



# policy

## COMMENTARY



## A Case for Abolishing Nebraska's Commission of Industrial Relations

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

Thomas Jefferson's famous preamble to the Declaration of Independence proclaims more than just the right of the People to revolt against a Government that has become destructive of personal freedom; it proclaims the method by which the People should enforce that right – first, by alteration of the transgressing Government; and second, if alteration should fail, by abolition of said Government, and creation of new Government, better designed, and better constrained, to protect the safety, happiness, and freedom of the People.

In *Commission of Industrial Relations: Wreaking Havoc on City Budgets and Governance in Nebraska*,<sup>1</sup> this author proposed a number of alterations to the CIR,<sup>2</sup> the sole administrative agency empowered to resolve city employee salary disputes in the state.<sup>3</sup> While this author believes the reforms proposed in the first CIR Report would ensure the financial viability of Nebraska city governments for years to come, this author also believes the CIR system would nevertheless remain largely involuntary and undemocratic. As a result, this author proposes, in the spirit of the unalienable rights proclaimed by Thomas Jefferson in the Declaration of Independence, as well as the method by which those rights should be enforced, that the CIR system be abolished, and replaced with a new system that is both voluntary and democratic.

RIP CIR.



# The CIR System Should be Abolished Because it is Involuntary and Undemocratic

The First Amendment to the Constitution of the United States of America protects the unalienable right of individuals to associate with whomever they wish.<sup>4</sup> Thus, if a group of city employees wishes to form an association such as a labor union, it may. However, the First Amendment provides no right to *any* individual to bargain collectively through an association to gain an economic advantage over *any other* individual, associated or not. Thus, while a group of city employees has a First Amendment right to form a labor union, *it does not* have a First Amendment right to bargain collectively for its own economic gain – gain which necessarily comes at the expense of local government control and individual economic freedom. From where, then, does the so-called “right” to bargain collectively come?<sup>5</sup>

In Nebraska, city employees have the right to bargain collectively as a result of Neb. Rev. Stat. § 48-837, a state statute which provides that “[p]ublic employees shall have the right to be represented by employee organizations [i.e. labor unions] to negotiate collectively with their public employers in the determination of their terms and conditions of employment and the administration of grievances arising thereunder.”<sup>6</sup> To put it another way, section 48-837 requires *all* Nebraska city governments to participate in collective bargaining with *all* public labor unions; meaning, Nebraska city governments *must associate* with labor unions to negotiate the terms of employment *for their own employees*.<sup>7</sup> As discussed at length in the first CIR report, when negotiations break down, the CIR intervenes and sets new (generally higher) salaries.<sup>8</sup> Thus, as a result of the statutory right of Nebraska city employees to bargain collectively, Nebraska city governments, and by proxy We, the Nebraska People, have lost all local control over city personnel management decisions; control *lost*, to the avarice of “organized labor,” and the vagaries of the CIR.

It may seem obvious to most,<sup>9</sup> but why is this system of involuntary association so deeply flawed? Why is a sys-

tem of *voluntary exchange* so important to the preservation of Our unalienable rights as individuals and Our paramount role in the political process?

*Voluntary exchange* is the virtue of capitalism, the system of economics which has made the United States the richest – and freest – country in the world. Lately, capitalism has been assailed in the United States and across the world because the stock market has stumbled and fallen flat. But “capitalism” is not exclusively the stock market at the corner of Wall Street and Broad; “capitalism” is primarily the meat market at the corner store.

Consider a rather crude example. When Tom, the Buyer, wishes to purchase beef from Bob, the Butcher, at the corner store, Tom must decide if the price of the beef is acceptable in light of Tom’s ability to pay and personal tastes. The price of the beef is set, in turn, by Bob’s costs of operation and desire to turn a profit. If Bob sets the price too high, Tom will not buy. If Bob sets the price too low, Bob will not be able to cover his costs and will, over time, have to go out of business. So, Bob sets a price that will both a) sell beef and b) turn a profit. This is a system of voluntary exchange; this is the market; *this* is capitalism – it happens millions of times a day on Main Streets across the U.S.A., and it happens automatically.<sup>10</sup>

Now suppose a central governmental authority establishes price controls for beef in Tom and Bob’s state. Let’s further suppose these price controls are below what Bob would normally charge. What would happen? Bob would run out of beef and go out of business. Why? Tom would think, “What a great deal!” and buy as much beef as he could.<sup>11</sup> Bob, on the other hand, would not be able to cover his costs and would therefore have to close up shop. Although Tom would benefit in the short run, *no one* would benefit in the long run – not Tom, not Bob, not Tom and Bob’s neighbors – because *no one* would have a meat store at which to shop anymore. This is a system of involuntary exchange; this is central planning; *this* is the CIR – alterations or not – because the setting of salaries by a central authority is no different than the setting of prices by a central authority.

Consider the Tom and Bob example further, but suppose Tom works for Bob.<sup>12</sup> Suppose further that Tom, a valued employee, wants a raise, but Bob, due to a down economy, cannot presently pay. What would happen?

Under a system of voluntary exchange, Bob and Tom would have to reach an alternative agreement if Bob is to retain Tom. Perhaps Bob could offer Tom more vacation time. Perhaps Bob could offer Tom more flexible hours. Or perhaps Bob could promise Tom a raise once the economy recovers. As for Tom, he can either accept or reject Bob's proposals; if he rejects them, Tom can either stay as is or seek employment elsewhere. Under a system of involuntary association like the CIR, however, Bob would have no freedom to seek such alternatives. Instead, Tom's labor union, which for the sake of this supposition represents meat store workers across the state, would file a petition against Bob with the CIR. The CIR, as the central salary setting authority in the state, would then substitute its judgment for the judgment of Bob and set a higher salary for Tom. Because Bob cannot pay, Tom would, at best, benefit at the expense of Bob, the future employees of Bob, and the growth of Bob's store, and would, at worst, put Bob out of business – except here, "Bob," i.e. any Nebraska city government, would not go out of business, because "Bob" would simply pass on his higher costs, i.e. Tom's higher salary, to the People in the form of higher taxes. This is the practical consequence of involuntarily submitting Tom and Bob's private dispute to a detached (and oftentimes distant) central public authority. *This* is the CIR, a system of involuntary association, where an individual such as Tom, through an association such as labor union, can gain an economic advantage over the unassociated, statutorily disfavored, People. Such an involuntary and undemocratic system is simply unacceptable in Our state; therefore, the CIR system – alterations or not – should be replaced by a system that is voluntary and democratic, a system similar to the successful system instituted in the state of Texas.

## The CIR System Should be Replaced by a Voluntary and Democratic System Similar to that Utilized in Texas

Instead of having a system of involuntary association like the CIR, the Texas state government has developed a vast and detailed statutory scheme which places the People first. In general, these Texas statutes: (1) provide no right to bargain collectively,<sup>13</sup> (2) provide no right to strike or

lockout;<sup>14</sup> (3) provide local control of city employment matters (including the establishment of wages and other conditions of employment);<sup>15</sup> (4) allow (*but not require*) city governments to negotiate with recognized associations (i.e. labor unions) regarding employment matters;<sup>16</sup> (5) allow (*but not require*) city governments to reach voluntary agreements with recognized associations regarding employment matters;<sup>17</sup> (6) require voluntary agreements to be (a) approved by a majority of the local governing body,<sup>18</sup> (b) approved by a majority of the association members via secret ballot,<sup>19</sup> and (c) negotiated in public;<sup>20</sup> (7) allow city residents, by way of majority voting, to repeal any voluntary agreement in a special election;<sup>21</sup> (8) permit voluntary agreements to include mandatory arbitration clauses;<sup>22</sup> and (9) provide resolution of any employment disputes by the district court with jurisdiction over the respective city.<sup>23</sup> The result of this statutory scheme is a system of voluntary exchange and democratic control, a system which has proven quite successful in Texas over the years, and a system which could easily be adopted in Nebraska now. But *how*, exactly?

The Nebraska Legislature should first repeal the Industrial Relations Act, the act responsible for the present CIR system, in its entirety.<sup>24</sup> In its place, the Legislature should codify the nine points listed above and should expand point nine by requiring local disputes to be decided by juries comprised of city residents. In so doing, the Legislature would create not only a voluntary and democratic system, but also a *new economic and political order*, which places, at its heart, *individual* rights; rights proclaimed self-evident, unalienable, and unsurpassable since the time Thomas Jefferson reduced reason – and truth – to a parchment held sacred by the People, but deemed treasonous by the powers-that-be. This is the Legislature's challenge: one at which the Legislature must succeed if it is to preserve the paramount position of the People in the political process; and one from which this author hopes the Legislature does not shirk for simple sake of seeming serenity.

# John Heieck, Biography

Nebraska native John Joseph Heieck II is an accomplished writer and licensed attorney who graduated *magna cum laude* from the University of Notre Dame and *cum laude* from the Creighton University School of Law. In the spring of 2010, Mr. Heieck will obtain an LL.M. in Public International Law from the prestigious Leiden University, located at The Hague, The Netherlands. Mr. Heieck currently resides with his wife Julie Borchers Heieck, a Captain in the United States Army Judge Advocate General's (JAG) Corps, in Heidelberg, Germany. Mr. Heieck currently works at the United States Army Europe (USAREUR) Tax Center.

## Endnotes

<sup>1</sup>Available at [http://www.platteinstitute.org/docLib/20090227\\_CIR\\_Report\\_-\\_Final.pdf](http://www.platteinstitute.org/docLib/20090227_CIR_Report_-_Final.pdf).

<sup>2</sup>The proposed alterations were: (1) the Legislature should amend the CIR statute to require the CIR to consider a city's ability to pay before setting new city employee salaries; (2) the Legislature should amend the CIR statute to require the CIR to consider Nebraska cities first when setting new city employee salaries; and (3) the Legislature should amend the CIR statute to provide meaningful legislative oversight and appellate review of CIR salary decisions.

<sup>3</sup>As discussed in footnote 5, the first CIR report focused on the CIR as it related to employees of city governments; however, the problems discussed in relation thereto were equally applicable to employees of school districts, county governments, and, ultimately, the state government. Therefore, the proposed solutions in the first report, although couched in terms of employees of city governments, applied to all public employees in Nebraska.

<sup>4</sup>The plain text of the First Amendment provides the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." While the First Amendment does not expressly provide for a right to associate, the Supreme Court has nevertheless held that the right to associate is a fundamental right protected by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958). The Supreme Court had also held

that the right to associate necessarily includes the right not to associate with others. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>5</sup>The so-called "right" to bargain collectively finds no express origin in the federal constitution. Unfortunately, this indisputable fact, this lack of express constitutional power, has not stopped the federal Congress from passing broad-sweeping legislation in the realm of private employment matters; legislation, which has created a statutory "right" for certain private employees to bargain collectively with their private employers over wages, conditions of employment, and the like. *See, e.g.*, the Wagner Act of 1935 (i.e. the National Labor Relations Act) and the Taft-Hartley Act of 1947 (i.e. the Labor-Management Relations Act). The federal Congress has found "inspiration," as it were, for these acts in Article I, Section 8, Clause 3 of the Constitution, the so-called "Commerce Clause," which provides, *in toto*, that "[t]he Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]". Based on these twenty-one words, which read *in pari materia* bespeak of an enumerated power to regulate only **trade** between the several states, as between the foreign nations and the Indian tribes, the federal Congress has passed all kinds of far-reaching legislation; legislation which has had very little to do with trade; legislation which has affected everything from the **home growth of wheat** (*Wickard v. Filburn*, 317 U.S. 111 (1942)) to the **medical use of marijuana** (*Gonzales v. Raich*, 545 U.S. 1 (2005)) to the **environmental protection of Texas cave beetles** (*GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003)); legislation which, over the years, has made a mockery of our republic, and made moot many an individual right. Thomas Jefferson foresaw this abuse, and prophesized its adverse effects, in a warning to a colleague over two hundred years ago:

You know my doubts, or rather convictions, about the unconstitutionality of the act for building piers in the Delaware, and the fears that it will lead to a bottomless expense, & to the greatest abuses....Altho' the power to regulate commerce does not give a power to build piers, wharves, open ports, clear the beds of rivers, dig canals, build warehouses, build manufacturing machines, set up manufactories, cultivate the earth, to all of which the power would go if it went to the first, yet a power to provide and maintain a navy, is a power to provide receptacles for it, and places to cover & preserve it....This act has been built on the exercise of the power of building light houses, as a regulation of commerce. But I well remember the opposition, on this very ground, to the first act for building a light house. The utility of the thing has sanctioned the infraction. **But if on that infraction we build a [second], on that [second] a [third], [etc.], any one of the powers in the Constiti-**

**tution may be made to comprehend every power of government.** Thomas Jefferson to Albert Gallatin, October 13, 1802, Works 9:398-99, available on page 487 of Volume Two of *The Founders' Constitution*.

Today, our political leaders fail to question that which Jefferson questioned above – whether an action by the federal government is constitutional – because the supposed *utility* of government action (“The Government must do something!”) sanctions *any* constitutional infractions thereby. This indifference towards unlimited government power must change if We, The People, are to preserve Our rightful place as Americans, and Nebraskans, in the political order.

<sup>6</sup>Neb. Rev. Stat. § 48-837.

<sup>7</sup>The author does not suggest that section 48-837 violates the First Amendment, for the First Amendment protects the rights of individuals, not governments. However, the author uses the analogy to demonstrate the involuntary nature of the present CIR system.

<sup>8</sup>See *Commission of Industrial Relations: Wreaking Havoc on City Budgets and Governance in Nebraska*, available at [http://www.platteinstitute.org/docLib/20090227\\_CIR\\_Report\\_-\\_Final.pdf](http://www.platteinstitute.org/docLib/20090227_CIR_Report_-_Final.pdf).

<sup>9</sup>Unelected officials, that is.

<sup>10</sup>Meaning, without government interference.

<sup>11</sup>Assuming Tom had a large deep-freezer.

<sup>12</sup>The author concedes that this analogy is imprecise due to the private nature of the relationship: Bob is a private storeowner, not a city government; Tom is a private store employee, not a city employee. Nevertheless, the author uses the analogy for purposes of exposition.

<sup>13</sup>See Tex. Loc. Gov't § 142.058.

<sup>14</sup>See Tex. Loc. Gov't § 142.057.

<sup>15</sup>See Tex. Loc. Gov't § 142.059.

<sup>16</sup>See Tex. Loc. Gov't § 142.058.

<sup>17</sup>See Tex. Loc. Gov't § 142.059.

<sup>18</sup>See Tex. Loc. Gov't § 142.064.

<sup>19</sup>See Tex. Loc. Gov't § 142.064.

<sup>20</sup>See Tex. Loc. Gov't § 142.063.

<sup>21</sup>See Tex. Loc. Gov't § 142.161.

<sup>22</sup>See Tex. Loc. Gov't § 142.064.

<sup>23</sup>See Tex. Loc. Gov't § 142.064.

<sup>24</sup>With the exception of the “no strike rule” contained in Neb. Rev. Stat. §§ 48-802(2) & (3), which is echoed in Tex. Loc. Gov't § 142.057.

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