society to be just. Here, I am using the term “liberal” in its broadest, children-of-the-Enlightenment sense, not just as a shorthand way of referring again to libertarianism, as the term “liberal” is sometimes used in continental Europe. By liberal I mean to include not only liberal egalitarians, prioritarians, sufficientarians, left-libertarians, and others on the moderate left, but also right-libertarians, traditional conservatives, and others on the moderate right, who are nevertheless liberals in the broad, history-of-political-philosophy sense rather than the man-on-the-street sense of the term. In other words, the purpose of this essay is to address all those who find the anti-union argument from liberty persuasive no matter what liberal political theory they happen to embrace. In any event, to make this argument, I discuss what the idea of a basic institution means, how we tell whether a particular institution is basic, and what flows from this determination once it is made with regard to unions. I also show that this argument is not as radical as it may seem, for something very much like universal unionization has already been recognized in a number of highly successful liberal capitalist democracies. Finally, I discuss how the idea of the union as a basic institution might be implemented and what kinds of issues would remain to be decided by post-institutional regulation.

In the third essay, I turn my attention to public sector unions and address the argument that, regardless of whether we think that unions in the private sector are a basic institution, the background circumstances in the public sector are different and therefore a similar conclusion should not apply. I address the various arguments raised in support of this claim and show that while the circumstances are indeed different in the private and the public sector, they are not *materially* different – meaning that the differences do not suggest that our conclusion about the necessity of universal unionization in the private sector does not apply. I then go on to address various other supposedly liberty-based arguments against public sector unionization, including that it inappropriately promotes the growth of government, that it puts essential services at risk, that collective bargaining by public employees is unfair to the public, that public sector unionization is undemocratic, that it is bankrupting us, and that it somehow constitutes a violation of free speech. What we end up with then, after the completion of the third essay, is an argument for a modern, liberal capitalist society in which unionization is not merely optional but required in both the private and public sector, where collective bargaining, being one of the core functions of unions, cannot be restricted or eliminated in either sector, and where union shop arrangements must be honored should the parties collectively agree to them. Beyond this, the details of what unions can and cannot do and how they must be organized are up for post-institutional regulation, just as is the case with firms and agencies of government.

In the course of presenting the arguments that I make in these essays, I will, of course, talk a great deal about liberty. It may be helpful at the outset to note that the term “liberty” is surprisingly general and vague – it can and often is

used to refer to what are actually some very different aspects of our life in the world. In one of the most famous essays of the twentieth century, the political philosopher and historian of ideas Isaiah Berlin argued that the various ways in which people have spoken about liberty over the centuries could be broken down into two general categories or concepts: negative liberty and positive liberty.<sup>42</sup> By using these terms, however, Berlin was not trying to suggest that negative liberty is “bad” and that positive liberty is “good.” Negative liberty is negative only in the sense that it protects people from interference – it focuses on whether people are restrained in some way from doing what they would otherwise have the capacity to do. Positive liberty is positive, in contrast, only in the sense that it “posits,” or proposes, that certain kinds of actions must be done rather than simply may be done if one is to be truly free. Berlin’s essay and especially his use of these terms has shaped the discussion of liberty ever since, but now a third concept, called republican liberty, has joined the two concepts Berlin identified.<sup>43</sup> Republican liberty is freedom from the arbitrary will of another, a form of domination that is argued to be demeaning, dehumanizing, and dispiriting and, if wide-ranging enough, tantamount to slavery. Republican liberty is republican, however, not because it is the kind of liberty that members of the GOP embrace (they may or may not), but because it is derived from what are thought by some to be the principles of the republics of ancient Greece and Rome. In any event, each of these concepts of liberty is very different from the others and is best used to perform very different functions in any philosophical analysis. I shall go into all this in great depth in the course of these essays. But for now, all that is necessary to keep in mind is that liberty is a complex notion, and whenever the word “liberty” is used, one must be careful to note which of these very different concepts of liberty is being employed.

It will also be important to keep in mind the difference between a concept of liberty and a conception.<sup>44</sup> A concept is a more general principle, such as the idea that people should be free to self-actualize or be the best that they can be, which is what positive liberty claims. But a concept is usually expressed in such general terms that it may not be specific enough to tell us what we should do in concrete situations. Concepts often need to be further refined, or cashed out, before they can give us specific advice about what to do in the real world. There are usually many ways any particular concept can be cashed out, and how it is cashed out can have a dramatic effect on its real-world implications. Each of the various concepts of liberty that I have mentioned can be cashed out in a variety of ways and distinguishing between these differing conceptions of each concept of liberty is important. It will be especially important to keep in mind that my conception of republican liberty is very different than the conception of republican liberty that is currently attracting a great deal of attention in academic circles. This latter conception of republican liberty is very thick – that is, it has been and is being used by many theorists as a comprehensive principle of justice that can be applied to

a wide variety of specific situations. In contrast, I will be using a very thin conception of republican liberty – one that does not attempt to do the work of a comprehensive principle of justice but remains a conception of liberty alone. In the present context, this is an advantage not a failing, for it means that embracing my conception of republican liberty does not require commitments that are unlikely to draw agreement from people holding a variety of comprehensive moral views. It can therefore be used to do things in our moral reasoning that a thick conception of republican liberty would be too controversial to do. I will talk about this more at the end of essay one, “The Libertarian Argument for Unions,” but I will go into it at even greater length in essay two, “The Union as a Basic Institution of Society.” To get the full picture of my conception of republican liberty, one must accordingly read the relevant sections in both essays.

I also want to say something about language, and especially about how I will refer to certain policies, practices, and forms of agreement in these essays and what terms I shall use to refer to them. In the debate about unionization, each side often uses different terms to refer to the same thing. I refer to “universal” unionization, but those on the right would refer to this as “compulsory” unionization, for “compulsory” tends to carry a negative connotation, while “universal,” I admit, tends to carry a positive one. Those on the right attack “closed shop” agreements, for most people have a positive emotional response to the idea of something being open and a negative one to anything being closed. However, a closed shop is one in which the employer has agreed to hire only those who are already members of the union and such agreements have been illegal in the United States since 1947. What many union critics actually have in mind when they refer to a closed shop agreement is a union shop agreement, which as I have already mentioned allows the employer to hire union or nonunion workers but requires all new currently nonunion employees to join the union and begin paying union dues shortly after being hired. Even these agreements, however, are not enforceable to the extent they require actual union membership, although many agreements still purport to require this. Employees covered by such agreements can therefore refuse to join the union, although they still must pay an “agency fee” that covers the cost of collective bargaining and certain other activities that directly involve the employment relationship but not the cost of lobbying, union organizing, or other more generalized activities. Union shop agreements are therefore, in effect, currently no different than what are expressly called “agency agreements,” which do not require employees to join the union and pay union dues but do require them to pay agency fees – often called “fair share fees” by those on the left – if they don’t join.<sup>45</sup> Despite the fact that no one is being denied a job because of their union status under either a union shop or agency shop agreement, however, those on the right often decry these agreements as denying people the right to work. To maintain the rhetorical pretense that these agreements



do deny people jobs, some states have in turn banned union and agency shop agreements using what are expressly, though misleadingly, labeled “right-to-work” laws, providing that workers cannot be compelled to join a union nor pay union dues or even an agency fee.<sup>46</sup> Those on the left, in turn, combat this rhetoric with rhetoric of their own, referring to these laws as “free-rider” laws, for they allow employees who benefit from unionization to refuse to pay for it. Because this argument proved convincing in a healthy minority of states, those which expressly rejected attempts to pass right-to-work/free-rider laws, the political right then opened up a second front in response, recasting the practice of insisting on the mandatory payment of union or agency fees as “compelled speech” and arguing that, under the First Amendment, public sector workers should not be forced to pay for speech with which they may disagree. While initially unsuccessful, this argument has now been accepted by the Supreme Court, effectively making all states right-to-work states with regard to public sector workers, even those whose elected representatives have rejected right-to-work proposals.<sup>47</sup>

What all this means is that whatever choices one makes as to how to describe the various arrangements that are at issue between workers and employers, one is going to have to use a term that is, to some degree, loaded with either negative or positive connotations and therefore open oneself up to the charge of trying to subliminally influence how people react to a discussion of these issues by associating some emotional baggage with one view or the other. But by and large, throughout these essays, I will use the terms favored by the right, although I shall use the terms “closed shop” and “union shop” in their correct sense, despite the use of the term “closed shop” to refer to both kinds of practices by some of those on the right. I will otherwise use the terms favored by the right because these are the terms that are now in common use among the general public, despite the efforts of the left to introduce more neutral or even favorable versions of them. I will even use the term “compulsory unionization” in some places instead of “universal unionization,” despite the fact that given the arguments I present in these essays I believe that the term “universal” more accurately captures the feeling that should be associated with this practice. I will use the terms favored by the right because my argument is strong, and I am not afraid of having to overcome the rhetorical power of the more negative versions of these terms in the process of asserting my argument. Nevertheless, it is important to keep in mind the subtle influence these terms may be having on one’s thought processes and be especially alive to and resist the idea that the negative or positive connotations associated with these terms are justified.

I should also point out that while everything I say in these essays should be equally applicable to any liberal capitalist democracy, the book is primarily oriented toward the situation in the United States of America. The same problems that have beset unions there have also arisen in many other



liberal capitalist democracies, of course, but nowhere else are they as severe. Indeed, some of the proposals I make in these essays have effectively already been accepted and instantiated in some liberal capitalist democracies because these approaches seem intuitively more plausible and appealing given the different cultural and historical traditions in place. Nevertheless, even though this book is primarily about the United States, its arguments can also be applied to other liberal capitalist democracies. Take, for example, the United Kingdom, where unionization has also been dramatically declining for many years and for many of the same reasons that apply in the United States. While I do not discuss the UK situation in anywhere near the detail that I discuss the situation in the United States, the application of my arguments to what is happening in the United Kingdom should be obvious. Moreover, even those residing in the countries of Northern Europe, where unionization is already close to being institutionalized, should be able to draw something from my discussion. Unionization is under attack even in these countries, and understanding how unionization can be supported by the argument from liberty should accordingly be helpful in resisting attempts to roll back the clock in Northern Europe too.

Finally, it may also be helpful to mention that just because my argument focuses on the application of the argument from liberty to unionization, this does not mean that it will not generalize and apply to other issues of contemporary import. The argument from liberty is currently being used by those on the right to push back against all sorts of achievements of the liberal state that have been driven mostly by the argument from equality. Indeed, the argument from liberty is being used against almost every progressive proposal currently in play, from prohibiting discrimination against LGBT people, to the mandatory purchase of health insurance, to almost every attempt at government regulation to protect our health and safety as well as the environment, to attempts to regulate the financial industry, to what kinds of limits may be placed on campaign contributions, and so on.<sup>48</sup> But as Emile Durkheim pointed out more than 100 years ago

Nothing is more false than the antimony that people have too often wished to establish between the authority of rules and the freedom of the individual. On the contrary, liberty (by which we mean a just liberty, one for which society is duty bound to enforce respect) is itself the product of a set of rules. I can be free only in so far as the other person is prevented from turning to his own benefit that superiority, whether physical, economic or of any other kind, which he possesses, in order to fetter my liberty. Only a social rule can serve as a barrier against such abuses of power.<sup>49</sup>

Without such rules, complex as they may need to be, whatever liberty remains “is purely nominal,” Durkheim then went on to say.<sup>50</sup> Gaining a deeper understanding of how complex the idea of liberty is, what kinds of liberty a liberal democracy is designed to promote and protect, and how the promotion and protection of certain kinds of liberty may actually undermine the kinds of

liberty that most of us hold dear is therefore critical if we are to meaningfully engage with one of the key arguments currently being used in a wide variety of public policy debates. By reclaiming the argument of liberty from the right with regard to unionization in this work, those who are so inclined should be able to draw arguments to defend a wide variety of progressive policies that currently rely exclusively on the argument from equality and may be foundering as a result.

With these points in mind, our journey toward universal unionization is now ready to begin.

## Notes

### INTRODUCTION

1. See Steven Greenhouse, "Union Membership in U.S. Fell Sharply in 2010," *The New York Times* (January 21, 2011) (rate of union membership at lowest level in more than 70 years); Steven Greenhouse, "Union Membership Rate Fell Again in 2011," *The New York Times* (January 27, 2012) (rate now at 11.8%); Steven Greenhouse, "Share of the Work Force in a Union Falls to a 97-Year Low," *The New York Times* (January 23, 2013); Russell Berman, "Why Can't Unions Keep Up with the Economy?" *The Atlantic* (January 23, 2015) (rate at 11.1% for 2014); Bureau of Labor Statistics, "Union Members Summary" (U.S. Department of Labor, January 26, 2017) (while rate of unionization had held steady at 11.1% in 2015, it dropped to 10.7% in 2016) ([www.bls.gov/news.release/union2.nro.htm](http://www.bls.gov/news.release/union2.nro.htm)); Mike McPhate, "The Collapse of Organized Farm Labor," *The New York Times* (February 2, 2017); Lawrence Mishel, "Overall Union Membership Rises in 2017, Union Density Holds Steady," *Working Economics Blog* (Economic Policy Institute, January 19, 2018). For a state-by-state analysis of unionization, see Planet Money, "50 Years of Shrinking Union Membership in One Map" (February 23, 2015) ([www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map](http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map)); James T. Bennett and Bruce E. Kaufman, "What Do Unions Do? A Twenty-Year Perspective," in *What Do Unions Do? A Twenty-Year Perspective*, eds. James T. Bennett and Bruce E. Kaufman (New Brunswick, NJ: Transaction Publishers, 2007), pp. 1–11.
2. See Department of Business Innovation & Skills, "Trade Union Membership 2014" (Statistical Bulletin, June 2015) ([www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/431564/Trade\\_Union\\_Membership\\_Statistics\\_2014.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431564/Trade_Union_Membership_Statistics_2014.pdf)); David G. Blanchflower, "Unions in the UK Public and Private Sectors" (Hanover, NH: Dartmouth College, March 16, 2005); Institute for Public Policy Research, *Prosperity and Justice: A Plan for the New Economy*

- (London: Polity, 2018), p. 50 (“in the 1970s more than 70 per cent of workers [in the United Kingdom] were covered by collective bargaining agreements; today it is just 26 per cent”).
3. See, e.g., Claus Schnabel and Joachim Wagner, “The Persistent Decline in Unionization in Western and Eastern Germany, 1980–2004: What Can We Learn from a Decomposition Analysis?” *Industrielle Beziehungen/The German Journal of Industrial Relations* Jahrg. 14, H. 2, Gewerkschaftsmitgliedschaft in Deutschland: Strukturen, Determinanten und Tendenzen (2007), pp. 118–132; Jean-Yves Boulin, “Trade Unions in France: How to Challenge the Trend Toward De-Unionization?” in *Trade Unions in Europe: Facing Challenges and Searching for Solutions*, eds. Jeremy Waddington and Reiner Hoffmann (Brussels: European Trade Union Institute, 2000), pp. 215–248; Bernhard Ebbinghaus, “Trade Unions’ Changing Role: Membership Erosion, Organizational Reform, and Social Partnership in Europe,” *Industrial Relations Journal* 33: (2002): 465–483; David Fairris and Edward Levine, “Declining Union Density in Mexico, 1984–2000,” *Monthly Labor Review* (September 2004): 10–17.
  4. See, e.g., Annie Lowrey, “Faces of the Minimum Wage,” *The New York Times* (June 15, 2013) (while only 1.7 million workers earned the minimum wage or less in the US 2007, by 2012 this number had increased to 3.6 million, with millions of others earning just a few cents or dollars more); Catherine Rampell, “Majority of New Jobs Pay Low Wages, Study Finds,” *The New York Times* (August 30, 2012); and the various articles included in the February 26, 2017, edition of *The New York Times* on “The Future of Work.”
  5. For an account of just some of these attacks, see, e.g., Thomas Ferguson and Joel Rogers, *Right Turn: The Decline of the Democrats and the Future of American Politics* (New York: Hill and Wang, 1986). See also Jeffrey D. Sachs, “How to Break the 40-Year Working Class Losing Streak,” *The Boston Globe* (August 17, 2017); David Kotz, *The Rise and Fall of Neoliberal Capitalism* (Cambridge: Harvard University Press, 2015), pp. 26–29.
  6. See generally *The Right and Labor in America*, eds. Nelson Lichtenstein and Elizabeth Tandy Shermer (Philadelphia: University of Pennsylvania Press, 2012); Tom McCarthy, “Sheldon Adelson Lost His Fight with a Union. Will It Have a Domino Effect?” *The Guardian* (February 24, 2017) (“Adelson is one of the country’s most high-profile, and powerful opponents of labor unions. He spent an estimated \$105m on political races in 2012, with crippling unions as his top priority, he told the Wall Street Journal at the time”). See also Patrick Healy and Monica Davey, “Behind Scott Walker, a Longstanding Conservative Alliance against Unions,” *The New York Times* (June 8, 2015); Thomas B. Edsall, “Republicans Sure Love to Hate Unions,” *The New York Times* (November 18, 2014). Of course, some of the most vigorous recent attacks have been directed against public sector workers. See, e.g., Editorial, “Governor Walker Resumes His War on Workers,” *The New York Times* (February 20, 2016); Dan Kaufman, “The Destruction of Progressive Wisconsin,” *The New York Times* (January 16, 2016); Noam Scheiber, “Supreme Court Case in Public Sector Union Fees Rouses Political Suspensions,” *The New York Times* (January 10, 2016); Nelson Lichtenstein,

- “Bashing Public Employees and Their Unions,” in *A Contest of Ideas: Capital, Politics, and Labor* (Urbana: University of Illinois Press, 2013), pp. 197–208. But private sector workers remain under vigorous attack too. See, e.g., Editorial, “When States Fight to Overturn Good Local Labor Laws,” *The New York Times* (February 19, 2016); Dan Kaufman, “Labor’s Last Stand,” *The New York Times* (June 14, 2015); Editorial, “Iowa’s G.O.P. Statehouse Shows the Locals Who’s Boss,” *The New York Times* (February 21, 2017).
7. See Noam Scheiber, “Trump Takes Steps to Undo Obama Legacy on Labor,” *The New York Times* (June 20, 2017); Steven Greenhouse, “Labor Movement Braces for Three-Front Battle with Trump, Congress and Courts,” *The Guardian* (November 14, 2016); Steven Greenhouse, “What Unions Got Wrong about Trump,” *The New York Times* (November 26, 2016); Jodi Kantor and Jennifer Medina, “Workers Say Andrew Puzder Is ‘Not the One to Protect’ Them, but He’s Been Chosen to,” *The New York Times* (January 15, 2017); Dominic Rushe and Tom Pietrasik, “‘I Was Naïve’: After Losing Health Care Battle, Factory Workers Fear Next Blow,” *The Guardian* (February 24, 2017); Samantha Sanders and Heidi Shierholz, “How President Trump and Congressional Republicans Are Undercutting Wages and Protections for Working People,” *Working Economics Blog* (Economic Policy Institute, April 19, 2017); Paul Krugman, “What Will Trump Do to American Workers?” *The New York Times* (August 21, 2017); Steven Greenhouse, “Is Trump Really Pro-Worker?” *The New York Times* (September 2, 2017); Noam Scheiber, “Trump Shifts Labor Policy Focus from Worker to Entrepreneur,” *The New York Times* (September 3, 2017); Joe Davidson, “Trump Labor Adviser’s Plan for Cutting Federal Compensation, Potentially Even Paid Holidays,” *The Washington Post* (December 17, 2018); Noam Scheiber, “Trump Appointee Is Trying to Squelch Us, Labor Board Staff Says,” *The New York Times* (January 25, 2018); Associated Press, “Trump v Trumka: President Marks Labor Day with Attack on Union Leader,” *The Guardian* (September 3, 2018); Steven Greenhouse, “How Trump Betrays ‘Forgotten’ Americans,” *The New York Times* (September 3, 2018); Editorial, “Trump’s War on Worker Rights,” *The New York Times* (June 3, 2019).
  8. See Nelson Lichtenstein, “Obama’s America: Liberalism without Unions,” in *State of the Union: A Century of American Labor* (Princeton, NJ: Princeton University Press, rev. ed. 2013), pp. 276–296; Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* (New York: Viking, 2017), p. xxxii; Monica Davey, “With Fewer Members, A Diminished Political Role for Wisconsin Unions,” *The New York Times* (February 27, 2016); Andrew Stern and Eli Lehrer, “How to Modernize Labor Law,” *National Affairs* 32 (Winter 2017) (describing “unions’ shrinking influence”); Bob Hennelley, “From the Supreme Court to a Constitutional Convention, Labor Is on the Defensive,” *City & State New York* (August 27, 2017); May Boeve and Michael Brune, “If US Unions Tumble, the Progressive Movement Could Go with Them,” *The Guardian* (March 2, 2018); Raymond L. Hogler, *The End of American Labor Unions: The Right-to-Work Movement and the Erosion of Collective Bargaining* (Santa Barbara, CA: Praeger, 2015).

9. See, e.g., Eduardo Porter, “Shaky Jobs, Sluggish Wages: Reasons Are at Home,” *The New York Times* (February 28, 2017); Laura Tyson and Ana Madgavkar, “The Great Income Stagnation,” *Project Syndicate* (September 7, 2016); Richard Dobbs, et al., “Poorer than Their Parents? Flat or Falling Incomes in Advanced Economies,” *McKinsey Global Institute* (July 2016) ([www.mckinsey.com/global-themes/employment-and-growth/poorer-than-their-parents-a-new-perspective-on-income-inequality](http://www.mckinsey.com/global-themes/employment-and-growth/poorer-than-their-parents-a-new-perspective-on-income-inequality)); Heather Long, “Half the Jobs in America Pay Less Than \$18 an Hour. Can Trump Help?” *The Washington Post* (August 24, 2017); Neil Irwin, “To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now,” *The New York Times* (September 3, 2017) (comparing Kodak in the 1980s and Apple today).
10. See, e.g., Lawrence Summers, “America Needs Its Unions More Than Ever,” *The Guardian* (September 3, 2017); Lawrence Mishel and Jessica Schieder, “As Union Membership Has Fallen, the Top 10 Percent Have Been Getting a Larger Share of Income,” *Economic Snapshot* (Economic Policy Institute, May 24, 2016); Will Kimball and Lawrence Mishel, “Union’s Decline and the Rise of the Top 10 Percent’s Share of Income,” *Economic Snapshot* (Economic Policy Institute, February 3, 2015); Benjamin Mueller, “Unionization Important to Closing Racial Wage Gap, Study Says,” *The New York Times* (September 4, 2015); Ruth Milkman and Stephanie Luce, “The State of the Unions 2015: A Profile of Organized Labor in New York City, New York State, and the United States,” *The Murphy Institute for Worker Education and Labor Studies* (City University of New York, September 2015) ([www.gc.cuny.edu/CUNY\\_GC/media/CUNY-Graduate-Center/PDF/Communications/1509\\_Union\\_Density2015\\_RGB.pdf](http://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Communications/1509_Union_Density2015_RGB.pdf)); Teresa Ghilarducci, “Farewell to America’s Middle Class: Unions Are Basically Dead,” *The Atlantic* (October 28, 2015) (as a consequence of low rates of unionization, America “leads rich nations in low-wage jobs – more than 20 percent of jobs pay less than two-thirds of the median wage,” “Americans work about 1,790 hours per year on average, but workers in wealthier nations work less than 1,600”); Noam Scheiber, “A Power Broker Who Wants Labor at the Table, Not on the Menu,” *The New Yorker* (July 29, 2016) (this is “probably the most perilous moment the public sector labor movement has faced since its emergence in the ‘60s and ‘70s,” quoting labor historian Joseph A. McCartin); Rick Wartzman, *The End of Loyalty: The Rise and Fall of Good Jobs in America* (New York: Public Affairs, 2017).
11. See Mark R. Reiff, *Exploitation and Economic Justice in the Liberal Capitalist State* (Oxford: Oxford University Press, 2013); Mark R. Reiff, *On Unemployment, Volume I: A Micro-Theory of Economic Justice* (New York: Palgrave Macmillan, October 2015); and *On Unemployment, Volume II: Achieving Economic Justice after the Great Recession* (New York: Palgrave Macmillan, October 2015).
12. See, e.g., Daniel J. B. Mitchell and Christopher L. Erickson, “De-Unionization and Macro-Performance: What Freeman and Medoff Didn’t Do,” in *What Do Unions Do? A Twenty-Year Perspective*, eds. James T. Bennett and Bruce E. Kaufman (New Brunswick, NJ: Transaction Publishers, 2007), pp. 373–400, 374, 391–395.

13. See, e.g., Richard Vedder, “The Economic Effects of Right to Work Laws,” *Employee Responsibilities and Rights Journal* 23 (2011): 305–310; Raymond L. Hogler, “How Right to Work Is Destroying the American Labor Movement: From the Ku Klux Klan to the Tea Party,” *Employee Responsibilities and Rights Journal* 23 (2011): 295–304, 299–300.
14. For a lengthy discussion of the argument from freedom of association, see Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven, CT: Yale University Press, 1992).
15. See *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. — (2018) (deciding that the compelled payment of agency fees is an unconstitutional form of compelled speech with regard to public sector workers); Adam Liptak, “Supreme Court Delivers a Sharp Blow to Labor Unions,” *The New York Times* (June 27, 2018); Noam Scheiber, “Labor Unions Will Be Smaller after Supreme Court Decision, but Maybe Not Weaker,” *The New York Times* (June 27, 2018).
16. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28–33. Nozick did contemplate that this might not hold true if the consequences of not infringing a right would produce a “catastrophic moral horror,” see Nozick, *Anarchy, State, and Utopia*, at p. 30, but no one contends that this is the case with unionization.
17. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971, rev. ed. 1999), pp. 26–28, 266, 474–480.
18. See generally James Feigenbaum, Alexander Hertel-Fernandez, and Vanessa Williamson, “From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws,” NBER Working Paper No. 24259 (National Bureau of Economic Research, January 2018).
19. See, e.g., Steven Greenhouse, “Billionaires v Teachers: the Koch Brothers’ Plan to Starve Public Education,” *The Guardian* (September 7, 2018). On the starve-the-beast strategy more generally see, e.g., Bruce Bartlett, “Tax Cuts and ‘Starving the Beast,’” *Forbes* (May 7, 2010); Eduardo Porter, “Tax Plan Aims to Slay a Reagan Target: The Government Beast,” *The New York Times* (December 5, 2017).
20. For a recent discussion of the use of the “corral the beast” and “starve the beast” tactics to reduce the size and limit the influence of unions, see Gordon Lafer, *The One Percent Solution: How Corporations Are Remaking America One State at a Time* (Ithaca, NY: Cornell University Press, 2017).
21. For a helpful discussion of the curious absence of a more sophisticated but also non-Marxist deontological defense of unionization, see Peter Levine, “The Legitimacy of Labor Unions,” *Hofstra Labor and Employment Law Journal* 18 (2001): 522–573, 528 and n. 6.
22. See generally Reiff, *Exploitation and Economic Justice*, p. 3.
23. See John Rawls, *Justice as Fairness* (Cambridge: Harvard University Press, 2001), pp. 42–43.
24. See generally Richard J. Arneson, “Luck Egalitarianism and Prioritarianism,” *Ethics* 110 (2000): 339–349.
25. See Reiff, *Exploitation and Economic Justice*, pp. 47–49, Mark R. Reiff, “The Difference Principle, Rising Inequality, and Supply-Side Economics: How Rawls Got Hijacked by the Right,” *Revue de Philosophie Économique/Review of Economic Philosophy* 13:2 (2012): 119–173.



26. Rawls, for example, only mentions unions three times in all his work. One of these works suggests that he thinks the difference principle does not apply to them. See John Rawls, “The Idea of Public Reason Revisited,” in *Collected Papers* (Cambridge: Harvard University Press, 1999), pp. 573–615, 596. The other two merely suggest that those who benefit from the union’s activities may have a duty of fair play not to be free riders; that is, they may have a duty to join the union and pay their fair share of the cost of its activities. But he says nothing to defend this proposition or place it within the larger structure of his theory of justice as fairness. See Rawls, *Collected Papers*, at pp. 61, 211.
27. See, e.g., Lafer, *The One Percent Solution*, pp. 91–92.
28. On the popularity of the argument from liberty in general among those on the right, see Paul Krugman, “Death and Tax Cuts,” *The New York Times* (February 24, 2017). See also Robert O’Harrow, Jr. and Shawn Boburg, “How a ‘Shadow’ Universe of Charities Joined with Political Warriors to Fuel Trump’s Rise,” *The Washington Post* (June 3, 2017).
29. See Reiff, *Exploitation and Economic Justice*, pp. 25–26, 44–45.
30. See, e.g., Nozick, *Anarchy, State, and Utopia*. For a discussion of this tactic and an attempt to refute it, see Ronald Dworkin, “What Rights Do We Have?” in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 266–278. See also Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 2002), pp. 138–153.
31. See Rawls, *A Theory of Justice*, sec. 82, pp. 474–480.
32. See Rawls, *A Theory of Justice*, p. 266.
33. See Martin O’Neill, “Philosophy and Public Policy after Piketty,” *Journal of Political Philosophy* 25 (2017): 344–375, 366.
34. Rawls, *A Theory of Justice*, p. 26. I suppose I should note that there are a few theories that purport to be able to determine rightness without considering consequences. Kant’s categorical imperative would be one prominent example. But even most Kantians concede that strict adherence to the categorical imperative no matter how bad the resulting consequences is not a morally appealing approach. See also Mill’s criticism of Kant in *Utilitarianism* (Oxford: Oxford University Press, 1998), pp. 51–52.
35. For further discussion and explanation of this feature of arguments from right, see Reiff, *On Unemployment, Volume I*, pp. 53–54, 159 n. 48 & 49; Reiff, “The Difference Principle, Rising Inequality, and Supply-Side Economics,” pp. 143–148.
36. For an example of how consequentialist reasoning can indeed be supplemented by deontological reasoning under conditions of empirical uncertainty, see Reiff, *On Unemployment, Volume I and II*, where I construct principles of justice regarding the obligation of a just society to address unemployment under conditions of uncertainty using both methods of moral reasoning.
37. For a discussion of what other fundamental presuppositions might be on offer, see Mark R. Reiff, “The Attack on Liberalism,” in *Law and Philosophy*, eds. Michael Freeman and Ross Harrison (Oxford: Oxford University Press, 2007), pp. 173–210; and Mark R. Reiff, *The Unbearable Resilience of Illiberalism* (forthcoming).
38. For further discussion of the difference between a concept and a conception, see Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986), pp. 70–72.



39. For further discussion for the difference between “ideal” and “non-ideal” theory and citations to some of the vast amount of literature discussing this distinction, see Mark R. Reiff, “Twenty-One Statements about Political Philosophy: An Introduction and Commentary on the State of the Profession,” *Teaching Philosophy* 41:1 (2018): 65–115, 85–86.
40. For a discussion of some of the regulatory options on offer here, the attitudes toward the employer-employee relationship they express, and why we might argue for one approach rather than another, see, e.g., John W. Budd and Devasheesh Bhave, “The Employment Relationship,” in *The Sage Handbook of Human Resource Management*, eds. Adrian Wilkinson, Nicolas Bacon, Tom Redman, and Scott Snell (London: Sage, 2009), pp. 51–70; John W. Budd, *Employment with a Human Face* (Ithaca, NY: ILR Press, 2004); Edmund Heery, *Framing Work: Unitary, Pluralist, and Critical Perspectives in the Twenty-First Century* (Oxford: Oxford University Press, 2016).
41. See Lewis F. Powell, “Attack on American Free Enterprise System,” Memorandum to Eugene B. Snyder, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (August 23, 1971) (<http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>), pp. 32–33. Note that the Powell memo is often characterized as being anti-union, and as using coded language to encourage the kind of attacks on unionization that already had a long history and subsequently doubled in intensity. See, e.g., Peter Temin, *The Vanishing Middle Class: Prejudice and Power in a Dual Economy* (Cambridge: MIT Press, 2017), pp. 18–19. But I choose to take Powell literally. Regardless of his attacks on suggestions for overcoming other aspects political liberalism, I will accordingly take him as meaning what he said about unionization – that real, substantive unionization and collective bargaining, and not some pale version of this, is indeed an essential freedom. For a discussion of the role the Powell memo played in reactivating the radical right in the 1970s, see Jane Mayer, *Dark Money: The Hidden History Behind the Rise of the Radical Right* (New York: Doubleday, 2016), Ch. 2; Kim Phillips-Fein, *Invisible Hands: The Businessman’s Crusade against the New Deal* (New York: W. W. Norton & Company, 2009), pp. 156–165.
42. See Isaiah Berlin, “Two Concepts of Liberty,” in *Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002), pp. 166–217.
43. See generally Frank Lovett, *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010); Philip Pettit, “Freedom: Psychological, Ethical, and Political,” *Critical Review of International Social and Political Philosophy* 18 (2015): 375–389, 382–385; Philip Pettit, “The Instability of Freedom as Noninterference: The Case of Isaiah Berlin,” *Ethics* 121 (2011): 693–716, 707–708; Philip Pettit, “Freedom in the Market,” *Politics, Philosophy, and Economics* 5 (2006): 131–149; Philip Pettit, “Liberty as Non-Domination,” in *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), pp. 51–79; Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998); Quentin Skinner, “Classical Liberty and the Coming of the English Civil War,” in *Republicanism: A Shared European Heritage*, eds. Martin van Gelderen and Quentin Skinner (Cambridge: Cambridge University Press, 2002), vol. 2, pp. 9–28.

44. See Dworkin, *Law's Empire*, pp. 70–72.
45. For more on the meaning of the terms “closed shop,” “union shop,” “agency shop,” and the difference between union dues and agency fees, see Michael Evan Gold, *An Introduction to Labor Law*, 3rd ed. (Ithaca, NY: ILR Press, 2014), pp. 31–32; John W. Budd and In-Gang Na, “The Union Membership Wage Premium for Employees Covered by Collective Bargaining Agreements,” *Journal of Labor Economics* 18 (2000): 783–807, 785–787; Charles M. Rehmus and Benjamin A. Kerner, “The Agency Shop after *Abood*: No Free Ride, but What’s the Fare?” *Industrial and Labor Relations Review* 34 (1980): 90–100.
46. For a very different conception of what the “right to work” should mean, see Richard Dien Winfield, “Economy and Ethical Community,” in *Hegel and Capitalism* (Albany, NY: SUNY Press, 2015), pp. 133–146, 145 (discussing Hegel’s views on this).
47. See *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. — (2018); 138 S. Ct. 2448; 201 L. Ed.2d 924. For some sharp criticism of the majority’s reasoning, see the dissenting opinions by Justice Kagan and Justice Sotomayor. See also Garrett Epps, “The Bogus ‘Free Speech’ Argument Against Unions,” *The Atlantic* (February 14, 2018).
48. See, e.g., George Monbiot, “Freeing Up the Rich to Exploit the Poor – That’s What Trump and Brexit Are About,” *The Guardian* (April 4, 2017); Robert Barnes, “Supreme Court to Take Case on Baker Who Refused to Sell Wedding Cake to Gay Couple,” *The Washington Post* (June 26, 2017); Peter Beaumont, “Israeli Airline Can’t Make Women Move Seats for Religious Reasons, Court Rules,” *The Guardian* (June 22, 2017); Gary Abernathy, “The Media Fundamentally Misunderstands Conservatives on Health Care,” *The Washington Post* (July 7, 2017); David Taylor, “‘In God We Trust’ – The Bills Christian Nationalists Hope Will ‘Protect Religious Freedom,’” *The Guardian* (January 14, 2019).
49. Emile Durkheim, “Preface to the Second Edition (1902),” in *The Division of Labor in Society* (New York: Free Press, 2014), pp. 9–10.
50. *Ibid.*

#### FIRST ESSAY

1. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
2. *Ibid.*, pp. 3–146.
3. See Mark R. Reiff, *On Unemployment, Volume I: A Micro-Theory of Economic Justice* (New York: Palgrave Macmillan, 2015). See also the section on the proper size of government in third essay in this volume, “A Defense of Public Sector Unions.”
4. See Mark R. Reiff, *Exploitation and Economic Justice in the Liberal Capitalist State* (Oxford: Oxford University Press, 2013), pp. 287–288.
5. For those interested in a discussion of and attack on economic neoliberalism, see Mark R. Reiff, “Two Theories of Economic Liberalism,” *Adam Smith Review* 10 (2017): 189–214.
6. See generally Peter Vallentyne and Hillel Steiner (eds.), *Left-Libertarianism and Its Critics: The Contemporary Debate* (Houndmills: Palgrave Macmillan, 2000). I consider myself a left-libertarian, although I am a left-libertarian in a

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