

FORMING A MORE DEMOCRATIC UNION: ORGANIZED LABOR AND  
AMERICAN DEMOCRACY, IDEALS AND INSTITUTIONS

By

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To my nan, Lavinia Rogerson (1909-2008),  
and my parents Maureen and Tony Orr

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By

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I examine how competing conceptions of democracy have shaped the development of U.S. labor law, and how in turn labor law has impacted the formation of unions and hence the nation's political democracy. I use the ideas of democratic theorists to illuminate historical debates about labor law, and those associated with contemporary efforts to reform it. I identify three weaknesses in political debates over labor law. First, participants of all political persuasions when engaging in such debates have justified their policy proposals by claiming they will further "democracy in the workplace" without defining just what they believe democracy entails. Second, that participants engaged in the development of labor law have failed to adequately distinguish processes and problems related to union formation from those associated with the governance of unions once formed. Thus they have addressed problems most properly associated with union governance by amending labor law to make it more difficult to form unions. Finally, there has been a tendency to assume that institutions associated with political democracy can be transported unproblematically into the workplace setting.

Having illustrated these weaknesses, I draw on democratic theory to outline a conception of democracy most appropriate for the workplace setting. I then use this conceptualization to

evaluate the legal framework that regulates union formation and proposals to reform it, and in addition, to compare the institutions that regulate union formation and those that are used in the political realm for purposes of group formation. As I proceed, I challenge the tendency to treat particular democratic institutions as sacrosanct and thereby insist that they can and must be transported from the political to the economic domain. I am attentive to the importance of clearly differentiating between the problems of forming unions from those involved in holding unions (and union officials) accountable once the union has been formed. These arguments in combination allow me to suggest that the common claim—that unions, compared to the polity, are undemocratic—is misguided and that the current proposal for labor law reform will actually ensure that the union formation process more closely approximates democratic ideals.

CHAPTER 1  
INTRODUCTION—DEMOCRACY AND AMERICAN LABOR UNIONS

*One of the reasons for this general agreement that industry should be put upon a democratic basis may be found in the general disagreement as to what democracy is.*

—Samuel Crowther 1919

To say that the concept of democracy has been central to the development of American labor law is—to put a twist on a popular song lyric—like saying it all and saying nothing at all. So far, the drama of federal labor relations has unfolded in three acts, most commonly referred to by their congressional sponsors, Wagner, Taft-Hartley, and Landrum-Griffin. The trilogy, like all good drama series, re-plays familiar themes; to date, the overarching motif of each episode has been democracy. Characters in each installment have debated the apposite way to enshrine “democracy in the workplace” and the importance of “industrial democracy” to democracy writ large. The problem is that as all parties have claimed the mantle of democracy for their particular ideas, finding any meaning in the term is a bit like trying to identify the real Spartacus.

Making the plot more complex, trade unions are first introduced as a democratizing force that will defend American democracy against the evil potentiality of creeping communism from the left, and fascistic forces to the right. Then, as the series unfolds, unions morph into the villains of industrial peace and become, according to their foes, the very embodiment of the evils they were supposed to suppress. Currently, unions are attempting to write a new chapter in this series by reforming labor law to reinvigorate their ranks and reinstate democracy in the workplace. In a manner that replays earlier struggles over labor law, this latest effort at reform has become one in which unions are depicted by their supporters as harbingers of democracy, and castigated by their foes as undemocratic. The way that actors engaged in this latest legislative struggle deploy the concept of democracy sparked my initial interest in questions of

labor law. However on closer examination, I quickly discovered that in order to truly understand the contemporary debate, it was essential to understand how conceptions of democracy had been used to shape labor law over the course of a century.

In the remainder of this introduction I do two things. First I offer a series of vignettes to illustrate the persistence for over a century of the entanglement of ideas about democracy with political debates about unions and labor law. I do this in part to establish the importance of the topic beyond the contemporary debate and to provide an initial warrant for my research. Second, I sketch out the central argument of my dissertation and provide a “road-map” for how subsequent chapters proceed.

*Without unions industrial democracy is unthinkable. Without democracy in industry, that is where it counts most, there is no such thing as democracy in America*

—Walter Lippmann

### **Industrial Democracy Sets the Stage**

The United States Commission on Industrial Relations (USCIR) was convened in 1913, and worked through 1915 to investigate the often-violent industrial conflicts that characterized the time.<sup>1</sup> This was the era before the nation had any comprehensive federal labor law, when union activists bombed the *Los Angeles Times* building, and striking miners were massacred at Ludlow. The commissions’ investigative work uncovered some notable facts. At the time, wealth was concentrated such that 2% of the population controlled 60% of the wealth. Business owners’ profits were increasing at twice the rate of wages; employees enjoyed little job security and testified to arbitrary treatment by their employers (one worker recalled being docked pay for laughing on the job). At the time the USCIR submitted its report, only twelve percent of workers enjoyed union representation (Troy 1965). Members of the commission noted the strong

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<sup>1</sup> For a comprehensive history of the work of the USCIR see Joseph McCartin (1997).

resistance to union organizing by employers who frequently violated workers' constitutional rights to free association. Since employer's actions were often reinforced by court decisions and injunctions, the labor representatives on the commission along with Chairman Frank Walsh recommended congressional action to ensure workers' freedom to organize. They felt unions were institutions that would democratize the workplace, something they deemed vital to American democracy. Mirroring the thoughts of Lippmann in the epigram above, they wrote that "political freedom can exist only where there is industrial freedom; political democracy where there is industrial democracy" (USCIR 1916).

Employer representatives on the commission disagreed with the laborites, as did representatives of the public—including labor scholar John Commons. They saw no inherent connection between the legitimacy of American democracy and industrial democracy as the labor members outlined. Commons penned a supplementary report calling for the establishment of industrial commissions to encourage cooperation between workers and employers. He believed government mediation was a moderate alternative to what he deemed a radical appeal to extend democratic principles to the workplace. Employer representatives on the commission endorsed Commons' proposal. While they acknowledged that some business owners had abused their power over workers, they attributed much of the blame for industrial turmoil to the irresponsible actions of labor leaders. They did not see unions as institutions that promoted democracy. Consequently they were uncomfortable with the prospect of government action that might facilitate the growth of unions and collective bargaining. Commons' proposal for government mediation to encourage compromise and fair contracts between *individual* workers and employers was much more acceptable.

The USCIR engendered great controversy and its hearings generated significant publicity. Frank Walsh, commission chairman and champion of industrial democracy, sparred with J.D. Rockefeller during his public testimony, a conflict that played out on the front pages of the national press. Despite its high profile, no policy initiative sprang from the commission's work, no doubt in part because the commissioners could not come to agreement on any proposal for action. Historian Joseph McCartin claims this should not be seen as failure. The USCIR's influence, he convincingly argues, was in placing the concept of industrial democracy firmly on the public agenda (McCartin 1997). That the meaning of the concept was poorly defined is of limited concern to McCartin. For him the critical thing is that the language of democracy featured heavily in debates about American industrial relations, and continued to do so for several decades. In that period—when the three major pieces of federal labor policy were enacted—the concept of democracy, albeit in competing conceptions, played a key role in shaping U.S. labor law. I describe this role in the next chapter.

Almost a century after the USCIR undertook its work, a similar commission, The Commission on the Future of Worker-Management Relations, was established by President Clinton to evaluate the nation's industrial relations. The Commission on the Future of Worker-Management Relations, popularly referred to as the Dunlop Commission, worked in a time marked by much less violent industrial turmoil than the USCIR. Nevertheless, its report and recommendations were similarly contradictory. The commissioners noted that additional protections were necessary to ensure workers' rights to organize collectively and to form unions. At the same time, they sought to promote what they considered "alternative forms of workplace representation" and to enhance cooperation between employers and employees. For historian McCartin this inconsistency was not the primary problem. His crucial concern was that unlike

debates at the time of the USCIR, the idea of democracy was absent from deliberations surrounding the Dunlop Commission:

Seldom do such discussions seriously assess the quality of democracy in the workplace. No doubt this would surprise Progressive-era reformers. In their time they came to understand the close connection between workplace democracy—even if they could not agree on its meaning—and the fate of democracy itself. Unfortunately however, the Walsh Report’s warning that political democracy can thrive “only where there is industrial democracy” finds little resonance today. (McCartin 1997, 227)

I think McCartin is just right about the important role the concept of democracy has played in shaping American industrial relations and, by extension, American unions and political democracy. I am much more concerned than he about how the concept has been used, and how competing interpretations of the idea have influenced the development of labor law. That is the central theme of this dissertation. However I feel his concern that the concept of democracy has been lost from discussion about labor law and industrial relations was premature.

*The unions have been busted, their proud red banners torn.*

—Steve Earle

*Well, it's sundown on the union, and what's made in the U.S.A., sure was a good idea, 'til greed got in the way. . . . Democracy don't rule the world, You'd better get that in your head.*

—Bob Dylan

### **Curtain Call—A Century Later, Will There Be an Encore?**

Since the 1990s when the Dunlop Commission finished its work, the U.S. labor movement has experienced significant organizational and operational change. Unions that had long focused on survival and servicing existing members have increasingly attempted to develop ways to generate new members and more effectively leverage their political and economic power. These actions have been prompted by many social forces similar to those faced by the reformers active almost a century ago, when the USCIR conducted its investigation. The labor market is uncertain, levels of income and wealth are becoming more inequitable, the number of workers

who are union members is low, and employers are hostile to union organizing efforts. Facing these difficulties, labor leaders have pushed to reform labor law, and even devised ways to organize around the law. In each case, their actions have once again placed the concept of democracy central to questions of labor law and industrial relations.

Americans familiar with the economic tumult of the first decades of the twentieth century must have a sense of déjà vu as the new millennium unfolds. American wealth is once again severely mal-distributed. After falling from the 1930s through to the mid 1970s the proportion of wealth held by those at the top of the income distribution has once again climbed to levels approaching those of the 1920s (Wolff 1996). By 2004, the most affluent one percent of American citizens controlled a third of the nation's wealth, a slightly greater proportion than the bottom ninety percent combined (Mishel et al. 2009).<sup>2</sup> Income inequality is following a similar trajectory. In the period following the New Deal until the mid-1970s, increases in output and wages moved together; as productivity increased so did wages. Since then, increases in median income and increases in productivity have diverged—the former increased only 22% while the latter increased 88 %. After a long period when economic gains were shared broadly throughout the economy, the last few decades have been characterized by disproportionate gains to those at the top (Mishel et al. 2009, 60).<sup>3</sup> Indeed, the income share going to the top one percent of the income distribution doubled in the period from 1980 to 2006, from 10 percent to 22.9 percent (Mishel et al. 2009, 26).

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<sup>2</sup> Unless otherwise noted, all economic statistics in this section are from Mishel et al. (2009).

<sup>3</sup> A brief period of low unemployment led to some wage compression in the 1990s; however, soon after this, job insecurity heightened and income inequality rose to levels not seen since the 1920s. The economic boom of the 1990s, which improved the economic fortunes of many citizens, appears to have been just a momentary respite in a steady pattern of diverging economic fortunes in America since the late 1970s (Mishel et al. 2009).

Scholars and commentators from left, right, and center have highlighted the danger to American democracy from such an economic landscape. “There are signs that rising inequality is intensifying resistance to globalization, impairing social cohesion, and could, ultimately, undermine American democracy,” remarked Janet Yellen, president of the Federal Reserve Bank of San Francisco, in a speech about economic governance (Yellen 2006). Mayor Bloomberg of New York claimed at a Treasury Department conference that “this society cannot go forward, the way we have been going forward, where the gap between the rich and the poor keeps . . . It’s not politically viable; it’s not morally right; it’s just not going to happen” (in Chan 2007). It has become a cliché among liberals to pronounce the arrival of a new gilded age (Krugman 2007), a theme that indeed has been taken up by conservatives as well (Phillips 2002).

If commentators across the political spectrum have raised concerns about the effect of inequality on political democracy, many are also in agreement that declining union membership is a significant contributor to the problem. Economists from diverse perspectives have identified declining union membership as a key factor contributing to the nation’s economic bifurcation (Bernake 2006; Card 2001; Freeman 2007; Mishel et al. 2009). Estimates of how much of the rise in inequality can be explained by declining union density range from between ten and twenty percent (Bernake 2006), to as much as a third (Mishel et al. 2009). Because unions influence income distributions in multiple ways—not just by raising their members’ wages but also due to the impact they have on wage levels generally, as well as their political actions in support of redistributive policies—precisely estimating their contribution to the creation of an equitable income distribution is difficult. However, the fact that unions play a role in reducing inequality and thereby strengthen U.S. democracy is not in doubt, which has led many to ask what has happened to American unions?

In the rapidly changing economy of the last decades of the twentieth century unions seemed slow footed and out of place. Unable or unwilling to adapt to technological innovation, a changing labor market and calls for “flexible” workplaces, they appeared to be heading the way of dinosaurs and dodos. Statistics of union membership bear out such pessimistic predictions—at the turn of the millennium only about one in eight American workers were union members, almost the same proportion as a century before and down from a high of about one in three at mid-century.

Scholars and journalists examining union decline have identified three broad categories of factors each of which go some way to explain the fall in the number of workers in unions (Clawson and Clawson 1999; Dark 2001; Farber and Western 2000; Goldfield 1987). First a slew of inter-related structural changes, largely though not entirely beyond the control of unions, eroded their membership base and hampered recruitment. Manufacturers increasingly shipped jobs offshore, or shifted production to areas in the U.S. where unions were weak. Manufacturing as a percentage of the economy declined and the more difficult to organize service sector gained workers (Farber and Western 2000). The federal government increased regulation of the workplace for health and safety, as well as for employment discrimination, allegedly mitigating the necessity of union protections (Bennett and Taylor 2001). Finally the “costs” of unionization increased and heightened employer resistance to organizing. This was predominantly due to the erosion of industry-wide bargaining and a weak U.S. welfare state, which meant union firms paying decent wages and providing benefits found it difficult to compete (Wallerstein and Western 2000).

A second set of explanations for falling union membership suggests that unions themselves are responsible for their decline. Facing an eroding membership and an increasing hostile

environment, unions as organizations turned inward and focused on retaining members rather than attracting new ones. From the late 1960s, many unions concentrated on their “servicing” role, allocating resources toward grievance handling and adding benefits for existing members. In so doing they neglected their “organizing” role and remained irrelevant to growing sectors of the workforce such as white collar and service sector employees, women and minorities (Clawson and Clawson 1999; Turner and Hurd 2001). Union leaders lacked ingenuity and, despite the changing economic and political milieu, resisted institutional change and experimentation (Goldfield 1987, Bronfenbrenner et al. 1998).

Finally, and most important for this dissertation, many scholars attribute declining union membership to failures of U.S. labor law. Despite numerous labor-backed attempts to amend the National Labor Relations Act (NLRA) to make it more amenable to union organizing, the nation’s primary industrial relations statute remains fundamentally unaltered since 1959. The Taft-Hartley Act, which I describe below, reformed the Wagner Act in ways that provided employers more rights in organizing campaigns, rights that they have used strategically to make organizing workers significantly more difficult (Bronfenbrenner 2009, Logan 2002). The Taft-Hartley reforms also weakened unions by allowing states to prohibit union security agreements that mandate all workers covered by a collective bargaining contract contribute to the cost of bargaining—a factor that both encourages free-riding and makes organizing more challenging. Employers have adapted to, and stretched provisions in, labor law in ways that mean it is no longer effective in protecting workers as they seek to organize collectively, leading one prominent legal academic to argue that U.S. labor law has “ossified” (Estlund 2002). She, along with other scholars, point to the erosion of the right to strike, the lack of effective enforcement of NLRA provisions, and increasing employer resistance to union organizing as key factors in

labors decline. Weak penalties for violations of workers' rights to organize, as well as escalating use of "consultants" or (more colloquially) "union-busters" to thwart organizing drives both highlight and contribute to the inefficacy of the law (Compa 2000; Levitt 1993; Logan, 2002).

With such an array of factors working against unions, it is unsurprising that commentators of all political persuasions forecast their demise. As the epigrams above show, the general lament about the plight of unions even permeated popular culture and found voice among "hardcore troubadours" predisposed to look favorably on the labor movement. Along with declining membership, the political clout of organized labor was increasingly challenged. Although unions joined with allies and secured some broad social reforms—such as the Family and Medical Leave Act—they were unable to secure their more narrow legislative goals. The Carter administration failed to enact labor law reform despite having a Democratic majority in Congress. Ronald Reagan took aim at organized labor soon after taking office by firing and permanently replacing striking air traffic controllers, setting a precedent that private employers quickly adopted (Lambert 2005). The Clinton years, arguably more favorable to American workers, saw the minimum wage increase and unemployment fall to record lows. However, even the moderate reforms to labor law recommended by the aforementioned Dunlop Commission were never implemented, and the North American Free Trade Agreement was enacted despite strong labor opposition. In short, considering American unions in the recent past, one would be tempted to skip the first clause of Dickens' famous phrase and simply state that "it was the worst of times."

The U.S. labor movement, however, has recently responded to its malaise in ways that make it at least possible to suggest that unions may soon be enjoying, if not "the best of times," at least a period of revitalization. The main reason for this is that after an initial period of

inaction in the face of decline, organized labor has looked inward and has self-reflectively sought ways to reinvigorate its ranks. Union practitioners, scholars, and concerned observers have suggested numerous strategies for union resurgence. More than a few have been implemented. A new generation of labor leaders seem to be heeding the wishes of Joe Hill, the union songsmith from time past who urged “Don’t mourn—organize!” Predictably, efforts to revive organized labor have led to a number of confrontations both between unions and their adversaries, and within the ranks of the labor movement. Emerging from these disputes is a familiar theme—the concept of democracy and what it means in the workplace and within unions.

The most visible clash within the contemporary labor movement came in the summer of 2005 when several prominent unions quit the AFL-CIO to unite under a rival umbrella group, “Change to Win” (CTW). The disagreement underlying the split was largely one of means rather than ends. When John Sweeney took the helm at the AFL-CIO in 1995, winning the federation’s first contested election on a platform of change, he introduced new programs to improve political action and increase new member organizing (Francia 2006; Mort 1998). While the political efforts met with considerable success—increasing member turnout and support for labor backed candidates—the organizing of new members remained lackluster. This prompted leaders of the future CTW unions to call for more resources and attention to be devoted to organizing and less to political campaigns (Masters, Gibney, and Zagenczyk 2006). In addition, the reformers advocated union mergers and consolidation, the aim being to facilitate organizing by structuring the labor movement on a scale more closely approximating its corporate adversaries. When these issues and some personal antagonisms went unresolved, president of the Service Employees International Union (SEIU) Andy Stern led the dissenting unions out of the AFL-CIO. This conflict at the heart of the much-publicized fracture of the labor movement illustrates a central

conundrum facing American unions: they can't change labor law to facilitate organizing until they have more political influence and power, yet gaining that influence requires more organizing.

### **Issues of Democracy and Attempts to Change Labor Law**

The AFL-CIO and CTW unions, despite their differing views on the priority of politics versus organizing, share a desire to boost the ranks of labor. They are uniformly and vigorously in support of a legislative proposal to reform U.S. labor law—the Employee Free Choice Act (EFCA). A central provision of EFCA would allow unions to gain formal recognition as the collective bargaining agent of a group of workers by a process known as “card-check,” or “majority sign-up.” This process involves collecting signed authorization cards from a majority of workers in a bargaining unit affirming the workers’ desire to be represented by the union. Currently, while employers may voluntarily recognize a union through the card-check process, they are not legally obliged to do so. Under the present law they can compel unions to demonstrate majority support through a secret ballot election administered by the National Labor Relations Board (NLRB). While a secret ballot would seem to be a fair and democratic way to determine employee choice, supporters of the EFCA suggest otherwise, arguing that the election process subjects employees to intimidation by their employers, thereby dampening union support. Conversely, employers argue that the card-check process exposes workers to intimidation by union organizers and thus oppose making the card-check process a mandatory route to union certification. Indeed, opponents of EFCA have introduced a counter bill, the Secret Ballot Protection Act, that would prohibit even voluntary union recognition by card-check and mandate an NLRB election even when not requested by an employer.

While it is possible to describe this debate in such matter-of-fact terms, that is hardly the way it has played out among interested parties, in the press, and during Congressional hearings.

Instead, as has historically been the case in discussions of labor law, each side has attempted to invoke the principle of democracy and draw an analogy between union representation elections and political elections to press their points. Consider just a couple of examples. The disingenuously-named Center for Union Facts (CUF), an anti-union group that opposes EFCA, has accused unions of “shredding democracy” and “(card) checking democracy at the door” for attempting to avoid the NLRB election process. Unions and their supporters, reinforcing their view that the NLRB election process is in fact undemocratic, counter that the EFCA would “put democracy back into the workplace” and “ensure the decision whether to form a union was made by majority choice, not by the employer unilaterally.” My agenda at present is not to evaluate the merits of these claims and counter claims, but rather simply to illustrate that a contest over the meaning of democracy has emerged as central to this contemporary dispute, the consequences of which have important implications for the political economy of the U.S., as well as the nation’s political democracy.

### **A Précis and a Roadmap**

This dissertation is about labor unions and democracy. As the above vignettes illustrate the idea of democracy—how it was to be instantiated in the workplace and what effect industrial democracy (or its lack) had on political democracy—was a concern in the first decades of the twentieth century. As we begin the new millennium, our political economy is reminiscent of, and union density levels are similar to, those of a century ago. Once again, a political battle over labor law and the way the political state regulates the formation of unions has emerged, and once again ideas about democracy are central to the dispute. I explore here how competing conceptions of democracy influenced the development of U.S. labor law, and continue to permeate discussions regarding labor law reform. In doing so, I do not seek to assess whether participants in struggles over labor law use the concept of democracy in a strategic way; simply

using the positive connotation of the idea to gain their desired policy outcome. While it might be tempting to simply dismiss as disingenuous the claims of those allied with business interests when they assert their concern for “workplace democracy” and the rights of workers to freely choose collective representation, I do not do so here. Nor do I assume that advocates of labor unions must straightforwardly be the champions of workers, and the heroes of industrial democracy they claim to be.

I argue that, even as all participants have presented their ideas about labor law as appropriately democratic and in turn cast doubt on the democratic bona fides of their opponents, they have failed to adequately specify what they believe the concept entails. This has meant that labor law has oscillated, first emphasizing the democratic empowerment of workers through the formation of unions and collective representation, and then the importance of individual “freedom” and choice regarding matters of workplace representation.<sup>4</sup> The capaciousness of democracy as a concept, especially when it is poorly defined, has meant that proponents of these quite disparate perspectives could each underwrite their broad visions with the ideal. The result is that current labor law is a strange amalgam that promotes both collective bargaining and the formation of groups (unions) to empower individual workers. And at the same time empowers employers to resist union formation and endorses the rights of individual workers to refrain from bargaining collectively. The current legal framework has not proved adequate to the task of

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<sup>4</sup> This oscillation may mirror broader trends in political economy, in the sense that the Wagner Act was passed in the wake of some landmark Supreme Court decisions such as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) that reversed earlier decisions of the “Lochner Era,” Court. The Lochner Era Court emphasized individual freedom and contractual rights, and in so doing rejected government interference in the workplace designed to protect the least powerful. To the contrary, later Congressional actions that supported government action to protect vulnerable groups in the workplace and thereby enhance their freedom were upheld by the Supreme Court. The Wagner Act, with its emphasis on ensuring workers freedom through the action of groups, surely fits this vision. While Taft Hartley was passed in a period of flux following World War II, the use of its provisions by employers to resist unions and emphasize individual rights have been ratcheted up in the Reagan era and beyond, when the political milieu has been characterized by a return to individual rights and freedoms.

protecting workers' rights to organize—hence the push by organized labor and its supporters to amend the law. However, this latest legislative struggle has been beset by the same weaknesses of prior deliberations I just noted—both supporters and opponents of the proposed reform claim that they are advocates of a democratic workplace, and castigate their opponents as undemocratic.

Two further crucial weaknesses characterize historical and contemporary political battles over labor law. First, participants from all political perspectives draw comparisons between democratic institutions in the political arena and those they believe should be enshrined in the workplace. In doing so they assert that those institutions they perceive as effective in furthering democratic aims in the political realm should be transferred into the workplace to promote democracy there. However, seldom do those advocating such views consider whether, in fact, those institutions we associate with political democracy will work effectively to further democratic aims in the context of the workplace.

Second, those engaged in the development of labor law have inadequately distinguished processes and problems related to the *formation* of unions from those associated with the *governance* of unions once formed. This meant that faced with genuine concerns about the internal democracy of unions, legislators initially responded by amending labor law in ways that made it harder for unions to form, and only later amended the regulatory framework with a view to promoting democracy within unions. This failure to distinguish the tasks of forming and governing unions has served to disadvantage workers who have been left inadequately protected when attempting to exercise their rights of association, and who may lack mechanisms to hold their collective representatives to account if do manage to form a union.

My aim in what follows is first to illustrate more completely the problems I have just outlined in the development of American labor law. Subsequently I aim to bring some clarity to the contemporary debate regarding labor law reform by bringing the ideas and scholarship of democratic theorists to bear on the various arguments that participants in the debate raise. To do so, I first provide a conceptualization of democracy that I argue is most appropriate for the workplace. I then use this conceptualization to evaluate the current legal framework that regulates union formation and the proposals to reform it. In addition to this comparison I compare the institutions that regulate union formation with those that are used in the political realm for the purposes of group formation. I do not fully address here, but do highlight the importance of, assessing the internal governance of unions according to the same standards of democracy.

As I proceed, I challenge the tendency to treat particular democratic institutions as sacrosanct and thereby insist that they can and must be transported from the political to the economic domain. I also stress the importance of clearly differentiating between the problems of forming unions, from those involved in holding unions (and union officials) accountable once the union has been formed. As I stated previously, I focus predominantly here on the former. These arguments in combination allow me to suggest that the common claim that unions, compared to the polity, are undemocratic is misguided.

The remainder of the dissertation consists of five chapters. In chapter 2, I provide an overview of the development of labor law in a manner that someone unfamiliar with the legal framework of union formation and governance could follow. At each step, I illustrate how the concept of democracy shaped the debate. In addition, I highlight how the idea of democracy was used by both pro- and anti-union legislators and groups, something that was possible largely

because the concept was left undefined. Finally, I illustrate how the law addressed problems properly associated with union governance, by making the process of union formation more difficult—particularly in the case of the Taft-Hartley reforms. Questions of union governance, I demonstrate, are not significantly addressed until passage of Landrum Griffin Act.

In chapter 3 I outline a conception of democracy that I subsequently use to evaluate the extant institutions and processes governing union formation, as well as proposals to amend them. In doing so I make four central points. First, the ideal of democracy does not imply a specific set of institutions. While we often associate democracy with such things as secret ballots and competitive elections, there is nothing about the concept of democracy that necessarily entails specific institutions. Second, the ideal that democratic institutions should seek to embody and facilitate is that of non-domination; on this view, the free choice of individuals as well as protection of individual interests is maximized, in both political and workplace settings, by institutions that minimize the possibility that any individual can be coerced by, or subject to, the undue influence of others. Third, representation is democracy; by this I mean that rather than being a poor imitation of democracy that is insufficiently “democratic,” when compared with a direct or participatory form, a representative system of governance, properly construed, is appropriate to realize the ideals of non-domination and protection of interests, and can facilitate participation by individuals on an ongoing basis. Fourth, representation requires institutions that facilitate both arguing and voting under conditions of relative freedom and equality. That is, we should be sensitive when designing democratic institutions not simply to the process of registering preferences (voting) but also to the process of preference formation (debate/discussion). Appropriate democratic institutions will seek to create conditions of freedom construed as non-domination in each of these.

Chapter 4 explores the first stage in the process of democratic group formation, one that occurs prior to the stage where individuals who will be part of the group register their preferences regarding whether the group should form. That is the process by which the boundaries of groups are constructed—in other words, it is the process of deciding who may or may not be included in the group, should the group form—and indeed, who should be included in the decision-making process that determines whether or not the group will form. In democratic theory this is referred to as the “boundary problem”; in the workplace setting, it is “unit determination.” I compare the processes outlined in labor law for determining the boundaries of unions in the workplace with those that have been historically used in the formation of nation states. The point of chapter 4 is to highlight that, contrary to the view that unions are undemocratic, the procedure for creating the boundaries of unions better approximates a wide range of ideals of democracy, including the ideal I view as most appropriate: democracy as non-domination

Chapter 5 evaluates the current process of union certification with the reforms to labor law that are being proposed. In contrast to the view that unions are acting contrary to democratic ideals in pushing for the EFCA, which would allow unions to form through the card-check process and without a secret ballot election, I argue that the amendments to labor law contained in EFCA will actually facilitate democratic ideals in the workplace setting. My argument centers on how secrecy can be used to either enhance or undermine democratic ideals in different institutional settings. In this case, I argue that the secret ballot does not protect workers from coercion in union representation elections in the same way that it protects voters, in political elections. This is because, unlike the threats that voters face in political elections that are leveled at individuals, the primary threats in union representation elections are leveled at the group in the

event that it should form. Thus secrecy does not further the democratic ideal of non-domination in the processes of voting in the workplace setting. In contrast, the card-check process allows workers to keep their discussions regarding union organizing secret from their employers; this means that they can engage in discussions about the merits of collective bargaining without the potentially coercive voice of the employer being involved.

In chapter 6 I argue that ensuring workers have a democratic framework within which to form unions is important to U.S. political democracy in a variety of ways. Unions improve the economic status and security of workers, making it more likely they will participate politically. Unions actively encourage the political participation of their members and those of limited means through voter education and mobilization programs. Unions also serve to amplify the voice of those demographic groups that are least likely to participate politically; in doing so, they broaden the range of candidates running for political office, diversify the political agenda, and enlarge the range of perspectives that are brought to bear in discussions of public policy. In this concluding chapter I also stress the importance of ensuring that unions once formed, are governed as far as possible in accord with democratic ideals—a topic I believe is an important area for future research.

CHAPTER 2  
CONCEPTIONS OF DEMOCRACY IN THE DEVELOPMENT OF U.S. LABOR LAW

*There can no more be democratic self-government in industry with-out workers participating therein than there could be democratic government in politics without workers having the right to vote.*

Senator Robert Wagner, 1937

If questions about how to bring “democracy” to industry set the stage for the development of American labor law at the beginning of the twentieth century and unions and their adversaries are calling for an encore in the first decade of the twenty-first, what happened during the main performance? Simply stated, during each of the three landmark debates concerning U.S. labor law, political actors repeatedly invoked the idea of democracy to gain support and legitimacy for their policy preferences. Public arguments around the passage of the National Labor Relations Act (NLRA) in 1935, and its subsequent amendment by the Labor-Management Relations Act (1947) and the Labor-Management Reporting and Disclosure Act (1959) were replete with appeals to the ideal of democracy.<sup>1</sup> Yet even as the concept of democracy has been a constant in shaping U.S. industrial relations, the meaning and interpretation of what democracy—or more specifically industrial democracy entails has remained contested.

Advocates and critics of American unions, alike, have deployed often divergent conceptions of democracy, of the ideas it embodies, and the institutional manifestations it entails, in pursuit of their policy objectives. On many occasions participants in these legislative struggles fail to clearly delineate the vision of democracy upon which their legislative proposals are proffered. No doubt more than a few partisans in debates over labor law have used the concept disingenuously, instrumentally claiming concern for “democracy in the workplace” to further

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<sup>1</sup> These three pieces of labor legislation, The National Labor Relations Act (NLRA), Labor-Management Relations Act (LMRA) and Labor-Management Reporting and Disclosure Act (LMRDA) are more popularly referred to as the Wagner, Taft-Hartley and Landrum-Griffin Acts after their legislative sponsors. I use the informal names or acronyms throughout this chapter.

their legislative goals. Others have argued sincerely—their disagreements revolving to a great extent around a persistent concern confronting theories of democracy (and representative government more broadly), namely, how to preserve the rights of minorities in a system of majority rule. From the most fundamental perspective, proponents of unions view democracy as self-determination that for workers can only be realized through collective representation and collective bargaining. Those opposed to unions most often stress the rights of individuals and individual choice as the primary characteristics of democracy, and hence place priority on a worker's right to refrain from group representation.

Starting from such contrasting premises, interested parties reach contradictory answers to questions that recur about the proper institutions for “democratic” union formation and governance. To give a few examples, is exclusive representation based on majority rule appropriate in the workplace, or is proportional representation more democratic? Is a secret ballot essential to determine the wishes of the workers regarding representation? What rights should workers, unions, and employers have to influence workers' choice during representation campaigns? How should workers be grouped for purposes of representation? How involved should the state be in the internal practices of unions and how should internal union democracy be instantiated? How much participation and control should workers be afforded in a democratic workplace?

The struggle between opposing groups to base legislation on their preferred answers to these and related questions is the drama of the development of American labor law. The story is complex, and contains a charismatic cast of characters. In this chapter, I briefly survey the key events in the unfolding saga. My intention is not to provide a detailed historical account, but simply to illustrate how conflicting and poorly conceived conceptions of democracy and

representation play a central role in the passage of each Act. In addition I underscore how participants in the debates often draw analogies between the democratic nature of institutions of the political state and those they believe should be introduced to the workplace. Finally, I highlight how these debates traverse questions of union formation and union governance, even as participants largely overlook such distinctions. The overview that follows then is meant to be neither a comprehensive history nor a detailed accounting of labor law. In that sense, it will be unsatisfactory to both historians and legal scholars. In providing such a sketch I aim to establish that the topic is fertile ground for the application of political theories of representation and democracy, one that I feel has been somewhat overlooked by political theorists and that is especially relevant given that labor law reform is once again a prominent public policy concern. Having provided such an initial warrant, I will proceed in subsequent chapters to use political theory to inform the contemporary debate, and in turn uncover how institutions and discussions of workplace democracy might contribute to democratic theory.

### **Act One—The Road to Recognition**

The Wagner Act named after its Senate champion, was the nation's first comprehensive labor law. It established federal protection for the right of workers to form unions. Senator Wagner argued that it was based on principles of "industrial democracy." As my epigram suggests, when speaking in defense of the NLRA, Wagner drew an analogy between employee participation in the workplace and voter participation in political elections. Unions, in Wagner's vision, were organizations that would democratize the workplace. Yet Wagner did not clearly define what he meant by industrial democracy, nor did he specify unambiguously the ways in which industrial democracy would smooth the progress of political democracy. Consider this passage taken from a *New York Times* editorial in which Wagner, shortly after the Supreme Court upheld the legislation bearing his name, outlined his vision of the "ideal industrial state":

But above all, in our search for the ideal, we must hold fast to the spirit and practice of democracy. All history teaches us, and our own times afford new examples, that in the long run autocrats misuse their power. They soon become either the tools of an oligarchy or the slaves of their own fanaticism. Benevolent despots are a rare exception. If the people would thrive, the people must rule.

Under modern conditions government by the people is not so simple. Politics in the narrower sense is becoming impersonalized. People cannot all join in as they joined in the old New England town meeting. The country is too large, its problems too complex, the pace of life too rapid. For the masses of men and women the expression of the democratic impulse must be within the industries they serve—it must fall within the ambit of their daily work.

That is why the struggle for a voice in industry through the process of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.

Fascism begins in industry, not in government. The seeds of communism are sown in industry, not in government. But let men know the dignity of freedom and self expression in their daily lives, and they will never bow to tyranny in any quarter of their national life.

That is why I earnestly believe that the victory for the principles of economic democracy in the recent Supreme Court decisions on the National Labor Relations Act ranks among the notable achievements of our entire history. (Wagner, 1937)

I quote this passage at length because many of its themes echo as well as anticipate recurring topics in labor law, and it illustrates a number of the ambiguities I find in the larger debate. Here, Wagner implies that worker participation is integral to workplace democracy—suggesting that workers in the workplace play the equivalent role of citizens in New England town meetings. At the same time, Wagner emphasizes the importance of worker “voice” attained through collective bargaining and applauds the Supreme Court confirmation of the legislation that he promoted to ensure that workers could freely chose representatives for just that purpose. This implies that it is a representative system of workplace governance that Wagner views as ideal.

A number of scholars have noted this ambiguity regarding the nature of democracy—whether representative or participatory—embodied in the NLRA, but none have turned to political theory to resolve the inconsistency (Becker 1993; Hartley 1982, 61; Klare 1978, 285). The lack of clarity is not unique to Wagner; as I will show, it is one shared by many participants engaged in legislative wrangling over labor law, and rears at each step in the development of the legislation that bears his name.

Wagner, in the quote above, exemplifies another common theme in the development of contemporary labor law: he juxtaposes American democracy with fascism and communism, casting “democracy in industry” as essential to the preservation of the former. Even as he imagines this role for democracy in the workplace, the senator does not truly specify the mechanisms through which it will function. For example, will participation in workplace governance enhance workers civic skills, or will collective bargaining protect workers’ shared interests and thus elevate their sense of holding a stake, and a voice, in society? Again, Wagner’s imprecision is not his alone; rather, it is characteristic of parties on all sides of the dispute in his era, and it has persisted since.

Finally, in contrasting alternate forms of political governance—namely fascism and communism—to “American democracy,” in his defense of democracy at work, Wagner is not only reflecting the historical context but adopting a strategy common to his interlocutors past, present, and future. I turn now to a broader discussion of the antecedents, enactment, and amendment of the Wagner Act to further illustrate these and other pertinent points.

### **Scene One—War Labor Policy Sets Precedents**

Wagner and his fellow proponents of the NLRA were influenced to a great extent by prior efforts to secure for American workers the right to freely join labor unions. In part, the origins of the legislation lie in the practices of the National War Labor Board (NWLB), and the

National Industrial Recovery Act (NIRA) (Bernstein 1950, chap. 2; Dubofsky 1994).<sup>2</sup> Neither of these government actions had as their explicit purpose to introduce democracy to industry, yet each was infused by the notion, and each in turn influenced how federal labor policy evolved.

The NWLB was formed by the Wilson administration to help regulate the economy, reduce the incidence of strikes, and ensure smooth production of essential goods during World War I.<sup>3</sup> The Board was created to unify war labor policy in one agency and grew out of recommendations from a report by the President's Mediation Council (PMC), a group tasked with finding solutions to labor strife. Felix Frankfurter, a leading figure in the progressive movement<sup>4</sup> authored the PMC's report and concluded that equalizing power between workers and management was vital. He recommended some form of "collective relationship between management and men," and stated that resistance to this idea by corporate leaders highlighted "a glaring inconsistency between our democratic purposes in this war abroad and the autocratic conduct of some of those guiding industry at home" (in McCartin 1997, 78). Frankfurter did not clearly delineate the form this "collective relationship" would take; in that sense, his report exemplifies the ambiguous way concern for democracy informs the history of the formation of American labor law.

Ultimately, a state-brokered compromise agreement between industrialists and labor leaders meant that during the war, the NWLB would settle questions of workplace representation. The agreement outlined eight key principles that would guide the Board's work. Most importantly the agreement recognized the right of workers to organize and collectively

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<sup>2</sup> Other precedents for the NLRA include the Railway Labor Act (1926) and the Norris La Guardia Act, though they are less pertinent to my current argument. A full explanation of these "sources of ideas" for the NLRA can be found in Bernstein (1950, 19-28).

<sup>3</sup> For a comprehensive account of US labor policy during World War I, complete with an in-depth analysis of how the ideal of democracy influenced discussions, see McCartin (1997).

bargain without interference from employers or coercion from union organizers. A further crucial principle was that both sides acceded to maintain the pre-war “status quo” in industrial relations; union shops would remain unionized, open shops union free. The NWLB, tasked with mediating the agreement, comprised an equal number of labor and corporate members. It was headed by public representatives: Frank Walsh, advocate of unions and industrial democracy who had previously served on the United States Commission on Industrial Relations (1913–1915), and former Republican President Taft, who had a reputation as something of a union antagonist. The conflicting viewpoints of these co-chairman were essential to the acceptance and legitimacy of the Board, and despite their differences, Walsh and Taft worked effectively together.

The NWLB was a voluntary agency with only the force of public pressure, patriotism, and occasionally presidential action to uphold its decisions.<sup>4</sup> Nevertheless, the Board navigated its difficult task in ways that frequently benefited workers: winning equal pay for women, establishing the eight-hour day in many industries, and facilitating the reinstatement of workers dismissed for union activities (Dubofsky 1994, 73). When it came to mediation, where unions were established the NWLB acknowledged them as workers’ legitimate representatives, in non-union workplaces the NWLB conducted “shop elections” to select employees to serve as worker representatives (Derber 1970; McCartin 1997). Many of these elections were won by union members, and labor leaders hoped that shop committees would form a basis from which they could increase collective bargaining after the war.

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<sup>4</sup> President Wilson intervened to pressure Western Union into accepting a NWLB adjudication during a labor dispute that would have required the company to reinstate union members against its wishes. When the company refused to do so, Wilson used emergency powers to take control of the telegraph wires. His actions endorsed and supplied much needed legitimacy to the Board. See McCartin (1997, 90-93).

This was not to be. After the armistice the NWLB disbanded in the face of increasing employer resistance to its decisions. President Wilson, despite the close relationship he developed with labor leaders during the war, failed to follow up on his message to Congress from the Paris Peace Conference that it should move to “democratize industry.” The two Industrial Conferences that Wilson called to outline post-war industrial relations ended without agreement, the president did not rally to labor’s cause, and the state withdrew from its role of affirming workers’ rights to organize. Employers, on the other hand, took up the mantle of industrial democracy and began transforming many of the “shop committees” established by the NWLB into company-controlled employee representation plans (Brody 2005, chap. 5). Overall, while the record of the Wilson administration’s support for labor was mixed, there is no doubt that war time policies increased union membership. Unions gained about 2 million new members during the course of the war so that by war’s end a historic high of 20% of the workforce was organized (Dubofsky 1994; Troy 1965).

The language in which wartime labor policies were conducted and contested is suffused with references to democracy. Historian David Brody suggests that industrial democracy became the “apotheosis on the home front of the Wilsonian struggle to make the world safe for democracy” (2005, 64). The connection, frequently drawn by participants in discussions of labor law, between democracy in the state and democracy in industry looms large in this era. All parties found American actions to uphold democratic government in Europe a convenient source of validation and a compelling rhetorical frame. Samuel Gompers, president of the relatively conservative American Federation of Labor (AFL)—the nation’s largest union federation—pledged labor’s support for the American war effort and the Wilson administration’s policies. He did so using patriotic language and appeals to democracy:

We uphold as fundamental the ideals of democracy and internationalism, politically as well as industrially. These are also fundamental principles of the American labor movement . . . loyalty to the ideals of freedom and democracy and internationalism requires loyalty to America . . . it shall be our purpose to bring to the support of the Government all the moral and material power of the working class. (in *New York Times*, August 16, 1917)

Gompers had not used the term “industrial democracy” until he associated his vision of industrial relations, characterized by collective action on the part of workers to increase wages and conditions on the job, with President Wilson’s war aims (Montgomery 1993, 24). He did so in part to thwart opposition from within the ranks of labor. In addition to presiding over the AFL, Gompers headed up the American Alliance for Labor and Democracy (AALD). The AALD was a “patriotic” organization created to counter associations formed by labor pacifists, as well as socialists in the labor movement whose vision of industrial democracy was more radical, and involved a more thorough restructuring of industrial relations than that of Gompers and the AFL.<sup>5</sup> In the address to the AALD quoted above and in other public statements, Gompers sought to ensure that the AFL’s version of industrial relations was seen as the true embodiment of American democracy.

In a letter to Gompers expressing appreciation and approval for the efforts of the American Alliance for Labor and Democracy, President Wilson pledged his full support for labor’s “just requests” on behalf of American workers, and claimed that labor would not lose by America’s war for democracy:

No one who is not blind can fail to see that the battle line of democracy for America stretches today from the fields of Flanders to every house and workshop where toiling, upward striving men and women are counting the treasures of right and just liberty which are being threatened by our enemies. (in *New York Times*, September 3, 1917)

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<sup>5</sup> For a more complete explanation of the role of the AALD, and the competing perspectives regarding “industrial democracy” among factions within organized labor at this time see McCartin (1997, especially chap. 3). See also Montgomery (1993). For a more comprehensive historical overview of how various factions within the labor movement have envisioned “industrial democracy” especially as it pertains to internal governance and the role of unions in political democracy, see Sinyai (2006).

During the war, Gompers seemed to agree with the president about labor's gains stating that the government had recognized principles that labor had long fought for, and exclaiming the inclusion of labor representatives in war time committees and conferences. Rhetorically not presciently, Gompers asked, "When the war is over do you think these representatives of labor are to be thrown aside?" (in *New York Times*, February 23, 1918)

Throwing aside the representatives of labor was just what many industrialists had in mind. They claimed that organized labor used the war situation for selfish ends, driving up wages without regard to the public good. Collective bargaining, according to many employers protected weak workers and promoted mediocrity in the ranks of organized labor, while violating individual workers' rights. All of this, according to industrial leaders, had been encouraged by the administration's wartime policies. As the war drew to a close, their criticism of organized labor and what they viewed as the government's pro-labor policies escalated. The *New York Times* published without personal attribution this declaration from "congressional leaders" supportive of industrialists and opposed to war labor policy:

Democracy is the word that labor cheers at its patriotic mass meetings open to the public and to the members of the Federal Government. But the coming, or already arrived, autocracy of labor and the virtues of collective bargaining are the things they cheer still more vociferously at the private meetings of the unions. . . . Mr Gompers condemns the Bolsheviki, but there is difference only in degree and not in kind between the Bolsheviki of Russia and the organized labor of America. (in *New York Times*, February 17, 1918)

All parties to labor-relations disputes during the war period then, despite fundamental disagreements in the actual content of their preferred institutional arrangements, claimed that their ideas captured the essence of democratic governance. In doing so they at least tacitly castigated their opponents as anti-democratic.

After the war, with the withdrawal of government intervention in workplace relations, the shop committees established by the NWLB were in many cases replaced by employer

representation plans. These plans, modeled on those introduced by Rockefeller after the Ludlow massacre, gave employees a “voice” in the workplace through representatives chosen from their ranks, but allowed employers to maintain veto power, limit the range of issues open to debate, and regulate the manner in which representatives were chosen. Employer representation plans had been adopted by some employers during the war to forestall government-sanctioned shop committees, and with the onset of peace were taken up by others to deter worker representation by independent labor unions. Employers couched these representation schemes in the language of industrial democracy. In a discussion about a company representation plan for International Harvester, hailed by the *New York Times* as one of the “most comprehensive,” executive Cyrus H. McCormck, Jr. argued;

Our country is just coming out of this great war in which democracy has been fighting autocracy. The working man naturally thinks of the autocracy of employers and believes he himself is on the side of democracy. I believe the vote of the working man on many things, well controlled by the machinery this plan will put in effect, will give us a chance to exercise democracy in industry.” (in Brody 2005, 67)

Regardless of the intentions of executives, to union advocates such schemes came to be seen as faux representation under the control of the employer, and were popularly derided as “company unions.”

There can be little doubt that the unique circumstances of the war accentuated the clamor by all parties to claim that their vision of industrial relations was authentically democratic. Yet many themes and assertions set in place during this period recur in future debates. Consistently, mainstream labor leaders as well as sympathetic politicians envision industrial democracy as worker representation through collective bargaining by independent unions. In doing so, they marginalize so-called “radical” elements within the labor movement for whom a more fundamental economic restructuring and greater worker control in the workplace would be authentically democratic. In turn, corporate leaders and their political allies frame true industrial

democracy in individualistic rather than collective terms. From this perspective, employee representation schemes and the right of employees to opt out of collective bargaining are compatible with the concept.

At this juncture in the evolution of U.S. labor law, while all parties to the debate claimed the mantle of “workplace democracy,” none of the proposed institutional arrangements was attentive to the internal governance of unions. Rather they focused exclusively on the form and formation of the bargaining structure in industry. In some cases, employer representation schemes were exceptions to this pattern, but generally this was due to a desire to retain control in the workplace not out of concern that workers’ organizations uphold principles of democracy in their internal arrangements. This failure to distinguish institutions that regulate union formation from practices of union governance reflects a further ongoing feature of discussions about labor legislation.

### **Scene Two—Labor Policy in Response to the Depression**

Questions of industrial relations re-emerged at center stage with the onset of the next national crisis: the Great Depression. It is surprising how much the governmental response to the new calamity mirrored that during the war. In many ways, while the scene changed, more than a few of the actors and the script remained the same (Dubofsky 1997, 108-111).

The NIRA was the first attempt by President Franklin Roosevelt’s administration to manage the economy and pull the country out of the Great Depression. NIRA sought to control competition between corporations, place a floor under prices and wages, and limit hours of work, in order to stabilize the economy and reduce unemployment. NIRA established “industry boards” comprised of representatives of employers, workers, and the public, to draw up “codes of fair competition” in key industries that would set fair prices and “living wages.” Section 7(a) of NIRA dealt with the rights of labor. Its stated purpose echoed the earlier Norris-LaGuardia Act

(1932), which outlawed “yellow dog” contracts (contracts wherein workers pledged to refrain from joining a union) and limited the use of court injunctions against unions. Section 7(a), like Norris-LaGuardia, affirmed government support for employees’ rights to organize, bargain collectively, and choose their representatives without employer interference.

The National Labor Board (NLB) was established to oversee implementation of Section 7(a) and to mediate labor disputes during the recovery period. The NLB, comprised of an equal number of labor and corporate leaders, was headed by Senator Wagner, whose role was to represent the public interest. In announcing the establishment of the Board, President Roosevelt informed members of the press that “until American industry and trade have learned democracy and self-rule, until individualism is succeeded by the corporate commonwealth, there must be government control of some sort” (in *Chicago Daily Tribune* 1933). The “government control” afforded by the NLB (and its successor agency, the first National Labor Relations Board) suffered the same problems as the NWLB. As the Recovery Act was essentially a voluntary scheme designed to balance the interests of labor and industry through government mediation, the NLB depended on the parties to cooperate and on presidential pressure to enforce its decisions. A particularly vexing problem for the NLB, reminiscent of the war era, was a rapid rise in employer representation plans or “company unions” (Bernstein 1950, 57; Dubofsky 1994, chap. 5). While corporations claimed they met the requirements of worker representation, unions fiercely resisted them as company dominated. This central problem plagued the government’s efforts to foster industrial democracy via state-mediated cooperation between capital and labor during the Depression as it did during the earlier wartime period. It revolved around a disagreement over what counts as legitimate democratic representation and is a critical example

of how competing views about what counts as “democratic” influenced the development of U.S. labor law.

In order to adjudicate frequent disputes regarding who should be designated as employees’ legitimate representatives, the NLB developed a “common law,” incorporating an electoral process to determine employees “free choice.” It upheld the principle of exclusive representation and maintained that the choice of the majority in a Board election of employees would become the exclusive representative of all workers.<sup>6</sup> However, where employers resisted its rulings, the NLB could not impose them. The situation was further complicated by the fact that both the National Recovery Administration (the bureaucracy established to oversee the implementation of NIRA) and the president made a series of decisions and took actions that made it seem as though company unions and proportional representation (multiple forms of representation: individual, company unions, and trade unions in one workplace) were consistent with Section 7(a) of NIRA.<sup>7</sup>

The AFL was initially enthusiastic about Section 7(a). Chester Wright, a federation economist, claimed labor saw the NIRA as a “charter of freedom.” He described the Act as a broad grant for unionization while denying that organized labor held any desire to fundamentally restructure American industry:

Unless there is some fatal blunder on the road from here to codedom, organized labor sees America racing toward something approximating industrial self-government. . . . American labor still regards state socialism, or any other socialism, as ‘bad business.’ It wants democratic practice, self government, a voice. It has no wish to disturb ownership and no

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<sup>6</sup> The Board outlined these principles in what became known as the “Reading Formula.” They were upheld by the NLB successor agency the first NLRB in the Houde case. Both cases are outlined in detail in Gross (1974).

<sup>7</sup> President Roosevelt endorsed proportional representation in brokering a settlement of the automobile strike. For a thorough description of this incident see, Gross (1974, 61-63). The National Recovery Administration endorsed proportional representation, both in public proclamations and tacitly by refusing to prosecute employers who violated the NLB’s principle of majority rule; for further explanation see Dubofsky (1994, 116-120).

wish to cut away the profit structure. It sees the present development as a logical development of industry in a nation devoted to democracy. (in *Washington Post*, 1933)

The right of workers to bargain with employers collectively through freely chosen representatives was, according to this view, in keeping with the tenets of the American democratic tradition and all that industrial democracy required.

As resistance to the NLB's decisions grew and employers, particularly in large industries such as steel and auto, thwarted unions' attempts to organize, labor leaders grew restless with what they referred to as "chisellers" denying workers their rights to representation. William Green, then president of the AFL, proclaimed: "The wage earners must have the freedom granted by the Act and they must have that freedom in its fullest measure. The idea that any private power should exist to curb that freedom is repugnant to every decent concept of democratic life" (in Wright 1933). One of Green's primary concerns was the aforementioned resistance by employers to employee representation exclusively by independent unions, and the rise of employer representation plans. Drawing on an earlier pronouncement of the AFL's executive board entitled "Industry's Manifest Destiny," Green proceeded:

Henceforth the movement of the workers into trade unions has a deeper meaning than the mere organization of groups for the advancement of group interest, however vital that function may yet remain. . . . The organization of the workers into trade unions must mean the conscious organization of one of the most vital elements for enlightened participation in a democracy of industry whose purpose must be the extension of freedom. (in Wright 1933)

Here it seems that Green desired something more for labor than the NIRA provision's allowed. In this statement he seems to imply that state-brokered cooperation between the freely chosen representatives of business and labor was desirable, yet fell short of real industrial democracy, which would require more comprehensive worker participation. In addition, Green implied that representation of workers by "trade unions," not simply collective representatives of their choosing, is a requirement of democracy in industry.

Given that many employers ardently promoted their “in-house” representation plans and that Roosevelt’s recovery administration vacillated on whether such plans were consistent with the language of NIRA, union successes under Section 7(a) were frequently dependent upon the economic power and pressure they could bring to bear in a given industry. John L Lewis, president of the United Mine Workers (UMWA), led a victorious campaign that won union recognition and collective bargaining from coal operators in the bituminous mines. The agreement was aided by a surge in membership driven in part by the ambiguous claim that “the president” (whether that was Lewis or Roosevelt was unclear) wanted miners to join the union.

In contrast, in the so-called “captive mines” controlled by major steel corporations, despite winning NLB representation elections, even the powerful UMWA could not secure recognition of the right to bargain as the exclusive representative of workers. Although steel manufacturers and other employers pledged allegiance to Roosevelt’s recovery program, in reality many fiercely resisted the notion that Section 7(a) could be interpreted to mean that they would be obliged to bargain with “outside” unions selected by their employees as their chosen representatives. Such corporations claimed instead that their own representation plans in which employees elected representatives from among their peers fulfilled the requirements of the act. They contested the idea that Section 7(a) condoned the closed shop (an agreement that mandates only union members can be employed at a worksite) and majority representation arrangements, suggesting instead that open shops and proportional representation better fulfilled the legislative intent. These objections are clear in this statement issued by the National Association of Manufacturers:

The act [NIRA] while establishing the right of collective bargaining to be used at the discretion of the worker, preserves his right to bargain individually and strives to safeguard him from coercion in the choice of method of collective bargaining if he wishes to bargain in that manner. Coercion would lead to oppressive labor dictatorship which would curb his

freedom of action. “Closed shop” agreements do precisely this. (in *New York Times*, 1933b)

This statement illustrates a vision of American unions that would later become more prevalent, namely that exclusive representation by independent unions constituted an infringement of the rights of workers who desired to bargain on an individual basis. More importantly perhaps, this argument depicts trade unions and union leaders not as the guarantors of industrial democracy but rather as harbingers of industrial tyranny.

When the NIRA was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) employers were already actively resisting decisions made under the jurisdiction of Section 7(a). Some declined to allow the National Labor Relations Board (NLRB) supervised elections to be conducted on their property, others refused to abide by Board decisions.<sup>8</sup> Meanwhile the number of strikes and work stoppages, which the Act aimed to reduce, increased as workers sought to win through other means the rights the Act promised. Sanctions available to the Board in the face of non compliance were either ineffective—in the case of the removal of the Blue Eagle symbol of NRA cooperation—or blocked due to inaction by the Department of Justice. Further hampering the situation was the Roosevelt administration’s inconsistent positions on the “true” meaning of Section 7(a). The NLRB and its predecessor board tried to implement exclusive representation in a workplace based on the choice of the majority of workers, while NRA administrators and Roosevelt repeatedly supported proportional representation and the co-existence of company and independent unions. The swift end to Section 7(a) wrought by the Supreme Court then was perhaps preferably to the slow strangulation it was suffering under so many difficulties with enforcement and interpretation.

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<sup>8</sup> The NLB, the board that originally oversaw Section 7(a), was replaced by what has become known as the first National Labor Relations Board (NLRB) in Executive Order 6073 issued by President Roosevelt in June 1934. This change was made in conjunction with Public Resolution 44. For a full account of how Section 7(a) was changed by these actions, see Bernstein (1950, 76-84).

### **Scene Three—The Wagner Act**

Senator Wagner had served as the chair of the NLB and was acutely aware of the difficulties of interpretation and enforcement that plagued Section 7(a). His commitment to democracy in industry informed both his service on the Board and his sponsorship of legislation designed to remedy problems encountered by the NIRA's labor provisions. In his efforts to ensure that workers gained meaningful rights to collective bargaining through independent unions, Wagner had in fact introduced his "labor disputes bill" (the basis for what would become the National Labor Relations Act) in Congress in 1934 and again in 1935, even before NIRA was ruled unconstitutional.

Wagner's bill aimed to strengthen workers' right to form unions, though it was very much a composite of legislation that had gone before. The Senator and his advisors took care when drafting the legislation to learn from prior experiences and resolve the thorniest difficulties encountered under Section 7(a) without fundamentally altering its framework. The crucial feature distinguishing the Wagner Act from its legislative progenitors was that instead of placing the state in the position of a mediator in industrial relations, for the first time it committed the state to a policy of encouraging collective bargaining.

Wagner's architects premised the bill on the claim that labor unrest and strikes disrupted interstate commerce. In this way they sought to insulate their bill from the same fate as the NIRA that was adjudicated by the Supreme Court to exceed the federal government's power of regulation. In its section on "Findings and Policy," the Wagner Act identified as a cause of industrial conflict and depressed purchasing power "the inequality of bargaining power between employees who do not possess full freedom of association and liberty of contract, and employers who are organized in corporate form." In order to redress these problems the Wagner Act asserted that state policy should encourage "the practice and procedure of collective bargaining

by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their own employment or other mutual aid or protection”(National Labor Relations Act 29 U.S.C. §§ 151-169).

The Wagner Act classified a set of activities as “unfair labor practices,” in order to limit employers’ actions and protect employees when exercising their rights of self -organization. Specifically the Act prohibited any employer interference, coercion, or restraint of employees in their efforts to select representatives and bargain collectively. It made any kind of discrimination—including dismissal or demotion—against employees who joined labor organizations unlawful. While it did not ban “company unions,” the legislation forbade employer dominance of labor organizations. The aim of this provision was to eradicate coercive employer representation schemes, yet at the same time permit any that were indeed freely chosen by workers and genuinely represented employees’ interests. The Wagner Act created a new independent National Labor Relations Board (NLRB) to implement and enforce the law. Described as a “supreme court” of labor relations, unlike previous boards the NLRB did not share administration of the law with any other agency. The NLRB was given the power to investigate and redress unfair labor practices. It could issue “cease and desist” orders and require the reinstatement with back pay of employees who were unfairly dismissed. It was also given power to appeal to circuit courts for implementation of its decisions in the face of non-compliance.

The Wagner Act prohibited proportional representation and mandated that representatives designated by the majority would be the exclusive representatives of all employees. It gave the NLRB the task of determining the legitimate representatives of the majority. The Board was

given the power to decide the “appropriate unit” for collective bargaining, and then to use a secret ballot or “any other suitable method” to determine the preferred choice of representative of the majority. The Act did not prohibit individual employees or groups of workers from presenting grievances to employers, nor did it prohibit “closed shops” if they were negotiated by employers and their chosen representatives.

As Senator Wagner stated when introducing his legislation, the NLRA did not fundamentally alter industrial relations; rather, it reaffirmed workers’ rights in existing law and codified the practices the two labor boards had established when administering Section 7(a) (Bernstein 1950,100-101). This meant that the NLRA almost exclusively focused on the process of forming labor organizations that would represent employees in collective bargaining. It contained no stipulations about how labor organizations would govern their internal affairs. In fact, an attempt by the National Association for the Advancement of Colored People to amend the act so as to deny its protections to organizations that discriminated against African Americans was thwarted by both conservatives within the AFL and southerners in Congress (Dubofsky 1994, 129). The Wagner Act similarly remained silent regarding the content of collective bargaining, merely requiring that the parties engage in the process.

The Wagner Act was signed into law in July 1935, but owing to employer resistance did not become fully effective until it was affirmed by the Supreme Court two years later in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937). With this judicial confirmation of the statute’s constitutionality, Wagner’s desire to enshrine democracy in industry finally came to fruition. Surprisingly perhaps, given the long struggle to realize this goal, the New York senator felt his legislation was straightforward, claiming of his bill that

The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that

democracy in industry means fair participation by those who work in the decision vitally affecting their lives and livelihood; and that workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing. (Derber 1970, 321)

Even as tenets of the NLRA were uncomplicated to Wagner, there was much about the new law and the democracy he heralded it would bring to the workplace that was contestable at the time and that provided substance for future disputes. To some, government protection of workers' rights to representation and collective bargaining guaranteed much less than the active participation and worker control that genuine industrial democracy would require. Further, the Wagner Act was silent about the content and outcome of any negotiation between combinations of employees and company owners—requiring simply that bargaining take place in “good faith.” The legislation also took on good faith that the collective organizations chosen by workers would operate according to democratic principles. If they did not, the premise that they would democratize the workplace was contestable. While Wagner's claim that it was an “accepted fact” that democracy should be brought to industry may have been true to a great extent, some disputed this fundamental premise. Others held competing views about the institutions necessary to democratize industry and found the new legislation lacking in variety of ways.

Almost universally, corporate leaders challenged Wagner's vision of industrial democracy and the way it was embodied in the Act he championed. Elucidating their own views of democracy, employer representatives disputed the content of the Act while endorsing its aims. To them, the most controversial aspects of the statute were its adherence to the principal of majority rule, the idea that the Act promoted the closed shop, and the fact that it identified no “unfair labor practices” that could be claimed against unions. Critics also asserted that a secret ballot election should be mandatory, not simply a preferred option for determining employees' choice of representatives.

George Chandler, speaking for the Chamber of Commerce during senate hearings, challenged the stipulation in the Wagner Bill that representatives chosen by a majority of workers would represent the entire group:

It denies minority rights. Of course, we talk about its being a principle of American government that we shall have the majority rule. That is true in the election of officers, about our Constitution, and our court decisions, and all of our practices are very jealous of the protection of minorities. Under this bill 51 percent of the employees voting on a question could bargain away the rights of a minority of 49 percent. (in National Labor Relations Board 1949, 1730)

William Green, speaking to the contrary for the AFL, argued;

Majority representation is the principle upon which our government is based. Collective bargaining can obviously succeed only when majority rule is made effective, just as government can succeed only under majority rule. . . . Minority rule can have only one aim, and that is to confuse and divide workers - to play one organization against another. (in National Labor Relations Board 1949, 1496)

Clearly these adversaries each draw on essential tenets of the U.S. system of representative democracy in framing their arguments. Yet they make contrary assessments regarding how those values might transfer to the nation's industrial sphere under the Wagner Act. This inconsistency can at least in part be explained by a further commonality of the antagonists reasoning. Neither of them considers the distinction between the inauguration of a group and its subsequent governance. Wagner's statute established governmental regulation of the process through which a system of collective representation might be instigated among a designated group of workers. It was not concerned with group governance. Parties debating the Wagner Act then, should have been attentive to how such principles as majority rule and minority rights factored into the formation of the U.S. as a democratic polity, rather than of its consequent governance when asserting whether it incorporated or violated the democratic standards embodied in the U.S. political system.

Walter Gordon Merrit, representing over 1,000 employer members of the League for Industrial Rights, suggested to the Senate Committee that the Wagner Bill should be amended so that its protections would apply only to labor organizations that met standards of “decency and fairness and democracy.” He objected:

I take it, so far as the wording of the bill goes, that I have to carry on relations, and the majority of employees want it, with a communistic organization pledged to my destruction. Absurd you may say by virtue of the illustration which I give, but extreme illustrations are useful for deploying an idea. . . . It is absolutely an unsound legislative policy . . . to say that you will have to do business with these organizations regardless of their wrongdoings, regardless of the fact that they are absconding with the moneys of members. (National Labor Relations Board 1949, 1704 [318])

Merrit introduces here what would become two persistent themes in discussions of American labor law and industrial relations, specifically that unions and their leaders, far from inculcating the ideals of American democracy to the nation’s workforce, were in actuality either promoting “un-American” philosophy (whether it be communism or socialism), or defrauding and coercing their members. The objection underscores the fact that the NLRA established procedures for the inauguration of collective bargaining, but did not include provisions for the internal regulation of those bargaining organizations once established.

Grover C. Brown, representing the steel industry, saw sinister, foreign, and undemocratic impulses in the Wagner’s proposal. He directly questioned the intent of the bill’s sponsors when he injected into the Congressional Record a statement claiming;

The obvious intention of the bill is, through the “majority rule”, to impose a closed shop upon industry and create a monopoly in favor of professional labor unions. The closed shop is un-American. (National Labor Relations Board 1949,1758 [372])

A spokesman for the auto industry voiced similar concerns, arguing that the legislation would undermine successful company representation plans, and expressing consternation about the powers given to the Board. Most particularly he objected to the authority vested in the NLRB to determine suitable units for collective bargaining, and determine the workers’ choice of

representatives through elections or other means. Citing the language of the bill, he raised an objection that would reverberate in future debates: “So far as elections to determine representatives for collective bargaining are concerned, there is no guaranty in this bill as to fairness and impartiality...The rule of ‘or any other suitable method’ is entirely too vague to be workable and is subject to grave abuse” (National Labor Relations Act 1949, 1991 [605]). That opponents of the Wagner Act raised objections such as these reveals that disagreements over the law engaged not only broad conflicts about just what industrial democracy means, but also disputes about the appropriate institutions through which it should be implemented.

While academics debate the extent to which the passage of the Wagner Act enhanced the power of America’s working class and was responsible for a surge in union membership, there is no doubt that an increase in union density followed its passage. Among non-agricultural workers, 13% were union members in 1935; this increased to 17% in 1937, 21% by 1939, and continued to steadily increase until it peaked at around one-third of the workforce in the mid 1950s (Troy 1965). Whether or not the legislation fulfilled its architects’ intent to bring democracy to industry, there is no doubt that the law was shaped by just that ideal. The bill, in final form, was similarly influenced by the competing conceptions of industrial democracy put forward by those opposed to Wagner’s vision. In constructing the bill all parties were building on precedent and responding to historical events that appeared to threaten the existence of democratic government, which surely encouraged rhetorical appeals to the ideal. If almost everyone in the course of the legislative history claimed the mantle of democracy in support of their views, few articulated with precision what they meant by the term. Thus a tacit conflict over the meaning of industrial democracy and the institutions it requires suffused passage of Wagner’s bill and has resonated in the subsequent politics of labor law.

## Act Two—Taft-Hartley Act

Twelve tumultuous years in American industrial relations marked the period after the Supreme Court upheld, and before Congress amended, the Wagner Act.<sup>9</sup> Over that time a series of events combined to shift public opinion away from supporting collective bargaining and the Wagner Act, toward endorsing revisions of federal labor law to curb the power of unions. The idea that unions would “democratize” the workplace came under attack as organized labor grew in strength and workers asserted their newly-won rights.

Even as the Court was discussing the constitutionality of the Wagner Act, emboldened workers engaged in a wave of sit-down strikes in an attempt to force employers to conform to the NLRA and recognize their unions as collective bargaining representatives. Although unions (particularly the industrial unions in auto and steel) gained recognition rights from the sit-downs, they opened the way for corporate and conservative foes to claim unions were acting irresponsibly, violating property rights, and furthering their own aims at the expense of the public good. Strike activity remained high in the buildup to World War II. It subsided somewhat during the war years as the Roosevelt administration put in place wartime controls reminiscent of those during World War I. However a surge of strikes marked the post-war economic transition and further raised the public ire. John L. Lewis, the president of the United Mine Workers, who led a coal strike in protest against wage formulas during the war and who engaged in a showdown in 1946 over miners’ right to strike with President Truman, became the exemplar of an authoritarian labor leader whose power had to be curbed.

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<sup>9</sup> For more complete overviews of the development of labor law during this period see, Gross (1974), Millis and Brown (1950) and Tomlins (1985). Dubofsky (1994) and Zieger (1994) provide background on the wider context of industrial relations at the time. I draw on all of these sources in this section.

Lewis's dramatic punch up with Carpenters' president William Hutcheson at the AFL's convention in 1935 marked the beginning of another cause of strife in industrial relations. Frustrated at the reluctance of the craft-based federation to organize workers on an industrial scale, Lewis's mineworkers and other key industrial unions spilt from the AFL to form the Congress of Industrial Organizations (CIO).<sup>10</sup> This led to mounting tension within the labor movement that only exacerbated the negative perception of U.S. unionism. A series of jurisdictional disputes caused strikes and industrial turmoil as AFL unions competed with CIO unions for groups of workers in the same plants. The NLRB, already under heavy criticism from employers who claimed it enforced the NLRA in ways that favored workers and unions, came under fire from an unlikely source—the AFL.

The NLRB was charged under the Wagner Act with the difficult task of determining appropriate units for collective bargaining. The AFL with its more exclusive and conservative craft structure attacked the Board, claiming that it favored the more inclusive and radical CIO. These claims had merit. Some NLRB members at that time believed that larger bargaining units would give workers more power, and thus fulfill the intent of the Act more appropriately than smaller ones. Hence they gave preference to larger units where possible. This meant that they frequently adjudicated that the industrial-size units preferred by the CIO were ruled “most appropriate” over the smaller craft units preferred by the AFL. Further, Board rulings negated a number of AFL contracts on the basis that they served the interests of the AFL and employers, at the expense of employees who preferred CIO representation and industrial-scale bargaining. Partially in response to these decisions, AFL leaders went so far as to support the attempt by

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<sup>10</sup> The Congress of Industrial Organizations was first established as a group of unions in the AFL that favored industrial rather than craft-based organizing. At that time it was called the Committee for Industrial Organization—the name change came later when the group was expelled from the AFL and formed a competing labor federation. For a comprehensive account see Zieger (1994).

southern Democrat Howard Smith (D-VA) and other conservative members of Congress to amend the Wagner Act as early as 1940 (Gross 1981, chap. 10). The AFL backed the proposed amendments because they limited the Board's ability to overturn contracts negotiated between AFL unions and employers, and removed the Board's power to deny the separation of craft units from larger industrial ones.

The effort to amend the Wagner Act so soon after its passage was aided by a congressional investigation of the NLRB. The Smith Committee (1939–1940), named for its chairman the aforementioned Howard Smith, held high-profile hearings into alleged misconduct and communist infiltration at the Board. In many ways it mirrored earlier investigations initiated by the NLRB and conducted by the La Follette Committee. Working between 1936 and 1941, the La Follette Committee investigators toured the nation exposing company arms caches, spying schemes, blacklisting, and other offensive practices used to thwart union organizing. Now it was the NLRB that came under scrutiny, as Smith and his colleagues investigated the Board's alleged communist ties and its biased decisions. Each of these Congressional Committees received media attention and influenced public opinion. The La Follette Committee created an outcry against abusive employers and cast unions as the champions of workers' rights and democracy. Conversely, the Smith Committee caused a backlash against out-of-control radicals and communists in the NLRB and their support for increasingly powerful and dictatorial unions.

The work of the Smith Committee did not immediately lead to labor law reform; amendments to the NLRA proposed by members of the committee passed the House but stalled in the Senate. However, a few years later as the nation emerged from World War II and struggled to convert to a peacetime economy, union workers mounted a rash of strikes to secure wage gains denied them by wartime restrictions. Anti-union sentiment surged, Republicans gained

seats in Congress, and the Smith proposals formed the basis of the Labor Management Relations Act better known as Taft-Hartley.<sup>11</sup>

The intent of Taft-Hartley, according to its House sponsor, was to reverse an “alarming trend” of increased strikes and lost man-days and to restore “industrial peace.” The best way to do this, according to Representative Fred Hartley (R-NJ), was to ensure that the rights of employers and individual employees were protected against “unregulated monopolists,” the result of “labor laws ill-conceived.” Introducing the Senate bill, Senator Robert A. Taft (R-OH) was not quite so harsh in his criticism of unions or the Wagner Act, though he agreed with Representative Hartley that legislative action was necessary to reduce industrial strife, and that “equalizing existing laws” to “encourage free collective bargaining” was the goal. Equality of bargaining power had been destroyed, Taft claimed, by the administration of the Wagner Act. The act, he argued, was one-sided because it afforded protections to employees and unions against management, yet denied management “any redress for equally undesirable actions on the part of labor organizations.” (National Labor Relations Board 1948, 408)

The Taft-Hartley Act was passed over President Truman’s veto in June 1947. It amended the National Labor Relations Act in numerous ways—it was actually an “omnibus” of legislative proposals rolled into one bill. Its proponents and sponsors believed that, combined, the amendments would facilitate their aims to protect the rights of individual workers, employers, and the public, from self-serving actions of powerful labor unions. Taft-Hartley added to the NLRA a set of unfair labor practices that employers and workers could claim against unions. Unions were barred from coercing workers to join their ranks or discriminating against

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<sup>11</sup> The House Bill, sponsored by Representative Hartley in 1947, was written in Representative Smith’s office using his 1941 bill as a model. The Senate version sponsored by Taft moderated the House version somewhat during the conference session, but many of the original Smith proposals remained. See James Gross (1995).

employees pursuing their rights to refrain from collective bargaining. Specifically, they were banned from setting excessive initiation fees and from pressuring an employer to discriminate against or discharging an employee (except if the employee had failed to pay required dues mandated by a security agreement). The closed shop that restricted employment in a workplace to union members, and was abhorred by business owners, was prohibited by the Taft-Hartley reforms. Union shop agreements, under which new hires are required to join the union within 30 days of employment, were not banned outright. However, under the new law, they were permitted only if a majority of employees in a bargaining unit voted in support of such an arrangement. Further, section 14(b) of the statute permitted states to prohibit entirely any union security arrangements such as union shops and agency shops.<sup>12</sup> Other ad hoc amendments to the Wagner Act included in Taft-Hartley restricted union activities with respect to concerted action and mandated restructuring of the NLRB.<sup>13</sup>

These reforms were all predicated on the notion that they would “equalize” the nation’s labor laws by limiting the power of unions and empowering individual workers. With this in mind, the Taft-Hartley reformers also modified the declared purpose of the law. While the original Wagner Act statement of purpose pledging the government to the promotion of *collective* representation and bargaining was retained, additional language stating that the

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<sup>12</sup> Union security arrangements include closed shops that permit only union members to be hired at a unionized worksite; union shops that require new hires in a union workplace to join the union within a set number of days after being hired; and agency shops that permit workers to choose if they wish to join the union in a workplace but require those who do not to pay a fee to the union to cover the costs of collective bargaining. Subsequent to the passage of Taft Hartley, 22 states have passed what are referred to as “right to work” laws that bar any kind of union security agreement. See Gall (1988).

<sup>13</sup> Taft Hartley banned secondary boycotts and jurisdictional strikes. The number of NLRB members was increased from three to five and an office of General Counsel was created to oversee the board’s prosecutorial role (this had previously been part of the role of the Board’s members). The research section of the NLRB, long suspected to have been infiltrated by communists, was eliminated. Finally, the NLRB was given the authority to seek anti-strike injunctions in certain circumstances and the president was given powers to intervene to prevent strikes in cases of “national emergency.”

government must eliminate union practices that obstructed the free flow of commerce and protect the rights of *individual* workers to refrain from collective action was inserted. Thus as Gross (1985) highlights, there is an inherent tension in the stated aims of the nation's labor law, which is pledged to promote both collective bargaining and group representation, as well as the right of individuals to refrain from such action.

With a view to protecting workers' individual rights and "free choice," the architects of Taft-Hartley incorporated a number of changes in the regulatory framework governing union formation. New provisions were added to permit employers and individual workers to call for an NLRB representation election, or call for an election to decertify a union they believe had lost majority support. Employers were awarded extensive "free-speech" rights during organizing campaigns. Previously, under the NLRB's interpretation of the Wagner Act, employer speech was often interpreted as coercive and was assessed to be an "unfair labor practice." Subsequent to the Taft-Hartley revisions, employer speech alone would not be sufficient to support an unfair labor practice claim unless explicit threats were made. Finally, the ability of the NLRB to certify a union by a "suitable method" other than an election was rescinded and NLRB-administered secret ballot elections became the only way for unions to demonstrate majority support.<sup>14</sup>

For present purposes it is important to note that while the Taft-Hartley amendments were hailed by supporters as enhancing industrial democracy by protecting individual workers, few of the modifications were directed toward regulating workers' rights within unions, and none addressed the content or scope of bargaining. Instead, the vast majority of the new legislation focused on enhancing the ability of employees and employers to resist the formation of unions.

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<sup>14</sup> While an NLRB secret-ballot election is the only way for a union to be certified by the Board for the purposes of collective bargaining, other methods to demonstrate majority support can be used if the employer agrees to recognize a union formed by an alternate show of support.

Other aspects of Taft-Hartley reflect this impulse to curtail the power of labor organizations, which were portrayed as self-serving, detrimental to the public good and damaging to the nation's economy and political system. One highly controversial stipulation of the bill required unions to file with the Secretary of Labor an affidavit signed by the organization's officers affirming they were not members of the Communist Party, as well as a copy of the organization's constitution and financial records. The first of these requirements reflects the context of the nascent Cold War and concern about radical, "un-American" unionists spreading anti-democratic philosophy. The second plays into the perception—and in some cases the reality—of union corruption.

A further set of changes to the NLRA wrought by Taft-Hartley sought to curb union power by limiting the types of workers permitted to combine for purposes of representation and bargaining. Supervisory employees were removed from the protections of the Act entirely. This was aimed at preserving management control in the workplace, particularly in the face of industrial unrest. Similarly, the NLRB was limited to finding bargaining units comprised of professional and non-professional workers appropriate for purposes of representation only where a majority of those who would form such a group agreed to the combination. Finally, partly in response to the complaints of the AFL, the NLRB was required to certify craft units wishing to separate from existing industrial units if a majority of craft workers voted for separate representation. This would allow the AFL craft unions to organize skilled workers in industrial plants where the CIO had already secured rights of representation. All of these amendments to the Wagner Act were justified, based on the premise that they would facilitate individual choice and self-determination of workers with respect to their preferred form of workplace representation. In turn, they raise questions pertinent to theorists interested in exploring

principles and institutions appropriate for the formation of groups according to democratic ideals.

True to the script of prior discussions of labor law, both proponents and opponents of the Taft-Hartley bill used diverging views of democracy to legitimate their arguments. Also reminiscent of previous legislative discussions of labor law was a broader context of crisis that all participants used to justify their chosen perspective. This time the post-World War II international upheaval and the emerging Cold War served as the backdrop, against which all sides argued that their proposals would preserve American democracy in the face of encroaching fascism or communism. Representative Hartley, the bill's House sponsor, provided a whirlwind history of democratic development when expounding the merits of his legislation;

In the year 1215, at Runnymede, King John delivered the Magna Carta, surrendering to the British barons sovereign power. In 1790, the Constitution of the United States gave to the common people of our country their Bill of Rights. In 1935, the New Deal brought forth the National Labor Relations Act, rightly called another Magna Carta, and by it surrendered to the labor barons sovereign powers over the working man and woman of the United States. This year, this Congress gives to these working men and women their bill of rights. (National Labor Relations Board 1948, 615)

In contrast, but with equal panache and broad scope, Senator James Murray (D-MT) lambasted the proposed law as detrimental to unions, collective bargaining, and American democracy:

This bill, Mr. President, constitutes a declaration that . . . labor is to be put in its place, stripped of many of its essential rights, and so battered and weakened as to be ineffective hereafter at the bargaining table. I wonder if this can be done in free America. . . . A chill apprehension has spread over the country, as we recall recent European history. In Italy, in Germany, and elsewhere, antilabor legislation was the prelude to fascism. . . . Can anyone boasting allegiance to the principles of liberty and freedom survey the littered wreckage of the Wagner Act, which remains as a memorial to a gallant effort to bring democracy to our working people, and take pride in such vandalism? (National Labor Relations Board 1948, 1568)

These statements typify many others entered into the congressional debate and in the wider public discourse over Taft-Hartley. Proponents and dissenters alike cloaked their arguments in

appeals to American values and charged that their policy preferences would save the nation's political and industrial democracy from encroaching foreign ideologies. Although they are high in drama, these proclamations, as is characteristic of the legislative debate, lack precision. The vision of democracy that the bill is intended to protect remain unstated, as does the mechanism by which the particular reforms will succeed or fail in bringing democracy to American workers.

Speaking with greater specificity, Representative Samuel McConnell (R-PA) outlined a list of alleged union and NLRB abuses drawn from testimony to illuminate why, in his opinion, the bill was necessary:

Violence, intimidation, and extortion, community paralysis, conspiracies to stop the necessities of life—food, fuel, transportation, and communications—conspiracies to restrict production, and to control prices; denial of rights to employ, or be employed; denial of free speech; invasion and suppression of democratic processes by the Federal agencies, in collusion with union tyranny; denial of home rule to workers; communistic infiltration and un-Americanism...The record of the testimony, the public-opinion polls, and the mail from people throughout the length and breadth of the land, demand correction of these conditions. . . . This bill seeks to protect the freedom of the individual worker. It attempts to emancipate him from abuses of power by either a labor organization or an employer. (National Labor Relations Board 1948, 639)

One problem with this claim is that in its final form, Taft-Hartley did not include provisions regarding democracy within unions. As I noted earlier the reforms limited the types of workers that could join unions and combine for collective bargaining, modified the process for certifying unions as the chosen representatives of workers, and prohibited a variety of union activities. They did not include any provisions limiting the power of union leaders, or seek to enhance the ways in which union members might hold their officers accountable—at least not without decertifying the union outright. Nevertheless, supporters of the reforms frequently cited authoritarian union practices and dictatorial union leaders to justify their position.

Opposing the bill, Representative Harold Donahue (D-MA) challenged the prominent claim that unions fell short of American standards of democracy. Instead, contrary to the popular image, he argued that unions embodied democratic ideals more fully than the political state:

Much is being said about the need for more democratic procedures within the ranks of organized labor. I would like to remind the authors of H. R. 3020 that the rank and file of union members are much closer to union affairs than are the electors of most cities. I would like to remind them that union members have a much more direct interest and a more direct voice in the way their unions are run than the citizens in the affairs of their city—where the latter are permitted a voice. Democracy in unions is not perfect, but it compares very favorably with its counterpart in other kinds of civic activity. (National Labor Relations Board 1948, 824)

Representative Donahue's defense of unions is strong, if in some ways a little opaque. It is unclear whether his claim is that unions are more democratic than city governments because union representatives are more effectively held to account than political representative, or if his point is that democracy in unions is stronger than in cities because workers exhibit higher levels of participation than citizens. This confusion echoes earlier statements by Senator Wagner, who articulated the participatory nature of democracy in unions at the same time his legislation introduced a system of representation in the workplace. Democratic theorists often juxtapose participatory and representative democracy, in ways that suggest the latter diminishes active participation. While I do not endorse this view, believing instead that effective representation often requires ongoing active participation, the crucial point for now is that a clearer statement of the characteristics of democracy would be helpful in evaluating Representative Donahue's argument.<sup>15</sup> Despite its ambiguity, if Representative Donahue's statement is interpreted as one that defends the democratic bona fides of unions on the basis of participation, it raises a crucial

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<sup>15</sup> I address questions of participation and representative forms of democracy in chap. 3.

question for those concerned with theories of democracy—namely, is more participation necessarily better than less? If so why, and in what context?

The legislative history of Taft-Hartley is littered with statements similar to the examples I have provided, linking democracy in American politics, and democracy in unions, with labor law. Themes that were resurrected from earlier episodes in American labor relations and that continue to reverberate in the present. Beyond Capitol Hill, public debate regarding the bill echoed that in Congress, with the actors taking predictable stances. To the National Association of Manufacturers, Taft-Hartley was “fertile soil” for “industrial peace,” while the AFL labeled it a “slave labor bill” and took out full-page ads declaring “a free America cannot exist without free labor.” CIO President Murray proclaimed in front of sixty thousand workers at a Taft-Hartley veto rally that the bill was “dangerously provocative” and “the first long step to domestic fascism” (in Raskin 1947).

President Truman did veto the Taft-Hartley bill, likely knowing that Congress had enough votes to override his effort. It is unclear whether he was actually opposed to the bill or whether his action was a political move to retain labor support in the upcoming elections and thus ensure enactment of the Marshall Plan (Dubofsky 1994, 205; Gross 1981, 258). Either way, his radio address announcing the veto denounced the bill in language that epitomized the debate. There, Truman cut to a critical issue, namely, how to ensure that workers had sufficient power to bargain effectively through collective action and yet respect their rights as individuals. Regardless of whether he felt privately that Taft-Hartley struck a good balance in that regard, he stated to the nation that

the bill is deliberately designed to weaken labor unions. When the sponsors of the bill claim that by weakening unions, they are giving rights back to individual workingmen, they ignore the basic reason why unions are important in our democracy. Unions exist so that laboring men can bargain with their employers on a basis of equality. . . . A bill which

would weaken unions would undermine our national policy of collective bargaining. The Taft-Hartley bill would do just that. It would take us back in the direction of the old evils of individual bargaining. (Truman 1947)

With hindsight, Truman's proclamation about the effect of the bill on collective bargaining seems prescient. His statement also highlights what I see as a fundamental weakness in the development of U.S. labor law. Too frequently, lawmakers have enacted legislation that does not truly address the problems they identify with the legal status quo. In the case of Taft-Hartley, as I suggested earlier, members of Congress identified the problems in extant labor law as ones associated with unaccountable labor leaders who did not appropriately represent workers interests. In passing Taft-Hartley, as Truman suggests, lawmakers tightened regulation of the processes of union formation, but did little to bolster workers' rights within unions.

Although union membership continued to increase after the passage of Taft-Hartley, the terrain on which unions attempt to organize workers was significantly altered. Employers became increasingly adept at resisting efforts by unions to organize, a situation to which at least two provisions of the legislation (each of which raise issues central to the concept of democracy), contributed. First, section 14(b) of the act, which permitted state-level bans on union security agreements and prompted the passage of a rash of so called "right to work" laws, made organizing more challenging (Gall 1988, Ellwood and Fine 1987). This part of the bill raises questions about the use of "exit" in democratic institutions. Specifically, when it comes to workplace representation, is allowing an individual worker to opt out of collective representation democracy enhancing or degrading? Proponents of 14(b) justified its inclusion on the basis that it enhanced workers' choice and thereby facilitated workplace democracy. Of course their opponents saw it as a way to undercut majority rule, encourage workers to free-ride (unions were

still required to bargain for all workers at a workplace, not just their members) and thereby diminish democracy at work.

The second provision of Taft-Hartley that has made union formation more challenging raises concerns about the role of “voice” in democratic institutions. As I mentioned earlier, the Taft-Hartley amendments guaranteed free speech rights to employers during union representation campaigns. Previous to Taft-Hartley the fundamental purpose of the Wagner Act was to encourage collective bargaining and ensure that workers could freely choose their preferred representatives. Thus employer speech during organizing campaigns had regularly been assessed by the NLRB as “inherently coercive” and hence a prohibited unfair labor practice. Thus management largely remained silent during union organizing drives. Taft-Hartley changed the intended purpose of the NLRA, and placed equal emphasis on workers’ right to refrain from collective representation. Under this new framework, proponents of employer speech rights argued that they would enhance workplace democracy by presenting workers with views contrasting those of unions and pro-labor employees. Those opposed to employer speech rights countered that the choice of whether to form a union was one that employees must discuss and decide among themselves, and that real democracy demanded employer silence, not employer “voice” in the process.

Although the amended NLRA prohibits employers from making “threats” and “promises” regarding the effects of unionization, it does not prohibit them from making “predictions.” To workers concerned about their employment prospects and conditions of employment, this distinction is surely artificial. Subsequent to Taft-Hartley the NLRB and Supreme Court have interpreted Taft-Hartley to the effect that it is possible for employers to hold “captive audience” meetings wherein employees are required to listen to anti-union speeches, but during which

unions or workers have no right to respond. This has all lead to the rise of a “union avoidance” industry comprised of consultants and lawyers who advise companies on effective strategies to deter unionism while observing the letter, if not the spirit, of the law. These strategies have been found to make union organizing more difficult and hence contribute to union membership declines (Lawler 1984, Logan 2002). This is just one of the ways in which the legacy of Taft-Hartley, as well as disagreements over the concept of democracy introduced during its passage, continue to impact American unions and feature in contemporary discussions of labor law.

### **Act Three—Landrum-Griffin**

The last major piece of federal labor law, the Landrum-Griffin, or Labor Management Reporting and Disclosure Act (LMRDA), was enacted in 1959.<sup>16</sup> It was prompted by investigations conducted by the McClellan Committee on Improper Activities in the Labor or Management Field. The McClellan hearings lasted for two and a half years and paid little attention to corruption in management but rather focused heavily on corruption and malfeasance within organized labor, most particularly the Teamsters union. Witnesses before the committee testified to a wide range of unethical actions by labor leaders, who were charged with offenses ranging from intimidating potential members, coercing employers, racketeering, arranging sweetheart contracts, and embezzling union funds to ballot stuffing, and disenfranchising the rank and file. Now, a new cast of characters—hoodlums and gangsters—replaced communists and fascists as the villains of American unions and by extension American workers, corporations, and the public.

The McClellan proceedings, like those of the earlier Smith Committee made great stories for the press. Jimmy Hoffa, strong arm “boss” of the Teamsters Union replaced John L. Lewis in

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<sup>16</sup> McAdam (1964) provides an in-depth accounting of the background and passage of the Act. I draw on it extensively in this section as well as Taft (1975).

the lead role—he was the epitome of union corruption and abusive power. In 1957, in an attempt to forestall legislative action, the newly merged AFL-CIO expelled the Teamsters and recognized that dishonest and undemocratic practices within unions were a problem, one that they hoped to resolve internally without government interference. However, President Eisenhower, Congressional leaders, and a majority of the public—according to opinion polls—felt to the contrary that government regulation of the internal affairs of unions was necessary.

Passage of the Landrum-Griffin Act marked for the first time federal government intervention to uphold democratic practices *within* unions, rather than with respect to the *formation* of unions. Owing to political exigencies, however, the legislation in its final form combined the provisions aimed at ensuring that unions operated democratically (reform provisions), with modifications of the Taft-Hartley Act—some desired by labor<sup>17</sup> and others by management.<sup>18</sup> The reform provisions of Landrum-Griffin were multi-faceted. They were aimed at eliminating the kinds of malfeasance and corrupt practices uncovered by the McClellan Committee, in part by enhancing the mechanisms through which the rank and file can hold union leaders to account. Title I of the act, in language consistent with the tenor of labor law legislation, contained a union member’s “bill of rights,” which was added to the legislation as an

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<sup>17</sup> With respect to the modifications to Taft Hartley, unions won a long-desired change to the effect that economic strikers, not eligible for reinstatement, gained the right to vote in union representation elections for a period of twelve months following a strike. This was important for unions as it meant that employers could not hire replacement workers and then petition for a decertification election in which striking union members could not vote. Construction unions gained concessions under Landrum Griffin, winning the right to engage in pre-certification negotiations with employers, and boycott non-union subcontractors. These changes were deemed appropriate given the short-term nature of construction employment that made many of the Wagner Act’s protections and procedures redundant for construction workers.

<sup>18</sup> The National Association of Manufacturers led a successful effort by business leaders to include their preferred amendments in the Landrum Griffin Act. In fact, three business-supported amendments were the source of most of the political wrangling during passage of the legislation. In final form, Landrum Griffin tightened the Taft Hartley restrictions on secondary boycotts and organizational picketing (picketing with the aim of forcing an employer to recognize a union). It also closed a loophole known as “no man’s land,” by allowing states to assume jurisdiction over cases involving small employers that the NLRB declined to hear—previously they had been left unresolved.

amendment sponsored by Senator McClellan. The “bill of rights” was designed to secure equal protection for workers within their unions. It required all labor organizations to ensure that every member enjoyed equal opportunity to participate in union meetings and run for office, and was afforded freedom of speech and assembly. The legislation prohibited unions from increasing dues except when a majority of members approved the increase in a secret-ballot election. The members’ bill of rights granted workers the right to sue their union for inadequate representation, and safeguarded members from arbitrary discipline by their union. Beyond these explicit assertions of worker’s rights, additional provisions of Landrum-Griffin aimed to enhance the accountability of unions to their membership by requiring unions to submit extensive financial reports to the Department of Labor and by limiting the ability of international unions to control their affiliated locals through the use of trusteeships.<sup>19</sup>

Congress included a set of provisions intended to ensure that elections for union officers were conducted according to democratic procedures in Title IV of Landrum-Griffin. These provisions were resisted by union leaders, who asserted that such measures were unnecessary, as most unions already had constitutions that outlined democratic electoral processes. Unconvinced, and with testimony from the McClellan hearings revealing the undemocratic nature of some union ballots, legislators established a series of minimum requirements that were applicable to all

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<sup>19</sup> Title II of the act established rigorous financial reporting requirements for unions, and mandated that employers disclose financial expenditures related to union organizing. Unions were required to file annual reports with the Department of Labor, including information about assets, liabilities, expenditures, salaries of officers, and any loans made from union funds. The drafters of the bill felt that such transparency in the use of union funds would enable union members to hold their leaders accountable.

Title III of Landrum Griffin placed limits on the use of Trusteeships. The McClellan Committee hearings revealed that they had been used by international unions to exert control of union locals for illegitimate purposes such as embezzlement of funds, or to deny local members the right to elect their own officers. The new law mandated that trusteeships be imposed only in accordance to union constitutions, and for the purpose of preventing misuse of funds, ensuring the observance of collective bargaining agreements, or restoring democratic practices. International unions were required to provide the Department of Labor a report detailing the reasons for any trusteeships within 30 days of their commencement. A time limit of eighteen months was also imposed with extensions available only if an international union could demonstrate the necessity for one. Title V of the Act outlines fiduciary responsibilities of union officers.

unions regardless of their existing practices. Landrum-Griffin established fixed terms of office for union officials: a maximum of three years at the local level and five years for international union officers. Elected union leaders would have to seek re-election after these terms—this provision was designed to prevent union leaders remaining in office for long periods, a response to the fact that some unions had required elections only if a challenger emerged for the position.

Secret ballots were required for all elections of union officers by Landrum-Griffin. With respect to the extent of the franchise, the bill stipulated that all members be eligible to vote in ballots for local office, but that higher officeholders may be elected via a ballot of delegates—the delegates having been chosen in ballots of all members. While Landrum-Griffin demanded that candidacy for office must be open to all members (subject to reasonable regulations), it explicitly prohibited communists and individuals convicted of felonies from serving as union officers. Finally, Landrum-Griffin mandated that all candidates for office be given access to view (but not copy) membership lists thirty days prior to an election, and that all contenders be provided equal opportunity to distribute information to members. As part of the bill, however, all candidates were prohibited from using union funds in their campaigns.

This third installment in American labor law introduced for the first time government regulation of the internal affairs of unions, establishing an extensive set of rights for union members within their organizations. To enforce the new statute, legislators gave the Department of Labor responsibility for overseeing the election provisions of Landrum-Griffin and pressing charges for violations of the law against unions on behalf of workers. The department was also given responsibility for monitoring and maintaining unions' obligatory financial reports. This means that government oversight of the procedures regulating union formation and governance are performed by separate bodies, the NLRB and the Department of Labor respectively.

Enactment of this third significant Act of labor law was not a smooth process. The part of the statute that revisited the Taft-Hartley amendments proved much more contentious than the new proposals addressing union internal governance. A coalition of southern Democrats and Republicans backed by the Eisenhower Administration pushed hard for, and eventually won, a series of tough restrictions on organizational picketing and secondary boycotts. Employers strongly supported these measures, on the basis of the belief that they would weaken organized labor's ability to use its strength in one company or industrial sector to organize workers or gain contractual benefits in others. Such strategies had been used to considerable extent and effect by strategically well-placed unions, notably the Teamsters with their stronghold in the trucking business. Unions and their supporters in Congress of course resisted these limitations on what they viewed as essential and effective organizing strategies for organized labor. Much of the congressional debate over Landrum-Griffin was devoted to rather arcane details of these proposals.

When it came to sections of the bill that charted new ground by regulating union internal governance, there was considerably less controversy. Against the backdrop of the McClellan hearings, during which a few notorious labor leaders were unveiled as corrupt and capable of coercing the rank and file, it was hard for any legislator to resist reform. All participants in deliberations over the law called for democracy in the workplace, but as in prior episodes, few stated clearly what they meant by the term, or carefully considered what it might require. In something of a reversal of previous discussions of labor law that focused on the procedures for establishing collective forms of bargaining and representation without considering whether workers' collective organizations would be internally democratic. Now legislators focused on labor organizations internal practices without any evaluation of the procedures they had put in

place for their formation. However, in keeping with prior debates, when justifying their legislative preferences, lawmakers frequently drew analogies between institutions of political democracy and those they thought appropriate for workplace democracy. Also consistent with the frame of the Taft-Hartley amendments, but in contrast to discussions over the Wagner Act, unions were for the most part vilified as the despoilers of democracy rather than its architects.

Senator McClellan (D-AK), when introducing his union member “bill of rights,” claimed that “be it enacted into law, it would bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution” (National Labor Relations Board 1948, 1098). Pre-empting an objection that unions, but not other organizations, should be singled out for such government oversight, McClellan proceeded:

the justification and desirability for unionization is the fact that the individual worker in an industrial economy has little or no power . . . to deal effectively with his corporate employer. . . . This justification becomes meaningless when the individual worker is just as helpless within his union as he was within his industry, when the tyranny of the all powerful corporate employer is replaced by the tyranny of the all powerful labor boss. (National Labor Relations Board 1948, 1098)

Secretary of Labor James Mitchell, in his testimony before the Senate, drew from the McClellan Committee hearings to dramatic effect to demonstrate the necessity for the administration’s proposals:

Teamster officials have crushed democracy within the union's ranks. They have rigged elections, hoodwinked and abused their own membership, and lied to them about the conduct of their affairs. They have advanced the cause of union dictatorship and have perverted or ignored their own constitution and bylaws. (National Labor Relations Board 1959, 991)

President Eisenhower, an advocate of strong labor law reform, in a nationally televised address called for “effective legislation designed . . . to protect the rights and freedoms of individual union

members including the basic right to free and secret election of officers” (National Labor Relations Board 1959, 80).

Resisting public pressure and invoking the independent spirit of Edmund Burke, Senator Wayne Morse (D-OR) refused to sign the conference committee report on Landrum-Griffin. He did so in part because he felt that the legislation was an ill-conceived reaction to public pressure that would erode many hard-won rights of labor, rather than a measured response to the exposure of a genuine concern. Even though he did not endorse the legislation, Morse lamented that organized labor had not done enough, soon enough, to curb corruption within its ranks:

“Organized labor has known for a long time that some union leaders have run their unions as totalitarian economic states, tolerating no opposition or no exercise of democratic rights. . . . A sad fact is organized labor should have cleaned its own house long ago” (National Labor Relations Board 1959, 1403).

Morse, despite his criticism, praised the belated action of the newly merged AFL-CIO to curb corruption in the labor movement. For good measure he entered the Federation’s code of ethics outlining democratic standards for the organization and its affiliates into the Congressional Record. The extensive code included a section pertaining to “Racketeers, Crooks, Communists and Fascists” that proclaimed

it is a basic principle of this Federation that it must be and remain free from any and all corrupt influences and from the undermining efforts of communist, fascist or other totalitarian agencies who are opposed to the basic principles of our democracy and of free and democratic trade unionism.’ . . . There is no room within the Federation or any of its affiliated unions for any person in a position of leadership or responsibility who is a crook, a racketeer, a communist or a fascist. And it is the obligation of every union affiliated with the AFL-CIO to take appropriate steps to ensure that this principle is complied with. (National Labor Relations Board 1959, 14)

That the AFL-CIO adopted the language of their foes when acknowledging problems within some of their affiliates did not prevent them from offering a defense of others. In doing so they

called into question both the nation's democratic bona fides as well as the dedication of the rank and file:

The record of union democracy, like the record of our Nation's democracy, is not perfect. A few unions do not adequately, in their constitutions, provide for the basic elements of democratic practice while the overwhelming majority of American unions both preach and practice the principles of democracy, in all too many instances the membership by apathy and indifference have forfeited their rights of union citizenship. (National Labor Relations Board 1959, 1410)

In a fashion reminiscent of prior legislative debates, this statement invokes the idea that active participation (in this case of workers in their unions) rather than meaningful representation is the true measure of democracy.

Other parties to the debate echoed this sentiment. Senator Hubert Humphrey (DFL-MN), a firm advocate of unions, voted for the bill with a “heavy-heart,” but not before making an impassioned public statement in contrast to the prevailing public discourse. He celebrated the achievements of the labor movement and called for inclusion in the bill of a statement of gratitude recognizing the contributions of union members and their families to American freedom and democracy. Emphasizing the participatory element of democracy, he questioned whether any institution or piece of legislation could secure the ideal:

I say to the union members, I know of no law that can protect you from mismanagement.

There is only one way to protect democracy in government, in a union, or in any other institution, that means that the people had better take care of their business.

If only 10 percent of union members attend meetings—and that is a good average—we can expect abuse of power. If only 10 percent of American voters vote, our democratic way of life will be placed in jeopardy. (National Labor Relations Board 1959, 1451)

This statement, as well as the previous, one addresses questions of democratic accountability; in that sense, it is clearly concerned with the ongoing governance of unions. This is a shift from earlier episodes in labor law when appeals to democracy were raised with respect to the appropriate way for workers to authorize their representatives.

## Summary

In this brief synopsis of the evolving drama of the politics of U.S. labor law I have illustrated how the concept of democracy is consistently central to the script. From the institutional antecedents of the Wagner Act, to the Landrum-Griffin Act and beyond, participants engaged in discussions of labor law have justified their legislative proposals based on the notion that they would bring democracy to the workplace. In my account I have not attempted to distinguish occasions when those appealing to the ideal of democracy did so out of genuine concern, from times when political actors used the term strategically, believing it would help them secure their legislative aims. For my purposes the difference is not important. That all parties could claim that their ideas were predicated on the idea of introducing democracy to industry, however, is central to my argument. The reason for this is that to a large extent participants have used the term without clearly specifying what they believe it means. Such ambiguity has meant that in the context of labor law the concept has become more of a buzzword or rhetorical flourish than an ideal against which to evaluate proposals.

This eclectic use of the concept of democracy has been exacerbated by a second feature of discussions of labor law. Almost universally, legislators and others engaged in the process of policy making have failed to distinguish the process of forming unions from those involved in governing labor organizations once formed. Architects of the Wagner Act seem to have presumed that collective representation of workers would equalize the power of workers and of employers and thus democratize the workplace. They appear to have assumed that the collective organizations formed by workers would operate according to principles of democracy (Summers 2000). When it came to the Taft-Hartley reforms, although the unchecked power of labor union leaders was repeatedly cited as justification for the amendments, legislators did little to empower workers. Rather than establishing mechanisms through which union members might hold their

leaders to account, they focused instead on “equalizing” the processes Wagner introduced to regulate union formation. It was more than two decades after the enactment of the Wagner Act before legislators sought to ensure democracy within unions, with passage of the Landrum-Griffin Act.

In combination, legislators’ lack of clarity regarding the concept of democracy and their failure to distinguish the processes of union formation and governance has created a legal framework that is rather confused. Each development in labor law was grounded in competing visions of democracy; such competing ideals justified a plethora of plausible institutional mechanisms, from which legislators created in piecemeal fashion our contemporary labor law. In the process, unions have been portrayed first as the institutions through which American industry would be democratized and later as despoilers of the industrial democracy they were meant to facilitate. In part, unions and labor leaders were responsible for this transformation as the malfeasance of a few undeservedly defiled the reputation of others. However, that unions could be framed as un-democratic was also a result of the legal structure that initially regulated their creation but not their governance. It has also been facilitated by the ambiguity with which the concept of democracy has been used in legislative and public debates over labor law.

The depiction of unions as undemocratic is not just historical. It is being employed by those opposed to contemporary legislative proposals to reform labor law with the Employee Free Choice Act (EFCA). In addition, participants in the policy debate over the EFCA have once again placed the concept of democracy central to discussions of labor law. Consistent with prior episodes, those engaged in this latest dispute fail to communicate precisely what they mean when invoking the concept. Thus it seems appropriate to turn to the work of democratic theorists in an attempt to clarify some of the confusion. In the next chapter I explore the ideas of, and debates

among, political theorists in order to make relevant distinctions and draw out the implications of different conceptions of the principle of democracy.

Having explored the concept of democracy in general terms I will proceed in subsequent chapters to take up questions related to the specific institutions through which we seek to instantiate democracy in the workplace and in our political system. In comparing these sets of institutions, I draw on a comparison that has been a constant feature in debates over labor law. In doing so I seek to evaluate whether the characterization of U.S. unions as undemocratic—a depiction labor's foes commonly deploy—is justified.

### CHAPTER 3 THINKING ABOUT DEMOCRACY—IDEALS AND INSTITUTIONS

*In the case of a word like democracy, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using that word if it were tied down to any one meaning.*

—George Orwell 1946

To assert that the idea of democracy is complex and contested is not particularly profound or enlightening. Political theorists have long debated the meaning and substance of the concept. Disagreements among scholars about the idea of democracy range from those on the broadest level that contest its fundamental aims, to more narrow disputes over the most advantageous institutions and rules through which to realize democratic ideals. Contestation among academics over what democracy entails is not restricted to the province of political theory. Empirical researchers debate how best to measure the concept; they also disagree about whether appropriate classification of extant political regimes should be dichotomous—democracies and non-democracies—or according to gradations of “more or less” democratic. Discerning what is, what is not, and what is somewhat democratic thus presents difficulties in the realm of theory and application.

Disagreements, and ultimately, decisions regarding the way in which we conceptualize democracy have consequences. In an evaluation of justifications provided by empirical scholars adopting dichotomous or graded conceptions of democracy, Collier and Adcock (1999) emphasize the impact of such choices on the substantive conclusions of studies, the process of data collection, and the kind of inferences researchers draw about the causes and consequences of democracy. Adopting a pragmatic approach to the conceptualization of democracy for social science research, Adcock and Collier conclude, “how scholars understand and operationalize a

concept can and should depend in part on what they are going to do with it” (Collier and Adcock 1999, 539). This underscores the point that it may be neither possible nor beneficial to establish agreement on one particular authoritative definition of democracy. Yet at the same time it highlights the need to clearly define the way the concept of democracy is used, as well as the consequences of adopting a particular definition in a given situation.

If acceptance of diversity in the meaning of democracy is commonplace among political theorists and scholars of democratization, it is frequently overlooked in political disputes and policy debates. In the contemporary era, as the idea that legitimate governing systems *should* be democratic has become almost universally accepted— “close to nonnegotiable” in the words of one scholar (Shapiro 2003, 1)—discerning just what the term means has become much more problematic and increasingly important. Widespread approval of the idea of democracy has meant that proponents of all kinds of regimes, from established constitutional governments to emerging democracies and even authoritarian states, adopt the nomenclature of democracy in the hope of claiming political legitimacy. Of course, such pervasive appeals to the idea of democracy threaten to undermine the concept, rendering it merely a politically expedient rationalization.

Robert Dahl captures the problem succinctly:

In our times, even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy. . . . Yet a term that means anything means nothing. And so it has become with “democracy,” which nowadays is not so much a term of restricted and specific meaning as a vague endorsement of a popular idea. (Dahl 1989, 2)

The general predicament Dahl identifies here is just the problem that I see with the ways “democracy” has been used in debates over American labor law. As the historical sketch I drew in the last chapter makes clear, participants on all sides appeal to the “popular idea” of democracy but fail to specify its meaning.

That Dahl and other scholars of democracy recognize the difficulties inherent in the complexity of the idea does not prevent them from trying to sort out relevant distinctions between, and consequences of, various visions of the concept. I aim to use the debates and disagreements among scholars of democracy to more clearly specify and restrict the meaning of the ideal as it pertains to discussions of workplace democracy and labor law. What follows, then, is not meant to be an exhaustive summary of democratic theory, but rather an illustration of the fundamental controversies among theorists that are most relevant to my undertaking. Specifically, I will address four broad questions. First, does the concept of democracy entail any specific set of institutions? Second, what is the fundamental goal, or principle, that democracy seeks to promote? Third, what is the relationship between democracy and representation? And finally, what institutions does democratic representation require?

In conducting such a review, I aim to illustrate some of the consequences that follow from the various ways participants in discussions of labor law have used the principle of democracy. I use disputes among democratic theorists regarding just what democracy entails to illuminate the real-world implications of adopting one or another conception of democracy to endorse policy proposals in U.S. labor law. I create a broad outline of what I believe the concept of democracy in the workplace entails, which I use in subsequent chapters to assess existing institutions, as well as policy proposals, related to U.S. labor law.

### **Democratic Ideals and Institutions—Multiple Mappings**

The first issue I want to address may seem trivial, and yet is quite important when thinking about the political wrangling regarding labor law. Partisans of all stripes claim their policy as the embodiment of democracy in industry. In fact, regardless of what specific view of democracy is endorsed, there is no inherent equation between the ideal of democracy and a particular set of institutions necessary to instantiate the ideal in a given context.

The idea that democracy necessarily entails any specific set of institutions seems easy to dispel. Most casual observers recognize that throughout time and space a plethora of institutional arrangements have, and do, constitute what might legitimately be termed democratic governance. For example, parliamentary systems as well as presidential ones can both reasonably fall into the category of “democracies.” Similarly, democratic principles can be realized through governmental arrangements that incorporate proportional representation or single-member district electoral schemes, as well as unitary or federal power arrangements. That there is a general consensus that various combinations of this range of institutions can justifiably be deemed democratic does not foreclose disagreements about the degree to which they further democratic ideals. This illustrates how the concept of democracy is used both as an ideal—however unlikely it is to be attained in practice—and to designated as “democracies” systems of governance that to a greater or lesser extent approximate democratic ideals.

Among political theorists, there is substantial debate regarding what properly constitutes the democratic ideal. Democratic theorists disagree vigorously about the fundamental aims of democracy. I address these disagreements in the next section. Democratic theorists agree, however, that no unique institution, or set of institutions, is essential to the realization of the democratic ideal. Once they have specified their particular concept of democracy, much of the crucial work of democratic theorists consists in discerning what range of institutions, in what context, and under what conditions will in practice best approximate the ideal as they articulate it.

Robert Dahl identifies each of these tasks when outlining the complex set of questions the term “democratic theory” encompasses. He suggests that “democratic theory” implies going beyond “justifications” or philosophical grounds for preferring democracy (the question of ideals

and aims). Democratic theorists, Dahl argues, should also consider the range of settings suitable for democracy (for example the workplace, universities, and social organizations), the criteria by which to distinguish democracies from non-democracies, and, “venturing still further...begin to explore the institutions that the democratic process would require to operate. An assembly of citizens? A representative legislature? Evidently the institutions required would vary depending on the circumstances” (Dahl 1989, 8). Beyond affirming that the ideal of democracy implies no specific set of institutions, Dahl here also posits that the selection of suitable institutions for furthering democratic aims is contingent upon the specifics of the situation.

John Dewey, arguably the preeminent scholar of radical democracy in the U.S., while having a different perspective than Dahl on the fundamental goals of democracy, nevertheless agrees that the “ideal” of democracy does not imply any specific institutional arrangement:

The idea of democracy is a wider and fuller idea than can be exemplified in the state even at its best. To be realized it must affect all modes of human association, the family, the school, industry, religion. And even as far as political arrangements are concerned, government institutions are but a mechanism for securing to an idea channels of effective operation. . . . What the faithful insist upon, however, is that the idea and its external organs and structures are not to be identified. ([1927] 1954, 143)

Dewey here converges with Dahl in two respects that are particularly relevant to debates over labor law. First, he stresses that the principle of democracy does not entail any particular set of institutions. Rather, he suggests, we should see institutions as merely mechanisms through which we attempt to best approximate the ideal. Second, he endorses the notion that the workplace is a suitable location for democratic decision-making. Indeed, to Dewey, workplace democracy is essential to fully realize the democratic ideal, while for Dahl industry is an appropriate arena for democratic decision-making (Dahl 1989, 328).<sup>1</sup> On this last point, it is important to note that in

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<sup>1</sup> Dahl makes a strong argument for workplace democracy in his *Preface to Economic Democracy* (1985) in which he argues that political democracy is frequently undermined by economic inequality owing to the priority that is

so far as they premise their policy proposals on the basis that they will further industrial democracy, almost all parties in historic and contemporary disputes over labor law tacitly support the idea that the workplace should be democratized in some form. Thus, we can bracket any debate about whether the workplace is a suitable domain for democracy for present purposes.

The point that the principle of democracy does not imply any specific institutions may seem somewhat uncontroversial and inconsequential in general terms. However, it is seemingly not so straightforward in the realm of labor law. As my examples in the previous chapter demonstrate, partisans on all sides of the issue proclaim their policy preferences are the embodiment of democracy. Thus by implication, and sometimes through direct contradiction, each side posits that the proposals of their adversaries are undemocratic or less democratic than their own preferred proposal. As I have mentioned previously, a further feature of labor law politics is that participants are inattentive to the background conditions and context that make institutions function to further democratic aims in a given setting. Most often, proponents of policy proposals legitimate their claims simply by indicating how they mirror a process or mechanism in our governmental system without considering whether the purposes for which the proposed institution will be used in the workplace, or the circumstances under which it will operate, are equivalent.

During discussions over the closed shop for example, proponents of the arrangement claimed that it was based on the principle of majority rule, which was the only way to settle things democratically, and followed the *modus operandi* of our political system. Their opponents were just as adamant that the closed shop violated the respect for minority rights that they

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afforded to liberty and private property over equality in the U.S. His argument on this point is not as strong in either his earlier or later work.

claimed is essential to American democratic politics. Similarly, opponents of the recent proposal to allow workers to form unions via certification cards, rather than a secret ballot, claim that secret ballots are the cornerstone of democracy. Secret ballot elections are vital in union representation elections, they claim, because they are used for choosing representatives in the U.S. system of government. In neither instance do those offering labor policy ideas consider the entire range of institutions that further democratic decision making in the U.S. political system, or the background conditions that are necessary for various institutions to function democratically. Further, they do not question whether the purpose and conditions under which the institution will be used to promote democracy in the workplace are equivalent to those in which the institution is utilized in the political realm.

Adrian Vermeule draws our attention to questions of context and the conditions that serve to make institutions more closely track democratic aims in his study of “mechanisms of democracy” (2007). He concurs with Dahl and Dewey that no specific institution is essential to, or perfectly captures, democratic ideals. However, rather than concentrate on large-scale institutional arrangements such as presidential versus parliamentary systems, Vermeule explores how “mechanisms”—small scale institutions such as voting rules, veil rules (conditions of ignorance), or conditions of secrecy—promote democratic ideals.

In the course of his argument, Vermeule points to examples in the U.S. political system where counterintuitive mechanisms such as sub-majority rules (e.g., the “Rule of Four” that permits four justices to grant a writ of *certiorari*, or rules that permit a minority to place a question on the ballot) actually further democratic ideals by enhancing accountability. He also highlights instances where conditions such as privacy for deliberation or publicity in voting can, and do, work to enhance democratic ideals. The point here is that just as Dewey argues that

institutions should be viewed not as essential to democracy but rather as “tools” to help us realize our democratic aims, so Vermeule suggest that the mechanisms he outlines should be seen as apparatus that under the right conditions can enhance the “tools,” and improve the performance of our democracy:

Democracy-promoting mechanisms are not panaceas to be prescribed under any and all conditions. . . . The basic project, in each case, is to identify the conditions under which particular democracy promoting mechanisms can promote widely endorsed attributes of democratic institutions or, more ambitiously can optimize across democratic values. (2007, 17)

In the context of labor law, then, rather than simply assert that a particular institution such as the secret ballot is desirable and democratic because it is one institution among the many that exist in the U.S. political system, proponents of policy ideas should realize not only that no institution is necessary or essential to American democracy, but that institutions operate to advance democratic ideals only under particular conditions and within specific contexts. Of course, in order for us to assess whether an institutional arrangement promotes democratic ideals, proponents must specify the ideal they have in mind. Again, this is something that adversaries contesting U.S. labor law often fail to do. I turn now to a discussion of some of the crucial disagreements over democratic ideals among theorists of democracy in order to redress this oversight.

### **Democratic Ideals at Work**

Dewey and Dahl, two pre-eminent American democratic theorists, endorse the ideal of democracy in the workplace. This might cause some to group them together as “radical democrats.” Yet even as these two scholars coalesce on a “radical” or expansive view of domains amenable to democratic decision-making, they reject in disparate ways what is perceived as a radical democracy in an ideal sense. That view, typically associated with Jean Jacques Rousseau, holds that the aim of democracy is to uncover the “common good” or

“general will.” Some theorists reject Rousseau’s vision of democracy on the grounds that in many situations no single outcome that would constitute the common good actually exists. Others dispute Rousseau’s idea based on the claim that even if such a unique common good exists, we lack processes and institutions to determine what it is.

Frequently, conceptions of democracy that reject the Rousseauian ideal of democracy as the pursuit of the common good are referred to as proceduralist or minimalist. However, what I intend to show is that, properly considered, such views, far from being minimalist, are quite robust in demanding conditions of freedom and equality. They can also be formulated in ways that maximize the protection of individual interests, and minimize the domination of individuals by those who are more powerful. Thus they afford a suitable basis on which to premise the idea of democracy in the workplace.<sup>2</sup>

Rousseau’s conviction that “the general will is always rightful and always tends to the public good” (Rousseau [1763] 1977, 202) has caused much controversy among scholars of democracy. Contemporary democratic theorists working in the social choice tradition express strong skepticism about the notion of deducing a common good from individual preferences given the nature of aggregation processes (Arrow 1951, Riker 1982). These processes, they assert, generate problems of instability (the outcome of aggregative processes differs depending on the method used to aggregate preferences, or the order in which alternatives are presented) as well as difficulties owing to ambiguity (if the outcome depends to a great extent on the method used to aggregate preferences, it is unclear that any outcome can be determined to represent a unique common good).

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<sup>2</sup> This issue cuts across other debates among democratic theorists that include those regarding preferences for participation over representation, and deliberation over aggregation. I do not address these conflicts directly here but rather take them up in future sections.

More recently, theorists of “epistemic” democracy have resolved some of the concerns over instability. They demonstrate that when voting rules are used to aggregate *judgments* about what is in the public interest, rather than individual *preferences*, stable outcomes are quite readily attained (Cohen 1986; Coleman and Ferejohn 1986; List and Goodin 2001). Others have proposed that deliberation prior to voting can similarly reduce problems of instability by clarifying the contours of disagreement (Dryzek and List 2002; Knight and Johnson 1994; Miller 1992). However, neither of these solutions resolves the more significant problem facing those theorists who argue that the ideal of democracy is the quest for the common good, which is the idea that there is, in fact, no such thing. Theories of epistemic democracy merely demonstrate that *if* a unique common good (or truth) exists, then under certain conditions a variety of aggregation processes reliably “track the truth.” Thus, they simply assume a common good. While those offering deliberation as a solution to instability make no such assumption but instead join a long tradition among democratic theorists in expressing skepticism that a common good exists.

Joseph Schumpeter is an exemplar of modern theorists of democracy who reject the notion that the aim of democracy is to generate decisions that reflect the “will of the people,” and thereby further the public good. For Schumpeter, the problem with ideals of democracy based on the common good are much more fundamental than flaws in processes of aggregation. In his classic *Capitalism, Socialism and Democracy* Schumpeter asserts:

There is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by force of rational argument. This is due primarily not to the fact that some people may want things other than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things. (1942, 251)

Beyond his skepticism that there is any such thing as a “common good,” Schumpeter argues that individual preferences are shaped and manipulated such that even if consensus on a common good should emerge from democratic processes, it would reflect a “manufactured” rather than “genuine” will. Even were we to accept that such a “manufactured will” was the outcome that served the common good, Schumpeter continues, considerable disagreement would remain over how to go about implementing policies to achieve it. Thus Schumpeter famously concludes that “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the peoples vote” (Schumpeter 1942, 269).

While Schumpeter’s view of democracy has often been denigrated as minimalist, a number of theorists have pointed out that, taken seriously, Schumpeter’s notion of democracy, and those like it, is not so minimal at all. O’Donnell (2001) argues that while realist, Schumpeter’s idea of democracy is far from minimalist. He asserts that Schumpeter qualifies his definition in ways that imply that significant guarantees of individual freedom and equality are necessary for democracy to exist. O’Donnell highlights how Schumpeter insists that by competition for office he means “free competition for a free vote,” and that while elections are the most likely mechanism through which to secure leadership, they may not be the only way (O’Donnell 2001, 9). Further, O’Donnell notes that Schumpeter acknowledges that the kind of free competition for office that he envisions demands “freedom of discussion for *all*,” which not only implies considerable rights of free speech, freedom of the press and association, but an expansive, equitable distribution of those rights.

The crucial point for O’Donnell is that any election-centered definition of democracy in the Schumpeter tradition necessarily involves significant individual freedoms and a relative level

of equality among citizens to ensure that elections are truly competitive. Dahl is a paradigmatic example of a theorist in this tradition, who instead of a substantive common good suggests a procedural one:

Our common good, then—the good and interests we share with others—rarely consists of specific objects, activities, and relations; ordinarily it consists of the practices, arrangements, institutions and processes that promote the well being of ourselves and others—not, to be sure, of “everyone” but of enough persons to make the practices, arrangements, etc. acceptable. (Dahl 1989, 307)

For Dahl, the entire set of institutions essential to democracy cannot be fully specified. But they include the equal ability of all people to discover and express their own preferences regarding collective decisions. This ability requires “enlightened understanding,” by which he means that people should be able to discern their own interests and how they will be affected by various group decisions. According to Dahl, such a requirement demands that individuals be afforded “opportunities to gain enlightened understanding,” which entails opportunities to gain education and information.

In addition, in order for people to channel their enlightened understanding into collective decisions, Dahl asserts that the common good requires the “institutions of polyarchy.” Polyarchy is the term Dahl adopts to indicate that, in reality, democratic ideals can never be attained, only approximated, and thus “polyarchy” denotes the realistic approximation. The institutions of polyarchy require that power be vested in elected officials who are chosen in free and fair elections. Free and fair elections require voting equality (one person, one vote), as well as equal rights of participation, freedom of expression, and freedom of association for all. Thus Dahl’s procedural vision of democracy amounts to a set of institutions through which people can discern, express, and promote their interests in a system of representative governance. This idea seems to approximate the original intention of the Wagner Act, which was predicated on the

notion that workers lacked the ability to express and represent their interests when faced with powerful employers in the workplace.

Ian Shapiro has recently defended Schumpeter's alleged "minimalist" view of democracy because it promotes his own view of the democratic ideal. Shapiro, like Dahl, dispenses with any substantive notion of the common good and instead argues, following Machiavelli in the *Discourses*, "the common good is that those with an interest in avoiding domination share" (Shapiro 2003, 35). Shapiro asserts that the importance of seeing democracy as a means to determine the common good is overestimated, and that "democracy is better thought of as a means of managing power relations so as to minimize domination" (Shapiro 2003, 3). This ideal of democracy as grounded in non-domination, does not conflict with the procedural view put forth by Dahl. It does, however, make more explicit the conditions of freedom and equality that any so-called minimalist view of democracy focused on competitive elections requires.

**The Principle of Non-Domination:** Placing the ideal of freedom as non-domination central to a conception of democracy could be viewed by some as a little audacious. This is not least because the concept of freedom as non-domination has its roots in republicanism, a tradition that has been contrasted both with democracy (Ferejohn and Rosenbluth 2006) and the liberal ideas considered so influential to the American Founding (Hartz [1955] 1991). That conceiving of freedom or liberty as non-domination has been revived from a republican heritage does not, however, mean that it is inconsistent with a contemporary vision of democracy in the American tradition. After all, historians have convincingly argued that the American founders were significantly influenced by republican thought (Bailyn 1967, Kramnick 1982, Pocock 1975, Skinner 1978, Wood 1969). Likewise, that the founders contrasted their system of government to Athenian-style direct democracy does not preclude us from designating contemporary

representative forms of government as democracies.<sup>3</sup> A closer look at the revived, or “neo-republican,” principle of freedom as non-domination establishes that the principle does not demand that we endorse traditional republican ideas and institutions in a wholesale way. Indeed, it demonstrates that freedom as non-domination is consistent with a contemporary conception of representative democracy.<sup>4</sup>

The re-appropriation of “neo-Roman” ideas is most closely associated with the work of Philip Pettit (1997) and Quentin Skinner (1998) who, despite some initial differences, now agree that what unites republican thinkers is a unique ideal of liberty.<sup>5</sup> The crux of their argument is that conceiving of liberty in a “bi-polar” way—the “positive” and “negative” conceptions of Isaiah Berlin’s seminal essay—has obscured the truly Roman notion of the ideal that is grounded in the belief that freedom requires the absence of arbitrary power.<sup>6</sup>

Berlin’s positive liberty is quite difficult to define, but is associated with self-determination or self-mastery (Berlin 1969). It envisions freedom as “rational self direction,” as the ability to resist our “lower” impulses and desires and act in accordance with the thoughtful, reasoned dictates of our “higher” nature. Berlin rejected this ideal of liberty as the basis for political action as he feared it could lead, in the extreme, to totalitarianism. Those who acted contrary to societal

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<sup>3</sup> I address the question of the relationship of representation and direct or participatory democracy directly in the next section.

<sup>4</sup> Goodin (1993) provides an overview of the revival of republican thinking in political science and cognate disciplines and the various values, ideas, and institutions related to the tradition. He is skeptical that there is anything uniquely “republican” about the various values (including “non-domination”) that the tradition invokes.

<sup>5</sup> Skinner initially argued that republican thinkers were not distinguished by their understanding of liberty but rather by their ideas about the conditions through which liberty is secured. He has since revised his view in keeping with Pettit’s argument; see (Skinner 1998, 70).

<sup>6</sup> Freedom as non-domination is the central tenet of neo-republicanism, but a significant research agenda has grown up around the paradigm that includes some disagreements about the central ideas and their political implications; for a review of the literature see Lovett and Pettit (2009). I do not take up the various disputes within the literature here but rather focus on the work of Pettit who is widely regarded as the primary innovator of neo-republicanism as it relates to contemporary political theory; references to his work in this section are to Pettit (1997) unless otherwise indicated.

views of “rational” and “reasoned” behavior could, as Rousseau suggested, be “forced to be free.” While there are no doubt some differences, Berlin’s positive liberty is quite closely aligned to what Benjamin Constant referred to as the “liberty of the Ancients” (Constant [1816] 1988). A liberty attained by active participation in the public sphere and the belief that citizens cannot be deprived of freedom by laws that they have played an equal role in formulating. It is this positive conception of freedom that has frequently be attributed to the republican tradition.

In contrast, Berlin’s negative liberty and Constant’s “liberty of the Moderns” are deemed central to the liberal tradition. Absence of interference is the defining feature of negative liberty, which envisions individuals as free insofar as no person or group actively prevents them from doing what they would like to do. Negative liberty is freedom brought about by being left alone, unfettered, to do as one pleases. In the political sense, negative freedom is allied to the liberal belief that activity in the private sphere is the source of personal fulfillment, and that engagement with public affairs and the role of the state should be minimized. The state on this view is just as much of a threat to liberty as private individuals, and thus, actions of the state are legitimate only to the extent required to protect citizens from interference by their compatriots or from foreign invasion.

Philip Pettit and other “neo-republican” thinkers argue that it is a mistake to identify republican conceptions of liberty as non-domination with Berlin’s “positive liberty.” On their view, republican liberty is essentially negative in character because rather than demanding action—such as self-mastery or active participation, it demands absence. Yet in contrast to the negative liberty Berlin describes, republican liberty requires not just the absence of interference but also the absence, as far as is possible, of the potential for interference. The difference, while perhaps subtle, is significant. It is popularly illustrated by invoking the condition of slaves under

the control of a benevolent master who generally allows them to do as they desire. If freedom is viewed as non-interference in the negative sense, the slaves are free as they are not actively coerced or prevented from doing as they wish. On the neo-republican view of freedom as non-domination, the slaves are not free because their liberty is not secure. They live with the ever-present possibility that their actions could be restricted by their master.

In one sense, neo-republican freedom is more demanding than negative freedom, as it requires the absence of the potential for arbitrary power, not merely the absence of the exercise of arbitrary power. Yet when it comes to the role of the state, the neo-republican ideal of liberty is more permissive. This is because in contrast to adherents of negative liberty who tend to characterize state action as an encroachment on liberty, neo-republicans hold that the non-arbitrary exercise of power by the state can enhance liberty. The difference stems from the fact that neo-republicans hold that interference, if it is not arbitrary, need not be dominating. Hence legitimate (that is, non-arbitrary) state action that, for example, secures the weak against powerful private interests, entails interference by the state, but not domination. Thus while it violates liberty in the non-interference “negative” conception, it expands liberty in the non-domination neo-republican sense.

In Pettit’s version of neo-republicanism, freedom as non-domination is the central value that the state seeks to secure. It does so within a governmental system he refers to as “contestatory democracy.” This consists roughly in a representative system of governance with majority rule determining the “authorship” of laws that should be designed to “track the common and recognizable” interests of the people. To ensure the state does not become a dominating force itself, Pettit endorses constitutional limits on government action, as well as institutions designed to ensure that all those subject to the laws have some mechanism by which they can

challenge them. This is the “contestatory” aspect of his scheme—he equates this to ensuring that all citizens can play a role in *editing*, as well as in authorship, of laws. Pettit advocates two strategies to promote non-domination: (1) promoting “reciprocal power” and (2) empowering a constitutional authority to deter “arbitrary interference.” Importantly for present purposes, Pettit espouses collective bargaining and the formation of unions as exemplary of the strategy of reciprocal power.

One aspect of the classical republican tradition that neo-republicans retain—one that I have earlier rejected—is a commitment to the common good. Pettit’s constitutional authority, for example, guards against arbitrary interference and enhances liberty only in so far as it interferes in ways that “track the interests” of the parties involved, according to their own conception of their interests. In this way, Pettit argues, it is “responsive to the common good.” Similarly Pettit’s neo-republican vision suggests laws are legitimate if they track the “common and recognizable interests” of citizens. In each of these examples, there is a presumption that there is in fact some way to identify a “common interest,” a position that I find objectionable. If a constitutional authority must interfere on the part of one party to protect it from the arbitrary interference of another, it is surely questionable whether it can track the recognizable interests of both parties. Surely the dominating party will see any interference on the part of the constitutional authority to restrict its actions as contrary, rather than consistent with its recognizable interests. Further, the requirement that in order to avoid becoming a dominating force the state acts only on the common and recognizable interests of all citizens seems surely to significantly limit the ability of state action in ways that are similar to the negative view of liberty that the neo-republicans reject.

Given this neo-republican commitment to the common good, I find Ian Shapiro's adoption of the principle of non-domination to justify democratic arrangements preferable. In effect, Shapiro collapses the common good into a procedural rather than substantive criterion, arguing that it is simply the minimization of domination. Shapiro's principle of non-domination differs little from the neo-republican ideal; in simplified terms, it requires the elimination of any illegitimate use of power. Illegitimate power includes not simply the use of force, but also such things as agenda control and undue influence over the formation of an individual's preferences. Importantly, Shapiro argues that

domination can . . . occur without the need for explicit commands when one person or group secures the compliance of another as a by-product of their control of resources that are essential for the second person or group, or, in the terminology I will deploy, is in a position to threaten their basic interests. (Shapiro 2003, 4)

Shapiro does not provide a complete definition of "basic interests;" he simply defines the term as the essential goods necessary for individuals to develop and live as independent agents.<sup>7</sup> Yet, importantly for present purposes, he depicts employers who can dismiss an employee in circumstances where there is no unemployment compensation as an example of someone in a position to affect the "basic interests" of others.

In like manner to the neo-republican view of liberty, Shapiro's approach also sanctions actions by the state that aim to minimize domination in the private sphere—with the proviso of course that state actions are not themselves arbitrary or a source of domination. The legitimacy of democracy on this reading depends upon the degree to which all sources of domination, whether public or private, are minimized. In a similar vein to neo-republican "contestatory" democracy, Shapiro advocates a representative political system bolstered with institutions that

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<sup>7</sup> The concept of "basic" or "real" interests is complex and contested see, for example, Geuss (1981, 45-55), Lukes ([1974] 2005, 143-148), Shapiro (1999, 80-99).

seek to promote deliberation, particularly to enhance the political voice of parties likely to be dominated. However, in contrast to the Pettit's neo-republicanism, which seeks consensus and the common good, Shapiro wishes to promote competition. Schumpeterian competition, he argues, is an effective if imperfect mechanism for managing power relations because, among other things, it keeps elected officials responsive to the majority and institutionalizes opposition. Each of these conditions limit the power of elected representatives and empowers those whose interests they are representing. For Shapiro, the flaw in Schumpeterian "competition for office" is not that it rejects the pursuit of consensus (or the common good) and embraces competition, but that in reality, democratic regimes—including that of the United States—are not competitive enough. To protect minorities in the event that democratic majorities dominate them, Shapiro advocates a limited role for judicial review. However, unlike Pettit's constitutional authority that intervenes substantively and has a degree of law-making power, Shapiro's merely rejects laws that serve to dominate minorities and requires the legislature to revise them.<sup>8</sup>

As I mentioned previously, grounding democracy in the principle of non-domination is consistent with the procedural view put forth by Dahl. It does, however, make more explicit the conditions of freedom and equality that any putatively minimalist view of democracy as consisting of competitive elections requires. This surely falls squarely into the vision that the original proponents of the Wagner Act had in mind, and seems an appropriate ideal on which to base workplace democracy. It is a view that comports appropriately with the idea that workers, bargaining as individuals, might readily be subjected to the illegitimate use of power by their employers, whereas those same workers, bargaining as a collective, are less easily dominated.

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<sup>8</sup> See Pettit (1997) 177-183; Shapiro (2003) 64-77

Thus the formation of unions for the purposes of collective bargaining furthers democratic ideals by reducing the potential for domination.

A democratic ideal of non-domination thus brings into focus two important points with respect to debates over labor law. First, it precludes any policy proposal that rests on the argument that such legislation is designed to promote the “public good.” The crucial evaluative factor for assessing resulting policies is whether or not they minimize the domination of workers by limiting the ability of employers to use illegitimate power. This leads directly to the second point, which is that it becomes crucial to distinguish institutions used to form unions from those regulating the governance of unions once formed.

An important question to ask when considering whether, and if so how, the ideal of democracy as non-domination can be extended to the workplace is whether competitive elections are plausible in that context, and whether they will function in the way that Shapiro argues they do in the political realm. With respect to the process of forming unions, it is not clear that competitive elections are appropriate, not least because the process is one of group formation rather than one in which parties or representatives compete to gain office. What we need to determine is which institutions will enhance the ability of workers to resist illegitimate power while they are in the process of forming organizations (unions) that, once formed, will serve to limit the potential for domination in the workplace.

In contrast, once workers have formed collective organizations, then a new potential source of illegitimate power emerges. This is because the individuals whom workers select to represent their collective interests could, in the same manner as political leaders, abuse their power and act to further their own interests rather than those of the group. This means that it is also necessary to identify an appropriate set of institutions that will limit the potential for domination of workers

and will aide union members in identifying, expressing, and protecting their interests within their unions. Here a system of competitive elections, bolstered by mechanisms that sustain the conditions of relative freedom and equality that make them effective, arguably will serve to promote democratic ideals within unions in the way that Shapiro argues they do in political democracies.

As I highlighted in the previous chapter, it was not until more than twenty years after the passage of the Wagner Act that legislators sought to regulate the internal governance of unions with the passage of Landrum-Griffin. Even though a prominent rationale for passage of the Taft-Hartley reforms was the dictatorial behavior of union leaders, legislators failed at that time to enact policies that aimed at enhancing union member's ability to hold their leaders to account. This was largely owing to the failure of legislators to effectively recognize that forming unions is distinct from governing them once they are established. Thus many of the Taft-Hartley reforms were directed toward problems that arise in the process of union formation and, insofar as they were targeted in this way, did little to aid workers within existing unions as they sought to hold their leaders, or collective representatives, to account. In order to facilitate democracy as non-domination in the workplace, legislators should distinguish between two problems. The first is how to minimize workers' exposure to illegitimate power in the formation of unions. The second is how to provide workers with the appropriate means to resist illegitimate power within their union once it is established. Of course, the institutions that best serve democratic ideals in each context may be quite different.

Critics may object that, in giving up on the ideal of democracy as the identification of the common good, I am adopting a "thin" and insufficiently robust notion of democracy. However, all of the points I make can be found in the work of Dewey, who is typically described as an

advocate of radical democracy. Dewey, like Schumpeter and Shapiro, rejects the idea of a general will or common good and sees the protection of interests as a primary goal of democracy. For Dewey, the idea of democracy as identifying the common or public good is unrealistic because to a great extent there is no defined “public” whose “good” democratic processes might identify. Democracy for Dewey is as much about the formation of community—what he terms a public—that entails facilitating the ability of individuals to recognize that they have interests in common as it is about identifying how best to further and protect those interests. The primary obstacle to democratic governance for Dewey is that in complex industrial societies wherein individuals have multiple, remote, and overlapping interactions, they cannot see themselves as a public and thus fail to recognize their common interests. For Dewey, then, what democracy requires is a set of institutions that will help individuals identify their shared interests and recognize themselves as a public, as well as mechanisms through which such a public can protect its shared interests from the forces that challenge them:

That government exists to serve its community, and this purpose cannot be achieved unless the community itself shares in selecting its governors and determining policies . . . are not the whole of the democratic idea, but they express it in its political phase. . . . The prime difficulty as we have seen, is that of discovering the means by which a scattered, mobile and manifold public may so recognize itself as to define and express its interests. ([1927] 1954, 146)

In particular, Dewey is especially concerned that members of a public devised ways of holding their representatives to account.<sup>9</sup> That is the problem to which I now turn.

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<sup>9</sup> While Dewey, like most pragmatists, is concerned with consequences—in this instance with the prospects that “inchoate” publics might come to discern their shared interests—he is clear that such consequences are sensitive to the conditions under which they emerge. As a result, he is preoccupied with the role of inquiry and communication in the formation of “the public.” The details of his argument are not germane here. I mention the theme only to suggest that the distance between his ideas and Dahl’s more explicitly procedural view is less great than it might seem.

## Representation Is Democracy

The relationship between democracy and representation has occasioned much consternation among democratic theorists. It is also central to discussions of labor law. As I demonstrated in the previous chapter, proponents of the Wagner Act, which established government protection for the right of workers to engage in a system of collective *representation*, argued that it would bring industrial *democracy* to the workplace. This notion would be anathema to some democratic theorists. Participatory democrats claim that the idea of representative democracy, if not quite an “oxymoron,” is at best a pale imitation of democracy proper. Democracy, for theorists such as Pateman (1970), Barber (1984) and Bachrach (1992) requires participation. Active engagement in politics is, for them, essential for citizens to gain the education and skills necessary to share in collective governance. It is the mechanism through which individuals retain their autonomy and become self-governing. Representation, to theorists in this tradition, undermines participation and enervates democracy. Skepticism about the democratic nature of systems of representation is not limited to the realm of theory. In fact, a common complaint of both conservative opponents of unions as well as critics within organized labor is that unions as organizations are insufficiently participatory and hence do not reflect the interest and aspirations of rank and file members.

The question of participation highlights once again why it is important to distinguish the processes of forming unions from the exigencies of governing them once formed. Most work by participatory theorists relates primarily to the latter question. Their arguments are especially relevant to discussions of democracy in the workplace, not least because many view the workplace as a primary location for encouraging active participation in democratic decision-making by citizens. To Pateman (1970), workplace democracy is critical to fostering a participatory society that will enhance the functioning of representative governance at the

national level. The central premise of her theory is that workplace democracy can serve to educate workers, enhance their civic skills, and increase their political efficacy, thus making them more active citizens in representative government at the state level. Similarly, Bachrach posits that the creation of workplace democracy in which workers actively engage in workplace governance is the appropriate place to begin to create a “democratic participatory system committed to the promotion of self-development and the well being of all of its citizens [that would] aim to establish participatory institutions wherever practically feasible, and thus serve as a continuing democratic leaven on the representative system” (1992, 47). Each of these theorists reluctantly accepts the idea of representative democracy at the national level, but believe that workplace democracy can make it more effective (meaning more authentically democratic) by increasing the participation of workers.

Here the criticism of theorists intersects with that of those within organized labor who advocate increased rank and file participation to ensure that unions operate democratically. Bacharach (1992), in fact, argues that unions, in their present form, are resistant to workplace democracy owing to their hierarchical structure and the reticence of union leaders to relinquish power to workers. Pateman is less critical of unions and less clear about the extent of worker participation necessary to sustain workplace democracy. For example, she states that “in the participatory theory ‘participation’ refers to (equal) participation in the making of decisions” (1970, 43), and at the same time she suggests that relatively low levels of participation and “only a relatively minor modification of existing authority structures” in the workplace may increase the political efficacy of workers (1970, 105). Despite this lack of clarity, it is safe to say that Pateman and Bachrach, along with advocates of “rank and file unionism” within organized labor, would all concur that democratic processes and worker participation *within* unions is crucial for

workplace democracy.<sup>10</sup> I agree wholeheartedly with this position. Where I disagree with participatory democrats and their sympathetic practitioners is on the *form* of democracy appropriate for union governance. I argue that a representative system with appropriate institutions to ensure that workers can effectively hold their collective representatives to account limits the exposure of workers to illegitimate power and protects their interests, but does not preclude their active participation. Instead, it leaves the level of participation an open question.

I borrow my subtitle for this section from David Plotke (1997), who defends *representative democracy* against the claims of participatory democrats.<sup>11</sup> The crux of Plotke's argument is that contrasting representation and participation is a category mistake. Instead, Plotke argues that "the opposite of representation is exclusion. And the opposite of participation is abstention" (1997, 24). On this view, questions of participation are orthogonal to those of representation. The critical error that participatory theorists make, according to Plotke, is that they fail to recognize the relational and interactive nature of representation. Representation, properly construed, requires continuous agency on the part of both the representative and those represented. The former, once authorized, engages in decision-making for the constituency, but the constituency plays an active role in decision-making by expressing preferences and articulating ideas to its representative in an ongoing dialogue. The chance of not being reauthorized as the group's representative, which is often though not necessarily the sanction of electoral defeat, is in theory the mechanism that ensures the continuing responsiveness of the representative to members of

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<sup>10</sup> While Pateman and Bachrach discuss forms of workplace democracy that do not involve unions such as employee ownership plans, quality of work life councils, and worker cooperatives; I do not address them here since they are tangential to my focus on arguments pertaining to U.S. labor law and the formation and governance of unions.

<sup>11</sup> In his defense of representative democracy Plotke (1997) is primarily concerned with questions of participation and the critique of participatory democrats. However, he appears to use the terms "participatory democracy" and "direct democracy" somewhat interchangeably. I understand the term direct democracy to refer to those institutional mechanisms such as citizen initiative and legislative referenda that allow citizens to vote on legislative proposals directly. These mechanisms may, but need not, engender citizen participation. Thus, to avoid confusion I will use the term participatory rather than direct democracy throughout this section.

the constituency.<sup>12</sup> Thus, on Plotke's view, those who advocate participation should be concerned that adequate institutions and mechanisms exist through which represented groups can formulate and convey their interests and ideas to their representatives, as well as effectively hold those representatives to account if they do not act upon their constituents expressed interests.

The view Plotke articulates is akin to that which Hannah Pitkin (1967) determined to be the essence of political representation in her classic account of the concept, namely that representatives act to further the interests of those represented in a manner that is responsive to them. Thus, for Pitkin, adequate institutions for groups to authorize and hold representatives to account are essential to political representation. However, this vision does not address Pitkin's further contention that representation is the act of "making something present," which is also central to the critique of participatory democrats, who argue that the actual participation (meaning presence) of individuals is critical. On this point Plotke's ideas are also helpful. He argues that *political* presence is not the same as *physical* presence—that in order for an individual's ideas and interests to be represented politically, their physical presence may not be essential. Rather a competent representative might more effectively convey and defend these ideas and interests. Conversely, mere physical presence does not in all cases guarantee political presence.<sup>13</sup>

Nadia Urbanati (2000) underscores this latter point. She highlights that many citizens in Athenian democracy—which is frequently held as an exemplar of a participatory system—were

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<sup>12</sup> Possible alternate mechanisms of accountability include, exit, oversight, deliberation, and voice. Some of these options may not be available to citizens of states, but may apply to voluntary or semi-voluntary organizations. See Urbanati and Warren (2008).

<sup>13</sup> Anne Phillips (1995) raises the question of whether physical presence is a necessary condition for effective political presence. She argues that the presence of historically disadvantaged groups in legislatures increases their legitimacy as well as opens up political discourse to new and possibly transformative policy ideas. Phillips's argument is important but tangential to the discussion here as her argument is explicitly framed around questions of representation and how best to ensure that historically marginalized groups are incorporated in representative bodies. This further illustrates the idea that exclusion rather than participation is the most accurate contrast to representation.

passive. They did not speak in the assembly but merely listened and voted. In contrast, a few citizens regularly addressed their fellow citizens and in doing so presented ideas and promoted the interests of *some* citizens. However, there was nothing that assured that all groups of citizens had willing and skillful orators to express their views and ideas. Turning to the thoughts of Rousseau—a second inspiration for participatory democrats—Urbanati finds presence but little real participation by citizens. This is because Rousseau did not want deliberation and interaction among citizens to influence their judgment when casting votes in the assembly. Public deliberation, to Rousseau, would fragment the general will and expose citizens to the influence of particular interests that would make it hard for them to cast votes with regard to the common good. For Urbanati, extensive deliberation with the inclusion of multiple and conflicting ideas and interests affords the locus for political action within representative systems thereby accounting for their attractiveness. Thus in two of the primary sources of inspiration for participatory theorists, Urbanati, like Plotke, finds that extensive physical presence co-exists with limited political presence.

It may seem as though I have strayed some distance from the discussion of American labor law. That appearance is misleading. The formation of unions provides an avenue for the inclusion of workers in decision-making, primarily in the workplace, but also in the wider political realm. Thus, if representation is the converse of exclusion, unions are a plausible mechanism through which to include workers in decision-making processes, thereby advancing their interests. On this point I concur with participatory democrats who argue that real democracy requires the expansion of democratic decision-making beyond the immediate sphere of the state. I further agree with them that democratic processes in the workplace can serve to strengthen workers' presence in political democracy.

Once unions have formed, it is of course crucial that as organizations they operate democratically in ways that are inclusive of the various ideas and interests of all their members. After all, the inclusion that a collective representative provides workers would be vitiated if workers were excluded from, and did not participate in, the process of first authorizing and then subsequently holding their representatives to account. However, I do not see any reason why these aims cannot be achieved through a system of representation.

On a conventional reading of democratic theory it might seem as though the position I'm advocating is confused. After all, participatory democrats tend to present "realists" like Schumpeter as defending a narrow conception of representative government. Indeed, Schumpeter explicitly sought to restrict the domain of democratic decision-making to the political sphere and to resist, thereby, the notion that it might infiltrate the sphere of industry. But simply because Schumpeter would not extend his realist view of democracy to the workplace does not prevent those who advocate workplace democracy from endorsing representative arrangements in that domain. Dewey (1927), for instance, both insists on the representative character of all government, and maintains that democratic arrangements be extended beyond the narrow "political" sphere. As I said in the last chapter, advocates of unions as the harbingers of industrial democracy cannot simply assume that unions operate democratically. Rather, they must also advocate for mechanisms necessary to ensure that unions operate as organizations to further the interests of their members. However, this need not lead to the conclusion that unions as organizations must embody the ideals of participatory democracy, as I will suggest in my concluding chapter. An adequate representative system within unions can facilitate such an outcome.

**Participation as Education—A Brief Digression:** So far I have addressed questions of participation and representation as they pertain to concerns about exclusion and inclusion, suggesting that representation does not lead to exclusion but rather holds potential for inclusion. Participatory democrats might still object that in large measure their call for increased participation is predicated on the belief that active engagement in decision-making serves an educative role.<sup>14</sup> This argument has two related strands, first that through participation citizens (or workers) gain civic skills and become familiar with democratic procedures. And second, participatory theorists contend that participation allows individuals to discover and recognize their common interests. This view of participatory democracy as “self-development” potentially raises concerns about representation that differ from those that I addressed earlier concerning the effective inclusion of citizens’ ideas and protection of their interests.

When considering the argument that participation has an educative effect, two important questions arise for the argument at hand here. First, is there persuasive evidence that participation in the workplace actually has the educative effects that participatory democrats claim? Second, do the theoretical sources that participatory democrats invoke actually sustain their skepticism regarding representative arrangements? On the first point, I will suggest that the existing empirical literature is at best ambiguous. On the second, I will argue that the answer is “no.”

**Empirical tests of participatory claims—equivocal findings:** Empirical researchers attempting to assess the impact of participation in workplace decision-making face considerable difficulty first in measuring and assessing changes in workers psychology, attitudes, and skills

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<sup>14</sup> Pateman (1970) argues, for example, that “the major function of participation in the theory of participatory democracy is therefore an educative one, educative in the very widest sense, including the psychological aspect and the gaining of practice in democratic skills and procedures” (42). Bachrach (1992) suggests that “democratic participation with others can be expected to lead to revised understandings of the participant’s capacities and resources, leading in turn to new conceptualizations of their individual and collective self-interest” (29).

and then in attributing any change in those measures to workplace participation. That is not to say that participation does not enhance political efficacy and develop citizens character, just that it is exceedingly hard to empirically demonstrate these effects. As Mansbridge (1999) argues,

when so many thoughtful observers of the political scene from Tocqueville to the present, have concluded . . . that active participation in democratic decisionmaking changes the character of the participants, it would be foolish to dismiss this claim without evidence to the contrary. However, because of the difficulty in designing major empirical studies of the phenomenon, we are not likely to produce highly persuasive positive or negative evidence in the near future. (319)

The contradictory findings of the relatively few studies that do examine the impact of workplace participation underline Mansbridge's skepticism. The studies taken as a whole lack consistency in what counts as workplace participation, and differ considerably on how they measure and assess changes in workers' attitudes and psychology. Frequently, rather than attempting to assess the educational effects of workplace participation, researchers turn to behavioral measures (such as voting, participating in political meetings, or writing letters to elected officials) that may or may not indicate educational development as indicators of the effect of workplace participation.

In early research on the participatory hypothesis, Greenberg (1981, 1986) studied workers (who enjoyed considerable participation in workplace decisions) in worker-owned plywood cooperatives and found that their level of political efficacy did not differ from similar workers in traditionally-managed firms. Considering behavioral measures, the co-op workers were no more likely to vote than their counterparts in traditionally -managed firms; however, they did demonstrate higher levels of participation in local politics and political activity beyond voting such as attending meetings and writing to political officials. With respect to the hypothesis that participation engenders concern for the common good, Greenberg, to the contrary, found that the workers in the co-ops did not demonstrate greater levels of "public-spiritedness" or concern for the "commonwealth." In fact, they were more likely to express individualistic and self-interested

values than those in traditional firms. This, along with the fact that the most politically active members of the cooperatives were those with “predominantly pecuniary ties” to the co-op led Greenberg to conclude that “the participation encouraged by the experience of industrial democracy in the cooperatives is motivated less by public-spiritedness than the pursuit, for better or worse, of self-interest” (1981, 979).

Contrary to Greenberg, Elden (1981) who studied workers in a paper manufacturing plant where managers had introduced a participatory workplace structure based on “semi-autonomous self managing work groups,” found a positive correlation between workers’ sense of autonomy and control at work and their level of political efficacy. Elden is careful to state, however, that his finding is a simple correlation and thus postulates that the causation could go the other way. Those workers with higher levels of efficacy may have responded more positively to the new workplace structure. These two early works are symptomatic of later studies in that their findings are somewhat contradictory. Moreover, they do not really measure the “educative” role of workplace participation; rather, they measure its effect on political efficacy and most particularly assess its impact on political participation.

In later work, Sobel (1993) finds that levels of workplace participation are correlated with citizens’ political participation, and that more formal workplace participation translates into more formal political participation. Essentially, Sobel’s claim is that those with authority at work are more likely to vote, while those who have control over their own job but not over the work of others are more likely to participate in political campaigns. Greenberg, Grunberg, and Daniel (1996) argue that the type of workplace participation—whether direct face to face, or indirect through representatives—affects workers’ sense of personal mastery (control over their environment), which in turn influences their sense of political efficacy and participation. Here

the researchers found that direct participation enhanced self mastery and thus political participation, while indirect forms did not. Greenberg, Grunberg, and Daniel further conclude that the efficacy of workplace participation was likely to have an effect on the “spillover” to political participation; if workers did not feel that their workplace participation mattered in the firm’s decision-making, they were less likely to participate politically.

The most recent study on the effects of workplace participation on political participation points to weaknesses in earlier work—particularly that researchers have not been consistent in categorizing and specifying what is meant by workplace participation and that prior studies have used only cross-sectional designs that may not adequately uncover causal relationships (Adman 2008). Using panel data that includes workers with various levels of workplace participation and authority (measured by the extent of workers’ control over their job, and the amount of face to face interaction with fellow workers), Adaman (2008) finds no significant relationship between workplace and political participation. However, he does conjecture that his study was conducted using data from Sweden, where economic and political inequalities are less than in the U.S. and where experiments with industrial democracy are more common. Thus the impact of workplace participation Adaman speculates may be more pronounced in the U.S. setting.

On that note, other researchers have posited that the broader context may diminish the “spillover” effects of workplace participation. Some argue that a more comprehensive participatory environment is necessary for the educative effect of workplace participation to impact workers’ public-spirited or socially-oriented world view in light of the dominance of liberal individual values in contemporary society (Bachrach 1992, 128-158; Greenberg 1986, chap. 8), while Schweizer (1995) explains the lack of empirical findings from a theoretical perspective, suggesting that it is unlikely that participatory democracy at work will encourage

political participation in representative systems. On the contrary, Schweizer argues that empowerment at work will only serve to undermine workers' disaffection from a representative political system in which they can only indirectly participate. While Schweizer's reflections are inspired by empirical studies, he offers no empirical verification for his argument. Instead, his ideas are rooted in the contrasting theories of participatory and representative democracy, a topic to which I turn shortly.

As this brief review of studies suggests, it is hard to find definitive empirical evidence that unambiguously either supports or refutes the hypothesis that workplace participation "educates" workers so that they become more active and public-spirited citizens. Empirically the question is complex, and vexed with problems over the measurement and authenticity of workplace participation as an explanatory variable, as well as with difficulties in assessing changes in workers' psychology and political attitudes beyond voting and other observable measures of participation. For present purposes, it is interesting to note that none of the studies assessing the impact of workplace participation explicitly distinguishes union and non-union workers. However, a number of researchers have found that union members participate politically at higher levels than similarly situated non-members (Freeman 2003; Leighley and Nagler 2007; Radcliffe 2001). Of course, this is not to say that union members provide evidence for the claims of participatory democrats, as it is unclear that their higher aggregate levels of political engagement are due to workplace participation. Rather, they may be due to union mobilization efforts and/or participation within the union outside of the workplace. Further, such increased participation does not indicate that union members have higher levels of political efficacy or that they have been educated such that they are more public regarding and less self interested. What it does indicate is that if increased participation in national politics is a key concern of participatory

democrats, then it is as likely to be accomplished through unions and collective workplace representation as it is through other more direct forms of workplace participation.

**A skeptical view of the theoretical roots of participatory democracy:** If the empirical evidence for the educative effect of workplace participation is inconclusive, are there convincing theoretical arguments that participatory democracy in the workplace is preferable to representation when considering educative effects? Here again the case for direct participation is at best equivocal. While many participatory democrats profess finding inspiration in the work of Rousseau, Mansbridge (1999) argues that Rousseau never claims that participating with others in decision-making leads to individual self-development and increases citizens' concern for the public good. Rather, she suggests that it is the act of "willing the common good" when making decisions for the community that in Rousseau's account brings about an "inner transformation" in citizens. As I mentioned earlier, Rousseau explicitly discourages deliberation or interaction between citizens in the assembly as he believes such exchanges would admit the corrupting influences of factions and particular interests. Thus, for Rousseau, each individual ideally should formulate decisions about the common good in isolation from the influence of others. While there is no doubt that Rousseau sees the shift from the state of nature to civil society as one that develops individuals, allowing them to move from a life based on instinct and impulse to one where behavior is governed by reason and justice, he seems not to attribute this developmental impact of civil society to participation with others.

The view of participatory democracy as self-development also draws quite heavily, especially in the case of Pateman, on the work of J.S. Mill. There is no doubt that Mill believes the development and education of citizens is a crucial function of good governance. However, it is less clear whether Mill believes that this educational effect cannot be achieved by

representative systems of government, or that he believes—as participatory theorists insist—that education is the primary function of government. Mill’s main writing on the role of government in the development of citizens is in his text *Considerations on Representative Government*, which, as the title suggests, argues for a representative system of government. The best government for Mill is one in which those with the most education wield the most power, even as it offers all citizens opportunities to participate and, in so doing, putatively enlarges their worldview and intellect. As Pateman (1970) points out, Mill saw a role for the development of lesser-educated citizens through participation in local government, and in his later works, through governance of the workplace. However, this local level government also comes in *representative* form, as Pateman herself writes:

For Mill, it is at the local level where the real educative effect of participation occurs, where not only do the issues dealt with directly affect the individual and his everyday life but where he also stands a good chance of, himself, *being elected to serve on a local body*. . . . In his later work Mill came to see industry as another area where the individual could gain experience in the management of collective affairs, just as he could in local government. (Pateman 1970, 31; emphasis added)

Thus it seems that while Mill is surely an advocate of participation in decision-making (including in the workplace) as a way to enhance citizens’ intellect and morals, a representative system is sufficient, if not ideal, for such purposes.<sup>15</sup>

It is apparent that Mill thought the opportunity to hold office would offer greater educational benefits than electing representatives, as *active* decision making is more demanding than *thinking* or *speaking*, the common ways for citizens to participate in representative systems. Mill writes of citizens holding local office: “In these positions they have to act for public

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<sup>15</sup> Mill is quite clear, too, that the representative assembly should exercise neither legislative nor executive power—the primary role of the representative assembly is to deliberate about the public’s concerns and how legislative proposals address them, as well as with regard to who should be appointed to executive positions and how effectively they perform once appointed. See Mill ([1896] 1991, chap. 5 “On The Proper Functions of Representative Bodies).

interests, as well as to think and speak, and the thinking cannot all be done by proxy” ([1861] 1991, 289). However, when discussing the extent of the franchise, Mill makes clear that the right to participate in selecting representatives and holding them to account has considerable educative effects:

Among the foremost benefits of free government is that education of the intelligence and of the sentiments which is carried down to the lowest ranks of the people when called upon to take a part in acts which directly affect the interests of their country. . . . People think it fanciful to expect so much from what seems so slight a cause—to recognize a potent instrument of mental improvement in the exercise of political franchises by manual laborers. Yet, unless substantial mental cultivation in the mass of mankind is mere vision, this is the road by which it must come. (Mill [1896] 1991, 170)

Mill believes that those who are awarded the franchise become more attentive to current affairs and political deliberation in ways that those who cannot vote do not. Thus their ability to cast a vote encourages the development of individuals through political discussion and exposure to new ideas, and because it requires them to think about how events will affect their own interests, as well as those of the wider community. So for Mill, even though all citizens cannot hold office and engage in decision-making directly, representative forms of government provide significant educational benefits.

Mill is clear that the education of citizens is one of two crucial tasks of effective government. However, the other function of government, which is the management of the public’s affairs in the best possible manner given the current moral and intellectual attainment of citizens, seems primary. Mill asserts that if government institutions are not organized and structured so that they perform their direct task well, then the indirect function of educating citizens will suffer:

Government is at once a great influence acting on the human mind, and a set of organized arrangements for public business: in the first capacity its beneficial action is chiefly indirect, but not therefore less vital, while its mischievous action may be direct. . . . The institutions which insure the best management of public affairs practicable in the existing

state of cultivation, tend by this alone to farther improvement of the state. . . . Nor is there any mode in which political institutions can contribute more effectually to the improvement of the people than by doing their direct work well. And reversely, if the machinery is so badly constructed that they do their own particular business ill, the effect is felt in a thousand ways in lowering the intelligence and activity of the people. ([1896, 1991, 44)

Here Mill unambiguously states that even though he views the education of citizens as a crucial task of government, that task is parasitic on the primary function of government, which is the effective management of the public's business.

John Dewey is often another source of inspiration for participatory democrats. But, like Rousseau and Mill, he offers little that would challenge the claim that industrial democracy consists precisely in the effective extension of representative arrangements to the workplace. This is despite the fact that Dewey clearly values both participation and the educative nature of democratic decision-making for citizens. As I mentioned earlier, Dewey believed all forms of government were representative. In fact he asserts that "all governments are representative in that they purport to stand for the interests which a public has in the behavior of individuals and groups" ([1927] 1954, 76). That interests, not individuals, are what Dewey claims are represented is crucial to note here. This is because, while Dewey believed holding public office and participating in public affairs (through such things as voting and public debate) might educate citizens and help them to recognize their common interests, he did not believe democratic participation would be transformative. Participation in public affairs for Dewey does not educate individuals to the point where they transcend their self-interested behavior and act only in ways that are in the public interest. Instead, Dewey insists that citizens' casting votes and

being public office holders are both subject to a “dual capacity,” or the conflicting pressures of acting in their own self interest, as well as with concern for the interests of the public.<sup>16</sup>

That Dewey thought participation was important—even crucial—to democracy is clear. However, to a great extent he saw participation as that process through which individuals would engage in inquiry and discussion about the interests they shared. The recognition on the part of groups and individuals of how the acts of others affected their interests and impacted their lives was a crucial aspect of democracy for Dewey. It was with such recognition that Dewey claimed “the public” came into being. However, the public in a democracy, for Dewey, did not have to act directly on its own behalf, but rather would delegate authority to representatives: “This public is organized and made effective by means of representatives who as guardians of custom, as legislators, as executives, judges etc. care for its especial interests by methods intended to regulate the conjoint actions of individuals and groups” (Dewey, [1927] 1954, 35). That Dewey believes the “public” acts through representatives does not mean he believes that the public is not participatory. To the contrary, public participation is vital for democracy.

Dewey’s skepticism about the transformative impact of democracy and his recognition that public officials operate as both self-interested individuals and officers of the public trust led him to highlight the importance of ensuring that the public had adequate means to monitor public officials and hold them to account. Indeed, he argues that

the essential problem of government thus reduces itself to this: What arrangements will prevent rulers from advancing their own interests at the expense of the ruled? Or, in positive terms, by what political means shall the interests of the governors be identified with those of the governed? (Dewey [1927] 1954, 76)

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<sup>16</sup> The tension between personal and public interest that citizens and elected officials face when making political decisions is a theme that runs throughout Dewey’s work (Dewey, [1927], 1954, 15-16, 18-19, 32, 67-68). How to reconcile these competing motivations is one of his primary concerns: “Every officer of the public, whether he represents it as a voter or as a stated official, has a dual capacity. From this fact the most serious problem of government arises” ([1927] 1954, 76).

Dewey does not provide a definitive answer to the question he poses. However, he does emphasize that communication of ideas and discussion of political issues among members of the public is a vital aspect of ensuring that they have the information and education necessary to ensure that government operates to advance their common interests. This ongoing communication that Dewey proposes might take place within groups and locations beyond the political sphere—such as the workplace—is the participatory engagement that his vision of democracy requires.<sup>17</sup>

That Dewey advocates that members of the public form groups that help them recognize and protect their shared interests would lead him to endorse the formation of unions to represent the shared interests of workers. His view that all government is representative no doubt extends to the governance of citizen groups. Thus he would not object to workplace democracy taking a representative form. However, he cautions that without proper representative institutions and the vigilance of the public in holding them to account, office-holders would retain their self-interested concerns rather than becoming purely public regarding. This underscores my earlier contention that while unions can enhance representative democracy and increase the

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<sup>17</sup> Dewey specifically addresses the question of workplace governance as a response to questions of socialism. Here, too, he stresses the importance of ensuring that those to whom authority is delegated are held to account in ways that incline them toward acting in the public interest: “One often hears it said by socialists justly impatient with the present economic regime that ‘industry should be taken out of private hands.’ One recognizes what they intend: that it should cease to be regulated by desire for private profit and should function for the benefit of producers and consumers, instead of being side-tracked to the advantage of financiers and stock-holders. But one wonders whether those who readily utter this saying have asked themselves into whose hands industry is to pass? Into those of the public? But alas, the public has no hands except those of individual human beings. The essential problem is that of transforming the action of such hands so that it will be animated by regard for social ends. There is no magic by which this can be accomplished. The same causes which have led men to utilize concentrated power to serve private purposes will continue to act to induce men to employ concentrated economic power in behalf of non-public aims” (Dewey [1927] 1954, 81). In later work, Dewey advocates “cooperative control” of industry as the way to revitalize and realize the potential of liberal ideas. Subjecting economic power to democratic decision-making and social control was for Dewey a path to ensuring the liberty of individuals in a way that realized their full potential (Dewey[1935] 2001, 59; chap. 3). The idea that industry should be subject to democratic control, does not negate my earlier claim that a representative form of workplace governance is endorsed by Dewey’s writings. However it does indicate that his notion of democracy in the workplace extends beyond the power that unions currently command.

participation of workers, it is essential that their internal governance embodies democratic arrangements so that workers are able to effectively hold their representatives to account. Once again this raises the question of what kinds of institutions and mechanisms democratic representation requires.

### **Representation Requires Voting and Arguing**

In many respects, to suggest that representative democracy requires not simply a system of voting but a period of discussion or argument prior to the vote seems commonplace. Yet it is not unusual for popular evaluations of the legitimacy of democratic governance to focus primarily on whether the voting process, the means through which citizens register their preferences, is free and fair. The way that preferences are formed often receives limited attention, perhaps because it does not provide the same kind of focal point as voting. This has certainly been the case when considering the most recent disputes related to the formation of labor unions that have focused almost exclusively on the method of balloting.

Among democratic theorists, dissatisfaction with competitive conceptions of democracy focused on elections prompted the rise of alternative theories that emphasized political deliberation. In fact, a common rift among contemporary democratic theorists is between those who adhere to the social choice or aggregative tradition and those who champion deliberative democracy. In simple terms, those in the former camp focus primarily on the *aggregation* of preferences and seek to determine the optimal way to count votes in various contexts. In contrast, advocates of deliberative democracy stress the process of preference *formation* and transformation; thus their endeavor is to outline circumstances and conditions that enhance discussion about political issues.

Despite their different perspectives, many adherents of both of these approaches share the view that the aim of democracy is to uncover the “general will” or common good. As I stated

earlier, I reject this view of democracy, arguing instead that democracy is best understood as a means to derive collective decisions and to coordinate social action in ways that minimize domination and abuse of power. Despite my disagreement over the ultimate aims of democracy, I nevertheless believe that theorists working in both the social choice and deliberative frameworks offer useful and complimentary ideas for thinking about democracy and representation. Happily, democratic theorists are coming to recognize that the contributions of theorists working within both the aggregative and deliberative frameworks are best viewed in combination when considering practical, rather than ideal, political situations.

The problems of democracy that social choice theorists highlight—namely that any aggregative rule is potentially subject to instability and ambiguity (Arrow 1951, Riker 1982)—lead them to advocate a vision of democracy that makes competition between elites central. For them, participation on the part of citizens should be minimal, restricted mainly to casting a ballot to indicate whether to retain current elites in office or reject them in favor of their competitors. Of course, as I suggested earlier, this view, typified by the work of Schumpeter (1942), if taken seriously is not as “minimalist” as either its proponents or critics suggest. Nevertheless, critiques of this “minimalist” view offered by advocates of participatory democracy, namely that it offers inadequate opportunity for citizen participation, have merit. It is a critique that is taken up by deliberative democrats, who suggest that given the right conditions citizens can actively discuss public issues and arrive at consensus decisions (Cohen 1997, Guttman and Thompson 1996, Fishkin 1995). In adopting this view, deliberative democrats demote voting to an action indicating failure, one to be taken as a last resort if agreement cannot be reached. They also suggest that democracy focused on electoral competition lacks legitimacy because it coerces a

losing minority to accept decisions of the majority, and encourages a politics based on self-interest and bargaining rather than the public good.

Originally articulated as a counter to what its proponents perceived as an impoverished view of democracy, deliberative theory has developed into a robust area of scholarship with many internal divisions.<sup>18</sup> Despite disagreements among themselves, deliberative democrats all adhere to roughly the same vision of democracy. They emphasize public discussion of political issues with a view to reaching an outcome, or common good, predicated on agreement forged by participants providing “reasonable” justifications for their particular positions in ways that others might find convincing. In its original formulation this concept of democracy rejected the view that democracy is a mechanism for reaching agreement in the face of citizens divergent preferences, suggesting instead that through “public reasoning” citizens preferences can be shaped, and arguments can be marshaled so that consensus on a unique outcome can be reached. In short democratic theorists originally formulated deliberative democracy as an alternative to, and response to the failures of, the aggregative tradition (Mansbridge et al. 2010). They advocated replacement of a “market” view of democracy based on competition, bargaining, and self interest with one based on the “forum” characterized by rationality, reasoning, and the common good.<sup>19</sup> As advocates of deliberative democracy have developed their theory, however, they have come to moderate some of their opposition to the aggregative tradition and are recognizing the complementary nature of the two approaches (Bohman 1998).

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<sup>18</sup> For comprehensive review essays regarding the development of deliberative democracy including outlines of the major points of contention among theorists, see (Bohman 1998, Freeman 2000, Mansbridge et al. 2010). For a review of literature regarding the application of deliberative democratic theory, see (Chambers 2003).

<sup>19</sup> The terms “market” and “forum” are used in an essay by Jon Elster (1986) that provides a more thorough analysis of the differences in the two approaches. As Fung and Cohen (2004) articulate, “The ambitious aim of a deliberative democracy, in short, is to shift from bargaining, interest aggregation, and power to the common reason of equal citizens as a dominant force in democratic life.”

One factor that has facilitated this conciliation is that many deliberative theorists have relaxed their view that public debate should lead to consensus and are more inclined to view public discussion as a way to enhance, rather than replace, collective decision making through voting (Bohman 1998, Mansbridge et al. 2010).<sup>20</sup> Public debate prior to voting allows citizens to share information, helps them form and/or transform their preferences, enhances awareness among citizens of the effects and anticipated consequences of competing courses of action for diverse groups, and helps clarify and structure the issues at hand.<sup>21</sup> On this last point, the process of discussion, in clarifying the dimensions of dispute has been theorized to mitigate some of the problems of instability and ambiguity in voting mechanisms that social choice theorists illustrated (Dryzek and List 2003; Knight and Johnson 1994; Miller 1992; Riker 1982), an idea that has recently received some limited empirical verification (Farrar et al. 2010).

Another reason that some deliberative democrats are finding more common ground with social choice theorists is that they have relaxed their ideas about what democratic discussion entails. Considerable differences exist among deliberative democrats regarding precisely what constitutes “public reason,” especially with respect to the kinds of explanations participants can put forward to justify their positions in deliberative settings (Freeman 2000, 393-411). Initially, deliberative theorists viewed as legitimate only reasons with which others could agree, or at least recognize as valid, and found any reasons based on self-interest to be lacking. This position was predicated on the ideal that, when deliberating, citizens should be oriented toward the common good and thus offer justifications for collective decisions based on their judgment of what was

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<sup>20</sup> The extent to which deliberative theorists were, and remain, committed to the view that legitimate democratic decisions require consensus reached through deliberation varies—as does the degree to which they accept alternative institutions as complimentary to deliberation. While I acknowledge these differences I do not dwell on them here as they are tangential to my argument; Bohman (1998) and Mansbridge et al. (2010) provide more nuanced accounts.

<sup>21</sup> There is a growing theoretical and empirical literature on how deliberative process impacts democratic decision making processes; for a review essays see (Delli Carpini, Cook, and Jacobs 2004; Mutz 2008; Thompson 2008).

good for the whole. This view is in stark contrast to aggregative views of democracy that use individuals' preferences rather than judgments to reach decisions, or pluralist views of democracy that regard democracy as a procedural mechanism for managing conflict between competing visions of the common good. However, as deliberative theory has matured (and in response to significant criticism), deliberative democrats are increasingly willing to see self-interested justifications as not only acceptable, but also helpful in deliberative settings (Mansbridge et al. 2010). Thus on these two important points the deliberative and aggregative traditions are starting to be seen as symbiotic rather than antagonistic.

A further point on which the two approaches converge concerns the conditions necessary to make democratic decisions legitimate. Deliberative democrats and those working in the aggregative tradition all insist that citizens must enjoy basic political rights, including such things as universal franchise; equal rights to hold political office; freedom of speech, of association, of assembly, and of the press. Proponents of deliberation further insist that in the ideal case, all those whose interests will be affected by a decision have an equal opportunity to participate in making the decision and that participants are free of any coercive power. The absence of undue power or coercion is essential to legitimate deliberation because it ensures that participants can express and formulate their own preferences rather than adapt their preferences to placate those with power and influence over them. These requirements mirror those that demand equally weighted votes and an absence of vote buying (or similar coercive practices) in aggregative processes. They cohere with the demand that democratic institutions should aim to minimize domination, as previously outlined.

A major contribution of deliberative theory is that it has drawn attention to the fact that the mere registering of preferences through voting, no matter how closely the process approaches

ideal conditions, is insufficient for legitimate democracy. Instead, appropriate attention must also be directed to the ways in which preferences are formed. As theorists begin to make accommodations between the two approaches to democracy and determine how deliberation can enhance aggregative processes, they come closer to historical and commonplace thinking about democracy and representative government.

In fact, prominent figures in the history of American political thought regularly characterize the U.S. as a representative democracy. As such, they see it as comprised of at least two essential components, voting and arguing (aggregation and deliberation).<sup>22</sup> James Madison promoted the Constitution in *Federalist*, No. 10, because it proposed “a republic, by which I mean a government in which a scheme of representation takes place.” He did so at least in part because such a scheme “would refine and enlarge the public views by passing them through the medium of a chosen body of citizens” (Madison, Hamilton, and Jay [1788] 1987, 126).

Representation, for Madison, was desirable because it facilitated discussion and argument. It should be noted that Madison advocated a much more limited franchise that was exclusionary in ways that we would now find unacceptable. In that sense, the political dialogue he imagined was between elites of roughly equal status. This does not undermine the general point that public debate is an integral feature of legitimate democratic governance; it merely challenges us to find appropriate institutions to incorporate such dialogue, given our expanded franchise.

John Dewey is another American democratic theorist who both insisted that all government is representative, as I noted earlier, and who emphasizes the importance of political argument to representative democracy: “The ballot is, as is often said, a substitute for bullets. But

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<sup>22</sup>In this sense they mirror broader themes in political theory. Hence, Bernard Manin, counts the “trial of debate” as an essential feature of all representative forms of government, insisting that “there is no doubt that, from the origins of representative government, the idea of representation was associated with discussion” (1997, 184).

what is more significant is that counting of heads compels prior recourse to methods of discussion, consultation and persuasion while the essence of appeal to force is to cut short such methods” (Dewey [1927] 1954, 207). Dewey, unlike Madison, advocated deep and expensive popular participation. Despite this difference, the commonalities between them illustrate a crucial continuity in thinking about democracy in America.

### **Summary**

One of my primary objections to contemporary and historical debates about labor law is that participants on all sides have invoked the ideal of democracy without specifying what they believe it entails. This failure has meant that American unions have been vulnerable to claims that they lack democratic bona fides. Corporate critics have depicted union leaders as coercive and authoritarian, while more sympathetic detractors from the left have decried them as insufficiently participatory. In this chapter I have sketched out a conception of democracy that, in subsequent chapters, I will rely on to assess and evaluate both current labor law and proposals to amend it. To do so, I have addressed just some of the major points of contention among theorists about just what democracy demands. In providing such a sketch I have no doubt glossed over nuances and omitted finer details of what, after all, are complex theoretical arguments in order to focus on questions most relevant to the task at hand. My aim was not to settle controversies among theorists; instead, I sought solely to use their ideas and insights to clarify discussions about democracy in the workplace.

The conception of democracy that I have outlined suggests that in the ideal, democratic institutions should seek not to determine a unique “common good,” but rather to ensure as far as possible that individuals can pursue their interests free from the dominating force of others. To facilitate the realization of this ideal, I endorse a system of representation that aims to include and give political voice to the ideas and interests of all relevant parties to collective decisions.

Such a system does not foreclose participation, as some argue, even though it does not insist upon the direct participation of all. Representation nevertheless permits broad and active engagement, first in processes that authorize representatives to promote and protect the interests of those represented, and subsequently, in procedures that hold representatives accountable for their actions.

Each of these elements of representation requires opportunities for public discussion to enable those who will be represented to discern and debate their collective interests. And given that such discussion is unlikely to result in consensus, each also requires a method of voting to settle disagreements. While representative democracy requires both arguing and voting, as I made clear, it does not entail any specific institutional arrangement. What is important is that in any given context the institutions that structure collective decision-making seek to minimize the possibility for some individuals or groups to dominate others. Of course, it is unlikely that institutions can fully embody the ideal of non-domination, so the question for legislators and policy makers becomes one of what kinds of institutional arrangements best approximate the ideal in any given context.

## CHAPTER 4 AMALGAMATING THE UNION

*Before the union did appear, My life was half as clear, Now I've got the power, To the working hour, And every other day of the year. . . . Oh you don't get me I'm part of the union.*

—The Strawbs (1973) adapted from Woody Guthrie's Union Maid

Woody Guthrie's famous lyric, "Oh, you can't scare me, I'm sticking to the union," captures succinctly the way unions serve as organizations of countervailing power. As such, they can be legitimized in a democracy that seeks to promote citizens, freedom from domination. From this perspective, unions serve two purposes. They both equalize power in the workplace and thereby protect their members from the arbitrary power of their employers. And they act as organizations in the political arena to give voice to the concerns of workers more broadly.<sup>1</sup> These democracy-promoting qualities of unions would be undermined, however, if unions were formed or functioned (once formed) in ways that violate democratic ideals. In next two chapters I address union formation and evaluate how closely the institutions that regulate this process (as well as proposals to amend them) approximate the democratic ideals I have previously outlined. Specifically, in this chapter I explore the first stage in the process of constituting a union, that is, defining the boundaries or limits of inclusion of its future membership. This process, referred to as unit determination, addresses the question of who among workers will be amalgamated into a union for purposes of collective bargaining and representation. The next chapter will take up the subsequent concern of how those workers will decide whether in fact they wish to constitute themselves as a union and authorize collective representatives.

Democratic theorists have recently given renewed attention to the question of whether—and if so, how—entities that will operate democratically can be formed democratically. This has

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<sup>1</sup> I take up each of these issues in my concluding chapter.

come to be called the “boundary problem,” for obvious reasons. It raises the troubling question of whether the boundaries of citizenship, participation, and other rights can be established by majority rule. Previously, the issue had been marginalized, in part because it was a question that seemed to evade resolution. In addition, the widespread acceptance of representative government on the scale of nation states made the issue of democratic boundaries seem settled and secondary to concerns about how to improve the functioning of democracies within those borders. Existing national boundaries were taken as given, even though they may have been derived in less than desirable ways, when surveyed through the lens of democracy. Democratic theorists have directed renewed attention to the problem of how to constitute democratic entities democratically because of an eroding sense that nation states and traditional representative government can promote the interests of citizens and protect them from sources of domination in a world that is increasingly globalized and interdependent. Given this perceived difficulty, democratic theorists are looking to organizational structures above, below, and beyond the nation state in civil society, hoping to identify institutions that will represent citizens’ interests and promote democratic ends.

In light of this new focus and the seemingly intractable problem of democratically determining the appropriate composition of democratic entities, theorists have suggested a plethora of new criteria by which to assess whether the boundaries of organizations are democratically appropriate and suitably inclusive. Critics of unions, as I have repeatedly suggested, regularly criticized them as undemocratic. Such criticism tacitly compares them unfavorably to political entities like the nation state. However, when we assess unions against the criteria democratic theorists have come to invoke when discussing the “boundary problem,” unions and the processes used to derive them fare very well in this tacit comparison. In fact, the

way in which unions are formed according to U.S. labor law *better* approximates democratic ideals than the manner in which nation states, including the United States, developed. Indeed, the constitution of unions, which involves processes that define the future members of the group and also permits them to determine whether the group will form, could serve as a model for the origination of other democratic organizations.

This chapter will proceed in the following manner. First I more closely specify the problem that the formation of democratic boundaries presents. Next I present a number of principles and ideas that democratic theorists have suggested to circumscribe democratic entities in the face of the perceived shortcomings of procedural democracy. In the third section I briefly evaluate how closely the formation of states adheres to these suggested principles. In the fourth section I describe the process that is used to determine the boundaries of unions in the American context. The final section evaluates how closely this process approximates the principles suggested by theorists for defining borders democratically. I argue that it not only tracks the various principles quite closely but arguably does so in ways that nation states do not.

### **Who Shall Be Represented? The Nature of the Question**

In order for a group to be represented collectively and engage in collective decision-making—whether in a manner deemed democratic or not—it clearly has first to be constituted as a group. In this sense the question of how such a group is constituted is analytically prior to any method that maybe agreed upon for decision making once the group has formed. It is also a matter that is central to democratic legitimacy. As I argued previously, representation properly understood raises questions of inclusion and exclusion, rather than participation and abstention as is often portrayed. The boundaries of representative units determine who is included, whose voices can be heard, and whose interests can be protected. To be outside of the boundaries of

representation is to be excluded from decision making processes and unable to exert influence over them. While individuals within the bounds of representative entities may choose to refrain from participation, the fact that their abstention may be temporary means that it is difficult for their concerns to be completely disregarded.

Decisions about who is included and who is excluded are crucial to democratic legitimacy, not least because they are often determinative of the outcome of collective decisions. So, while questions of how groups are constituted are deceptively thorny theoretically, in practice it is a problem that leads to some of the most significant and heated political battles. For example, consider the conflict that has roiled Northern Ireland over the last century. The “Good Friday Agreement,” the treaty that quelled the troubles and devolved power to Northern Ireland, was approved by a referendum in both Northern Ireland and the Irish Republic, but not by citizens of the United Kingdom. A staunch unionist might object to these respective inclusions and exclusions for a variety of reasons; some might be motivated purely by strategic calculations about which boundaries would secure the outcome she desired, others by genuine concerns and legitimate reasoning. This of course raises the question of how to discern the difference. There are many more vexing territorial disputes that raise difficult questions about who should have standing in any democratic processes that attempts to resolve the problem. On the nation state level, the Israeli-Palestinian conflict presents a similar quandary. What is the appropriate constituency for any settlement? Would a two-state solution require independent referenda among Palestinians and Israelis, whereas a one-state solution would require a single referendum among the joint populations? The difference is perhaps subtle, but depending on the relative size of the two populations and the distribution of preferences, it could well be that the definition of the constituency would determine the outcome. Of course, the problem is especially acute

because it is not possible to rely on democratic procedures to settle the question absent a defined constituency.

Sub-national politics presents comparable concerns. If devolution of power to a region within a state is proposed, should the decision to proceed be decided by members in each of the existing entities, or only the one to which power will be devolved? Once power has been devolved, what kinds of rights and standing should members of the devolved power retain in the original entity? This is a matter that is gaining increasing attention in the United Kingdom wherein the representatives of Welsh, Scottish, and Northern Irish constituencies retain full voting rights on all matters before the Westminster Parliament. This allows them to vote on matters related to policy areas (such as education) in which power has been devolved to their national legislatures such that decisions made in Westminster no longer affect their constituents. Their colleagues representing English constituents are frequently upset by their inclusion (especially when Scots, Welsh, and Irish MP's vote against them), but as yet have not acted to formally redress the situation.

Consolidation, the reverse of devolution, presents its own boundary problems. If a small political unit wishes to be consolidated into a larger one, should approval be sought in each of the exiting jurisdictions or only among members of the unit that would be dissolved? This is a growing concern in U.S. states that have a vast number of local political jurisdictions that they would like to combine because of population loss, or to enhance efficient use of resources and avoid duplication of services. The issue of who should decide on which entities should be consolidated, and how, is not as simple as it may seem. Villages value their identities and services and do not want to be absorbed into surrounding towns and counties, while, conversely counties are loath to take on the additional costs for increased services that their new residents

may demand. Discerning the appropriate constituency to resolve these questions is a difficult, inherently political problem.

The process of redistricting in the U.S. and the all too familiar partisan gerrymander presents the same kind of boundary dilemma. A pithy statement from *The Economist* nicely captures why it is so hard to draw the line under a practice that can be decisive with respect to who is elected to the legislature and by extension what policies will be adopted: “In a normal democracy, voters choose their representatives. In America, it is rapidly becoming the other way around” (*Economist* 2002). Despite much wrangling and consternation about partisan redistricting, courts and policy makers have so far failed to come up with an alternative appropriately democratic process to derive districts.

Questions about the appropriate bounds of democratic entities involve more than disputes over territorial boundaries. Matters of inclusion and exclusion are not just geographical, but also pertain to issues about who, *within* an established geographically circumscribed polity, should have rights and standing. The historic and heroic struggles by those without property, women, and racial minorities to win the franchise exemplify this issue. While there is now a presumption that democracy entails a universal franchise, such a presumption overlooks a considerable number of categories of exclusion that persist—whether legitimate or not—in states popularly designated as democratic. All democracies have age restrictions on the franchise, many exclude felons and those deemed “mentally unfit” (however these categories are defined), some do not permit permanent residents to vote while others disenfranchise citizens living overseas (Blais, Massicote, and Yoshinks 2001). In this sense, the “boundary” problem for theorists and policy makers is to determine whether there are justifiable reasons for any of these modes of exclusion or whether they are arbitrary or prejudicial. Given that “democracies” vary considerably with

respect not only to which of these exclusions they observe, but also regarding how each of the criteria is specified, the issue becomes even thornier. Instead of being a dichotomous question, decisions about inclusion becomes a matter of degree; for example, should all non-citizen residents be excluded from the electorate or just short-term residents? Should felons be permanently disenfranchised, just for a limited time, or not at all?

The “boundary problem” is one that seems to be rapidly escaping its territorial roots. Contemporary problems of social interaction and collective existence are more and more evading the geographical confines of states designed to regulate them. Consider, for example, growing concerns about resources and the environment. Who should have a say about a proposal to build a polluting power plant solely citizens of the country in which it will be located, or should citizens of bordering states also be included? Sub-national entities do not escape the dilemma of “border crossing concerns,” something that has recently been illustrated by the BP oil spill in the Gulf of Mexico. The fact that Florida residents prohibited offshore drilling to preserve their shorelines did not protect them from the consequences of a drilling accident in a neighboring state. Should they have a right to a say in future decisions about whether drilling in the Gulf is permitted?

It might seem that concerns about inclusion and exclusion are irrelevant to organizations that have no binding control over individuals or authority over collective decisions. Nonetheless, questions of democratic legitimacy arise even in such organizations. Groups in which membership is voluntary and from which individuals can easily exit present problems about the legitimate composition of decision-making constituencies in spite of their openness. To illustrate this point, consider the AARP, an organization that purports to represent Americans over the age of fifty. In the public sphere, the AARP often “speaks” for older Americans and is presumed to

give political voice to their interests and concerns. It is surely relevant and important to the veracity of the AARP's claims to represent the views of those Americans who are retired, soon to be retired, or hoping someday to retire, to know who had input and influence over their policy positions and public statements. There are a plethora of other organizations that purport, like the AARP, to represent groups of citizens in the political sphere. In each case, the question of who is included in their decision-making processes is pertinent to the status of their representational claims.

Labor unions are organizations that have authority over their members, albeit less extensive than states, and also serve to represent their members and working class citizens in the political realm. As such they are subject to the same kinds of boundary problems as political entities more conventionally understood. In labor law the process of defining constituencies for purposes of collective bargaining is referred to as “unit determination.” It is a process that presents the same kind of practical difficulties as those outlined above with respect to determining the bounds of political jurisdictions. Historically, it was intense conflict over the structure of collective bargaining—on a craft or industrial scale—that led to the 1935 split of the Committee of Industrial Organization (CIO) from the American Federation of Labor (AFL). The former wanted to expand the scope of collective bargaining to include all employees in an industrial plant regardless of trade, skill level, or job task. The more traditional AFL wanted to maintain bargaining units based on specific crafts and specialized skills. This conflict was in part responsible for the development of the formal process of unit determination, described below, that the National Labor Relations Board (NLRB) still uses.

Apart from the matter of unit *composition*—that is, which categories of workers should be included in a collective bargaining unit—decisions about the appropriate *scope* of bargaining

units also has been subject to much historical controversy. This concern relates specifically to employers that have multiple locations or plants, for example, a steel company with multiple manufacturing sites, a retail business with multiple stores, or a hotel chain with properties in many locations. In such situations, a union could represent workers companywide, or each location could have a separate collective representative that bargains with the employer independently of the others. This is an especially troubling issue as it pulls both unions and employers in different ways for different reasons. Studies document that it is generally easier to form unions among smaller groups of workers, meaning that a collective representative for each location might be more readily formed (Farber 2001). This greater likelihood of winning representation rights in smaller units generally leads unions to favor and employers to oppose them. Conversely, once unions are formed, larger units are potentially more powerful when it comes to collective bargaining. This is especially true if they represent workers in multiple locations within a company, so that employers cannot play unionized workers in one location against non-union workers in another during negotiations. Thus, in some cases unions might prefer to organize company-wide even though it is more difficult initially, and of course most employers would resist a multi-site bargaining unit.

This kind of dilemma is illustrated by the actions of Federal Express, a company that has lobbied Congress hard to ensure that it maintains its designation as an airline. Airline employees are not covered by the NLRA but instead fall under the Railway Labor Act (RLA), a statute that regulates labor law in the transportation sector. A major reason that Federal Express lobbies to retain “airline” status is that the National Mediation Board (NMB), the agency that administers the RLA, mandates that workers organize in nationwide bargaining units (Gould 2000, 185; Civil Rights Leadership Council 2010). Unions find it difficult to organize on such a scale and, so far,

Federal Express has managed to resist organizing efforts and remain “union-free.” This is a situation that many Federal Express employees in pro-union local work places, as well as the Federal Express’s unionized competitors, lament.

The practical political problems that the task of creating boundaries democratically presents are significant. They traverse traditional political institutions as well as voluntary organizations that represent citizens in political arenas. They certainly impact the formation of labor unions. I turn now to a consideration of how political theorists have engaged these considerable concerns.

### **The Boundary Problem and Democratic Theory**

The dilemma posed by determining the limits of inclusion and exclusion for democratic systems has been referred to variously by political theorists as “the boundary problem” (Arrhenius 2007; Whelan 1983), the “problem of constituting the demos” (Goodin 2007, 1), the “unit problem,” and the “problem of inclusion” (Dahl 1989). No matter what they choose to call it, the fundamental question each theorist raises is whether there exists a democratic procedure by which boundaries for associations can initially be constructed. It turns out that this issue has been both identified as a critical question for democratic theory and one that has historically received limited attention. Robert Dahl, writing as late as 1990, wished to “call attention” to a “neglected and yet absolutely crucial problem,” namely,

If we agree that by democracy we mean in some sense “rule by the people,” we need to clarify not only what we mean by “rule” but also—and this is the aspect most overlooked—what we mean by “the people” . . . who should be entitled to participate in the government of a democratic association? (Dahl, [1970] 1990, 46)

Dahl would no doubt be heartened by the renewed attention this matter is receiving among theorists, prompted at least in part by the idea of cosmopolitan or international democracy.<sup>2</sup>

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<sup>2</sup> See, for example, Arrhenius (2007), Fung (2010), Goodin (2007), Miller (2009), and Nasstrom (2010),

It seems to me that the principle reason for the historic lack of attention to the issue is that any purely theoretical consideration of the problem does not, in colloquial terms, get you very far. If democracy is considered as a decision-making process, it seemingly cannot provide a solution to the question (Dahl, [1970] 1990, 45; Whelan 1983, 40). An aggregative view of democracy, one in which decisions are made by the agreement of some numerical majority, requires that the scope of the electorate be established in order to determine whether the threshold (be it 50% +1, or 66%, etc.) has been reached. And it is common in discussions of the “boundary problem” for theorists to assert that it is not possible to decide the scope of the electorate, or who should be entitled to vote, by taking a vote (Dahl [1970] 1990, Goodin 2007, Whelan 1983). Similarly, if one favors a participatory or deliberative view of democracy, the difficulty of who should be entitled to participate immediately pops up.

Inevitably democratic theorists exploring the “boundary problem” admit that it is a question that exposes the limits of democratic decision-making. Dahl concludes, “Having puzzled over the problem for years, with astonishingly little help from the legacy of great writings about democracy, I have become persuaded that there is no theoretical solution to the problem, only pragmatic ones” (Dahl, [1970] 1990, 45). Likewise, Frederick Whelan concludes, “Democratic theory cannot itself provide any solution to disputes that may—and historically do—arise concerning boundaries” (Whelan 1983, 40). Acknowledging this limitation of democratic theory and suggesting that the “demos” must initially be formed by a principle “outside democracy,” Robert Goodin contends that this incompleteness makes democratic theory “powerfully permissive” such that, “any group of people constituted on any basis whatsoever could constitute a perfectly proper demos for democratic purposes” (Goodin 2007, 44). This sentiment echoes that of Schumpeter, who argued that because democracy did not have the

resources to define the extent of “the people,” then it must be left to each polity to define itself (Schumpeter 1942, 245).

This standard would appear to set an extremely modest threshold for adjudicating the democratic nature of the process of forming labor unions. Yet most theorists who have addressed the topic, Schumpeter excepted, have struggled with this conclusion and grappled to find a “democratic” way to define boundaries that does not rely on democratic procedures. Dahl acknowledges that any mode of determining boundaries will be “highly disputable”; nevertheless, he specifies “other criteria” that might provide guidelines as to why one set of boundaries should be preferred to another (Dahl 1989, 207). Goodin suggests there are “principles somehow internal to the standards of democracy” that connect the “how” and “who” of democratic politics (Goodin 2007, 47). Arrhenius, in a comparable manner, argues that the solution to the “boundary problem” can be found in the “normative ideals” that motivate our preference for procedural democracy (Arrhenius 2007, 7). So what are these principles and ideals that stand as proxies for procedural democracy when delineating democracies’ edges?

The most commonly-proposed solution to the “boundary problem” is what is referred to as the “all affected interests principle” (Arrhenius 2007; Dahl 1989; Fung 2010; Goodin 2009; Miller 2009). The essential proposal here is that individuals should be able to influence decisions that affect their interests and thus all those whose interests are affected by the decisions of a democratic entity should have the right to participate in that entity. At first glance, this seems to be an attractive and straightforward basis on which to decide questions of inclusion and exclusion. However, given a little further thought it quickly presents several significant difficulties. First, there is the question of determining, on any given issue, precisely whose interests will be affected and to what extent? Interpreted broadly, the “all affected interests”

principle supports expansive and highly inclusive constituencies. Dahl, for example, suggests that because taxes go to support actions of the state, then the all affected principle means all taxpayers have an interest in any use of tax revenue. This would mean that seemingly local decisions, such as membership of a school board in New York, become open to all adult citizens on the basis that a portion of federal tax dollars (no matter how small) are distributed to New York public schools (Dahl 1989, 51). This example illustrates that the principle does not take account of the degree to which interests are affected, something Dahl finds troubling.

On a broader level, given the global power and influence of the U.S., the all affected principle would give citizens of most other nations a claim to a right to participate in U.S. elections because their interests would be affected by the outcome (Dahl, 1989, 51; Goodin 2009, 60). The same would apply to decisions made by any democratic entity that might affect the environment, or deplete natural resources, and thus impact those in other locations or succeeding generations. In instances, for example, where a decision whether to reduce green house gases by taxing fuel or carbon emissions was being made, the all affected principle justifies a global intergenerational constituency. This is because people everywhere, as well as people in the future, could plausibly be seen as being affected by the decision. Turning to organized labor, an unqualified “all affected interests” principle would support broad claims of inclusion. Imagine a union of hotel workers considering a strike to win improved pay and conditions. Any strike would surely affect the interests of holidaymakers, businessmen, and conference-goers who were planning to use the hotels facilities. On the basis of the all affected principle, they would all have a legitimate right to participate in the strike vote.

A second difficulty with the “all affected interests” principle is that it may not be possible to discern whose interests are affected until after decisions have been made. Given there are

often many laws and policies proposed as solutions to collective problems, it might not be plausible to discern whose interests are affected until it is determined which law or policy has been enacted from the available alternatives (Goodin 2009, 52; Whelan 1983, 16). Of course, this introduces circularity, as the constituency cannot be defined until after the decision is made, but the constituency must be defined in order to make the decision. To circumvent this circularity, one would have to enfranchise all those who *might* be affected by any of the possible policy outcomes.

A third objection to defining boundaries on the basis of the “all affected interests” principle is that it would inevitably lead to boundaries that shift according to the issue at hand. While some democratic theorists find no problem with this outcome, and argue that individuals are already accustomed to “a world of overlapping inclusion and membership” (Fung 2010, 27), most find it an untenable proposition that would place impossible demands on individuals who would have to track and devote time to multiple decision-making entities (Dahl 1989; Goodin 2007). A further complaint is that shifting constituencies would undermine the shared sense of community central to some conceptions of democracy (Miller 2009).

Theorists offer a plethora of possible solutions to these various objections and, in the process, have generated a growing literature on topic.<sup>3</sup> I do not evaluate this entire literature here. At one extreme, Goodin overcomes any difficulty in determining who is, or who may be, affected by a collective decision by concluding that the “all affected interests” principle understood in an expansive way means “giving virtually everyone everywhere a vote on virtually everything” (Goodin 2007, 64). While such a global solution may resolve any concerns about excluding anyone whose interests are possibly affected by a collective decision, many theorists

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<sup>3</sup> See for example, Arrhenius (2005), Fung (2010), Goodin (2007), Miller (2009), and Nasstrom (2010).

dismiss the notion as impractical (a critique Goodin himself acknowledges).<sup>4</sup> A more practical alternative that various theorists propose is to qualify “affected interests” so that only those whose “primary” or “basic” interests might be affected are included within the boundary (Arrhenius 2007, Fung 2010, Miller 2009). Of course, this qualified alternative demands some definition of “basic interests,” and given a definition of “basic interests,” some set of institutions to adjudicate who should be enfranchised based on that definition.<sup>5</sup> Nevertheless, this way of defining a constituency comports in many ways with the view of democracy, which I previously outlined, that seeks to maximize freedom from domination. It bases decisions about inclusion in a democratic entity on questions of interests and power, rather than, as is often the case, on individual characteristics or geography. That said, this shift in focus suggests that an alternative proposal for defining constituencies—one based on the “coercion principle” —more closely tracks the democratic ideal of minimizing domination.

The “coercion principle” differs from a qualified all affected principle because it recognizes the distinction between merely being “affected” by the action of some other person or group and being *compelled* to act based on the actions of others (Miller 2009, 223).<sup>6</sup> A collective decision might affect the interests of an individual by foreclosing a possible choice; in that sense it prevents an individual from acting in a way that he or she might have chosen. This is distinct

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<sup>4</sup> A further criticism of this approach is that it would serve to undermine democracy because it would dilute the anticipated influence of individuals in ways that would discourage engagement and participation. (Dahl 1989; Miller 2009).

<sup>5</sup> The concept of “basic” or “real” interests is complex and contested. I do not engage with the debate here as it is tangential to my argument but see, for example, Geuss (1981, 45-55), Lukes ([1974] 2005, 143-148), Shapiro (1999, 80-99).

<sup>6</sup> This principle seems to differ only slightly from the “all subjected” principle advanced by Fraser (2008, 65) and Nasstrom (2010), which argues that boundaries should be drawn so that those who are subjected to a system of governance are granted rights of inclusion within its boundaries. However, as Nasstrom (2010) points out, this articulation of the idea seems to be bound up with the notion of a territorial state that presumes a “boundary of law” and then justifies the inclusion of all those who fall within the bounds. For this reason, I prefer the “coercion principle”.

from coercion because, while it may limit an individual's feasible set of possible actions, it does not compel them to act in any particular way. Based on this distinction, David Miller argues that "being coerced by a demos...generate[s] a claim for inclusion that is far stronger than any claim that the affected interests principle is likely to generate" (Miller 2009, 225). This more stringent criterion allows us to discriminate between those who are merely affected by some decision and those who would be coerced by it, and thereby affords the basis for justifiably excluding the former and including the latter. This principle may not be fully consistent with the ideal of non-domination, but it coheres with the ideal nicely as the basis for drawing boundaries. Recall that the ideal of non-domination does not demand the absence of laws that compel actions, but it does mandate the absence of arbitrary power—meaning that it requires that individuals have a voice and a vote in any decision that may compel them to act.

Two further proposed solutions to the "boundary problem" have received more limited attention, perhaps because they seem to elude the dilemma more than resolve it. In an attempt to overcome resistance to his expansive view of the "all affected interests" principle, Goodin proposes another option. He suggests that we might take the boundaries of political units as given and then restrict the decision-making domain of those democratic entities to questions that affect only the interests of those who comprise the group (Goodin 2007, 62). Realizing that this might be overly constraining (to the point that it would preclude the group from making all but the most trivial decisions) he then suggests a further modification to allow groups to make decisions that affect people beyond the membership of the group, but to demand that the group compensate anyone outside the group affected by its actions (Goodin 2007,63). Thus, the "all affected interests" principle becomes the basis of claims to compensation for anyone who was affected by a decision, but who was excluded from the decision-making group. It is hard to see

how Goodin's proposal truly resolves the question of how boundaries to political units might be derived democratically. In truth, this solution takes the boundaries as given and then compensates those excluded from the decision-making process. Surely, though, democratic decision-making involves questions and concerns beyond those that can be compensated for in any material way. David Miller has a parallel, but more plausible, proposal related to his "coercion principle." Acknowledging that the "coercion principle" might define a democratic group whose actions may occasionally coerce those beyond its borders, he suggests that in such circumstances those who might be potentially coerced be given a voice in making that specific decision (Miller 2009).

Basing boundaries on the principle of consent is the second proposal that in many ways evades rather than solves the problem of delineating democratic boundaries. The idea that only consent obliges individuals to observe the decisions and laws of a democratic entity has a long tradition in political theory; it is central to contract theories, including those of Hobbes and Locke, which were influential to the American founders. However, in practice, the idea quickly runs into several problems. Taken literally, the principle of consent would mean that democratic entities would essentially become voluntary associations to which individuals could give and withdraw their consent at will; thus borders would become fluid rather than settled. In essence, any binding decision would require unanimous approval, as those who did not consent might otherwise refuse to abide by it. A further difficulty that the principle of consent raises is that it begs the question of who should be asked to consent. Thus it deflects the concern about inclusion and exclusion rather than actually addressing it. Indeed, as Frederick Whelan, writing on the "boundary problem" highlights, the traditional contract theorists—Hobbes, Locke,

Rousseau, etc.—largely evade the matter of constituency definition and presuppose the existence of a community that then constitutes itself consensually as a political entity (Whelan 1983, 19).

This brief overview does not provide a complete evaluation of the various strengths and weaknesses of the several solutions democratic theorists have proposed to the problem of defining boundaries. My agenda here is not to resolve the “boundary problem,” nor endorse any specific proposal to solve it. The crucial point that I wish to make is that the processes used for establishing the boundaries of American unions quite closely approximates *all* of the principles that democratic theorists propose in response to the larger problem of establishing the boundaries of a democratic polity. And despite the fact that unions are frequently depicted as having a democratic deficit compared to the American polity, the degree to which they satisfy those principles renders such relative assessments unfounded.

### **Considering the Boundary Problem and the Formation of States**

In some respects, the comparison I am making between the formation of states and that of unions is an unfair one. This, not least, is because no one is under the illusion that contemporary nation states, including the U.S., were derived by democratic procedures. Yet given that participants in debates about American labor law, and by extension American unions, tacitly and sometimes explicitly make precisely the comparison I am highlighting, it is useful to assess its veracity. It is also true that many of the principles theorists have invoked to resolve the “boundary problem” have been prompted by the historical development of state boundaries as well as their perceived failings. Thus it is informative to briefly explore them.

When scholars addressing the “boundary problem” turn to empirical examples of the formation of democratic states, they find a number of ways in which political boundaries have historically been delimited, none of which adhere to democratic procedures (Whelan 1983). Frequently, state borders are the result of historical conquest or colonization. Often, geographical

features such as mountains and rivers serve as focal points around which boundaries are constructed, perhaps because they form natural barriers that are easy to defend, or because they are “common knowledge” and thereby serve as coordination and communication mechanisms (Goemans 2006). In a related way, environmental features—valleys, islands, mountain ranges, lakes, and rivers—have served to keep some groups simultaneously in close physical proximity to each other and isolated from other populations. Such processes historically have led to the formation of distinct communities, cultures, and later the idea of nationality, and these in turn have been invoked as a basis upon which to establish the boundary of “the people” (Goemans 2006; Whelan 1989). Here the boundary is not simply based on territory; rather, inclusion is rooted in common ancestry and the boundary excludes anyone outside the lineage. Much less often there is some form of constitutional moment—a convention or popular referendum—that serves to initiate a democratic system of government, although importantly, such mechanisms largely presuppose rather than bring about the existence of a political group. In that sense, they rely on one of the previously-mentioned mechanisms to delineate the possible scope of inclusion; they frequently fail to include all of those who might plausibly fall within the territorial or national group.

Democratic theorists observe that factors such as territorial states and national identity capture to some degree ideals that underpin procedural democracy, and that have been suggested as principles on which to draw democratic boundaries. Nation states do, on some level, comprise communities that share interests in common, and thus approximate the “all affected interests” principle. However, actions of nation-states clearly impact people residing beyond their borders; conversely, many actions taken by states do not affect the interests of all those residing within their territorial limits. When democratic decisions of nation states do coalesce with the all

affected principle, it is more often by chance than design. It happens merely because an issue that a pre-determined polity has on its agenda is one that impacts those individuals—and only those individuals—who comprise the polity (Whelan 1983, 18).

Nation states come closer to encompassing the “coercion principle,” but again there generally remain some groups of people—minors, disenfranchised felons, resident aliens—who are clearly compelled to take actions based on a nation’s laws, but who are unable to influence their content. It should be noted that even though polities may not have initially been formed according to the all affected principle or the “coercion principle”, excluded groups within polities have subsequently used each criteria to ground their claims for inclusion.

The idea that the boundaries of political entities might approach the principle of “all affected interests” and therefore approach democratic legitimacy by restricting their decision making domain does not really pertain to the formation of states. However, it is an idea that is somewhat captured by “subsidiarity,” the concept that collective decisions ought to be handled by the smallest, lowest, or least centralized competent authority. The principle of subsidiarity has been adopted by the European Union to help maintain governmental accountability to citizens, and to constrain the power of the supra-national body. In some ways, federalism encapsulates the same kind of reasoning and reserves power to lower levels of government, which often means that decisions are taken by those most affected by them.

Turning to the principle of consent, while it is possible to imply consent from the notion of citizenship or participation in a nation-state, strictly speaking such a suggestion is appropriate only when considering naturalized citizens who consciously decide to join a political society (Whelan 1983, 26). The vast majority of citizens of nation states inherit their membership in what in essence are compulsory political associations; the idea of exit, in the form of emigration,

is for most either too costly or prohibited. So, notwithstanding the thought experiments that contract theorists fabricate, in reality the limits of political societies are generally established in ways that defy procedural democracy or any principle that has been proffered in its stead. The initial boundaries of almost all nation states are arbitrary with respect to democratic legitimacy and cannot be justified by claims to either procedural democracy (by virtue of democratic decision mechanism) or any underlying principle that embodies democratic ideals. That said, once formed, political states may—and in fact do—increase their membership and effectively “bootstrap” their way to a better approximation of democratic ideals by way of political contestation and democratic decision making.

Consider the origins of the United States. The original boundaries were arguably formed by geography and conquest, or by a war of independence. Alternatively, if one considers the ratification of the Constitution as the genesis of the modern American state, its origins reside in a convention of elite representatives of states that overstepped their authority and drafted a Constitution. The Constitution was subsequently ratified by representatives chosen from far less than the majority of the prospective citizens. The ensuing history of the U.S. entails a great deal of struggle for inclusion by groups clearly within the territorial boundary over which the United States claimed sovereignty, yet excluded from the boundaries of political society on the basis of poverty, race, or gender (Keyssar 2000). Of course this briefest of sketches omits many significant details. But it highlights that the boundaries of nation states, including the U.S., are not initially constructed democratically, though they may have some relation to and subsequently evolve to embody democratic ideals.

So, how does the process of forming the boundaries of unions (unit determination) compare? I argue that the way bargaining units are constructed, while not entirely surmounting

the “boundary problem” with which democratic theorists wrestle, more closely approximates a democratic-decision making process. Furthermore, the process by which bargaining units are determined under current American law more closely approximates those principles that theorists have identified as appropriate for delineating democratic borders than has historically been true of the formation of political states.

### **The Process of Unit Determination and the Formation of Unions**

Forming a union under U.S. labor law involves at least two distinct processes. The first employs an administrative process to define the parameters, or borders, of the group of workers who may become the union; this is referred to as unit determination. The second is to hold a plebiscite, often referred to as a representation election (or in the event that current proposals to reform labor law are accepted, an alternate decision-making process) to determine whether the group of workers so identified wish to form a union. Relying as it does on an administrative determination to define the limits of the group, this complex process does not entirely address the concerns democratic theorists have raised regarding the “boundary problem.” However, provided that both stages of the process—unit determination and the representation election—adhere to democratic principles, overall it comes close to resolving the “boundary problem” in a way that has democratic legitimacy. In the remainder of this chapter I illustrate how the process of unit determination comports with democratic principles identified by theorists as appropriate for defining boundaries. In the next chapter I will explore the procedures used to establish whether the majority of workers wish to form the union as outlined. In the next three sections, which describe the process of unit determination, I will go into what might seem to be excessive detail. My aim is to establish that I have not simply selected those aspects of the NLRB process that suit my interpretation hence I provide a relatively comprehensive overview of the unit determination process by which to assess my argument.

## **Unit Determination and the Formation of Unions—A General Overview**

Unit determination is a quite complex process that has evolved considerably as the NLRB has interpreted and implemented the National Labor Relations Act (NLRA) passed by Congress in 1935. I provide here the broad outlines of the process in three sections: a general overview, some significant historical developments, and current practices. For those who would like greater specificity, Gross (1974, 1981, 1995) as well as Abodeely (1971) provide excellent accounts of the historical development of the process while the NLRB (2008) comprehensively details current practices.

Recall from chapter 2 that the NLRA or Wagner Act provided workers with the right to organize and bargain collectively with their employer through representatives of their own choosing. The NLRB is the quasi-judicial agency established to administer the NLRA. What I describe in this section are the procedures used by the NLRB to uphold the provisions of the NLRA pertaining to the certification of unions as collective representatives of employees with whom employers are subsequently legally obliged to bargain. The description that follows does not pertain to union formation among workers who fall outside the jurisdiction of the NLRA. For example, public employees, agricultural workers, transportation sector workers, and supervisory employees all fall outside the scope of the NLRA. Finally, the process I sketch does not apply in circumstances where an employer voluntarily agrees to bargain collectively with a union representing employees.

The initial step toward gaining union certification occurs when a group of workers (or a union on their behalf) presents a petition to the NLRB that indicates their desire to be collectively represented.<sup>7</sup> The petition proposes a bargaining unit, and must include the

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<sup>7</sup> Representation petitions are submitted to regional offices of the NLRB administered by professional staff, not directly to the Board itself.

signatures of at least 30% of workers who comprise the unit, as proposed. The NLRB will then inquire whether or not the proposed unit is appropriate for collective bargaining purposes before conducting a representation election. If the union prevails in the election—that is, if a majority of workers support the union—the NLRB certifies the union as the employees’ collective representative. Prior to the holding of a representation election, the employer has an opportunity to challenge the bargaining unit proposed by the workers. If the employer does choose to challenge, the NLRB conducts a hearing in which both the employer and workers present arguments as to why their proposed unit is most appropriate. Subsequently an NLRB Regional Director evaluates the competing proposals and supporting arguments before issuing a decision regarding unit determination.<sup>8</sup> In arriving at a decision, the NLRB directors consider provisions of the NLRA, principles established by the Board to discern whether workers have a “community of interest” appropriate for collective bargaining, and decisions in prior representation cases before the Board.

It is important to note here that because of the NLRA’s stated aim to facilitate workers “self-organization” and “full freedom of association,” there is a presumption in favor of the unit the workers propose. Unless the NLRB determines, or an employer can establish convincingly why that unit is not appropriate, the NLRB then rules in favor of that unit. Sometimes employer challenges are due to genuine concerns and objections. Often, however, the challenges they raise are strategic attempts to propose an alternative bargaining unit in which the union is less likely to secure majority support. Employers also routinely challenge workers’ proposed bargaining units

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<sup>8</sup> The power to define bargaining units was delegated to NLRB Regional Directors from the Board in 1959; however, decisions may be transferred or appealed to the Board in Washington, DC, and beyond that, to Federal Circuit Courts.

simply to delay the election process in a strategic attempt to dampen enthusiasm for the union and gain time to mount an anti-union campaign (Levitt 1993).

While in the contemporary setting the most common disputes over bargaining units are between unions and employers, they also sometimes, and historically more frequently did, include contests between rival unions seeking to represent various groupings of workers at the same workplace. In such instances, the NLRB will hold a hearing and make a determination just as when an employer challenges a unit. However, if units proposed by different unions are deemed equally appropriate, the NLRB will hold a self-determination or “Globe” election, to determine the preferences of workers regarding the parameters of the bargaining unit.<sup>9</sup>

In order to better adjudicate these various disputes over the proposed boundaries of unions, the NLRB has overtime developed a detailed set of guidelines, principles, and case law to interpret and supplement the statutory requirements set out in the NLRA and subsequent amendments. The statutory requirements regarding unit determination are relatively few; thus the NLRB has considerable latitude for interpretation in implementation. Section 9(b) of the NLRA empowers the Board to “decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” (29 U.S.C. §§ 151–169).

The Taft-Hartley amendments added a number of provisions relating to unit determination. The most significant was one that prohibited the NLRB, when determining an appropriate unit, from using the extent to which workers have organized as the controlling factor. This is a little

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<sup>9</sup> “Globe” elections are named for a case, *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937), in which, finding that the factors that might allow the Board to distinguish between a petitioned-for industrial or craft unit were evenly balanced, determined that the desires of the employees should be the decisive factor.

abstract, so I will give an example. Imagine that a union proposes a bargaining unit comprised of only cashiers in a supermarket because they have majority support for collective bargaining among the cashiers, but not among workers employed as shelf stockers. The employer opposes arguing that cashiers and shelf stockers have the same terms and conditions of employment and often work as substitutes for one another. Hence, the employer claims, an appropriate unit should comprise cashiers and shelf stockers. In this hypothetical case, the NLRB would lack grounds to find the unit of cashiers appropriate, absent a reason beyond the sheer fact that the cashiers have organized themselves in support of collective bargaining.

Abodeely (1971, 5) points out this provision of the Taft-Hartley amendment arguably runs counter to the original provisions of the Wagner Act insofar as giving employees their “fullest freedom” to organize would require the NLRB to approve any unit the employees desired. But proponents of Taft-Hartley invoked yet another stated purpose of the NLRA, that is, to create stability in industrial relations, to justify the limitation. Employers and members of Congress who backed the provision argued that permitting multiple bargaining units in one workplace, purely based on how effectively unions had organized, would create difficulties and require additional time, when negotiating contracts.<sup>10</sup> Subsequent NLRB and federal court rulings have clarified the extent to which the level of existing organization among workers can be considered as a factor when determining a bargaining unit, but nevertheless insist that it may not be the sole or controlling factor.

Two other Taft-Hartley amendments germane to unit determination relate to restrictions of combinations of employees in a bargaining unit. One prohibits outright workers who are employed as guards at a workplace being combined in the same unit as other employees. The

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<sup>10</sup> Subsequent NLRB and federal court rulings have clarified that the extent of organizing can be considered one factor when determining a bargaining unit, but that it may not be the sole controlling factor.

other bars professional employees from being included in a unit with non-professionals unless the professional employees vote for inclusion. These restrictions were designed to ensure a “community of interest” was maintained among members in a bargaining unit sufficient to provide for effective bargaining. A final Taft-Hartley amendment related to defining the boundaries of proposed union bans the NLRB from denying a petition for a unit based on specific craft, simply owing to the fact that the craft employees had previously been included in a larger unit. This restriction was a response to claims by the American Federation of Labor (AFL), whose member unions organized along craft lines, that the NLRB favored the Congress of Industrial Organization (CIO), whose member unions sought to organize all workers in plants regardless of craft jurisdiction or skill level.

As should be clear, the statutory stipulations leave the NLRB considerable room for interpretation. The drafters of the NLRA were aware that they were giving the NLRB wide latitude in this regard. However, their prior experience suggested this was the right thing to do. Frances Biddle, chair of the “old NLRB” (which administered labor relations under the NIRA), when speaking about unit determination to the Senate Committee on Education and Labor stated that “to lodge this power of determining this question with the employer would invite unlimited abuse and gerrymandering and would defeat the aims of the statute...[t]o permit employees to decide the appropriate unit would defeat the practical significance of majority rule by permitting workers to splinter into small groups that could make it impossible for an employer to run his plant.” When Senator La Follette retorted that the NLRB could also do that, Biddle responded, “ou have to take a chance to an extent on your Board” (in Gross 1974, 134). La Follete’s statement is somewhat prophetic given the political wrangling that ensued over the earlier Board’s decisions.

Before I turn to a discussion about how the NLRB has interpreted the NLRA, I want to make a couple of general points that should make for easier comprehension. First, notice that the statutory requirement is simply that the proposed unit be *an* appropriate unit, not necessarily *the most* appropriate unit; thus there are often multiple plausible units that meet the legal requirements. Second, the NLRB considers the question of how a bargaining unit should be composed (the job classifications it includes) as distinct from the question of the scope of the unit (whether the unit is limited to a single location, single employer, or multi-employer). With respect to composition of a unit, it is job classifications, not individual employees, that are considered, such that the composition of a bargaining unit remains the same even as the individuals occupying the jobs with the unit may change.

### **Unit Determination and the Formation of Unions—A Little History**

In the first few years after passage of the Wagner Act, the way that the NLRB defined bargaining units was subject to much controversy, conflict, and variation. Over time, however, as successive Boards have outlined principles for guiding unit determination and precedents from prior cases have built up, the factors used by the Board to make decisions have clarified. As a result, unit determination has become more predictable.<sup>11</sup> I address the most significant early disputes in this section, and current practices in the next.<sup>12</sup>

Almost before the ink was dry on the Wagner Act, conflict emerged regarding unit determinations largely because the NLRB took seriously and prioritized the NLRA's stated purpose of equalizing power between workers and their employers to facilitate stable industrial

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<sup>11</sup> The NLRB uses adjudication rather than rule-making for unit determination in all industries except hospitals. For a discussion of the latter, see Grunewald (1991)..

<sup>12</sup> James Gross (1974; 1981; 1995) provides detailed accounts of the changing preferences of the NLRB with respect to unit determination in his trilogy of books on the development of the Board. Tomlins (1985) includes details of the early struggles between members of the NLRB and their adversaries over unit determination issues.

relations. The first Board under Chairmen Madden (1935–1940) frequently certified the largest units possible because they believed this would maximize the bargaining power of unions.<sup>13</sup> The three-member Board attracted much criticism for this practice. Employers accused the Board of favoring unions while the AFL, with its craft-based structure, claimed that the larger units (and thus the NLRB responsible for adjudicating them) favored the industrial scale of the newly formed CIO.

Dissatisfaction with the early Board about union determination, among other things, led to a Congressional investigation of Board practices conducted by the Smith Committee, under the chairmanship of Congressman Howard Smith. The recommendations of this committee resulted in the Smith Bill (1940) to amend the NLRA, which passed the House but died in the Senate Labor Committee, only to later become the basis for the 1947 Taft-Hartley legislation. The Smith Committee investigation placed substantial political pressure on the Roosevelt administration such that President Roosevelt refrained from reappointing Board members who were alleged to be biased toward unions and who often voted in favor of large industrial-scale units.<sup>14</sup> The change in the makeup of the Board led to a fundamental shift in emphasis in unit determinations so that employee self-determination was prioritized (Gross 1981; Millis and Brown 1950). This change is perhaps best illustrated by the historical course of some specific cases.

In one much cited case related to the scope of units and specifically to *multi-employer* units, *Ship Owners Association of the Pacific Coast*, 7 NLRB 1002 (1938), the NLRB initially determined a coast-wide unit including all longshoremen on the Pacific Coast to be appropriate.

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<sup>13</sup> At that time, the size of the unit did not seem to influence the ability of unions to organize workers to the same extent it does in the contemporary era when unions are more successful in organizing smaller units. See Henry Farber (2001).

<sup>14</sup> Donald Smith was replaced with William Leiserson, Chairman J Warren Madden was replaced with Chairman Harry Millis, and finally Edwin Smith was replaced with Gerard Reilly.

This meant that the CIO's International Longshoreman's and Warehouseman's Union (ILWU) was certified as the representative of all west-coast longshoreman despite the fact that workers in four ports indicated that they preferred the AFL's International Longshoreman's Association (ILA). As you might surmise, this decision was driven by Board members' desires to certify units that would leverage power most effectively in collective bargaining. Later, changes in Board personnel led to a reversal of the decision. In *Ship Owners Association of the Pacific Coast*, 32 NLRB 668 (1941), the Millis Board (1940-1945) ruled that workers in the three ports that remained loyal to the AFL union should be able to decide for themselves if they preferred separate units and ordered a self-determination, or "Globe," election in each of the three ports. Globe elections are named for a case, *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937), in which finding no factor that might allow them to distinguish between a petitioned for industrial or craft unit, the Board determined that the desires of the employees should be the decisive factor. Thus they ordered elections in both craft and industrial units to determine the employees' choice. Such Globe elections have subsequently been used to determine not only craft versus employer units, but also single versus multiple location and as was the case in the *Ship Owners Association* case, single versus multiple employer issues. The AFL's International Longshoreman's Association was successful in each election, and won rights to represent the workers in four ports. As I suggested, the reversal of the decision in these cases reflects the new emphasis on employee self-determination wrought by the change in the composition of the Board.

The *Libbey-Owens-Ford* cases are an example of a set of cases pertaining to the *scope* of a unit, and were decided and reversed in a similar fashion, this time regarding single versus multiple location units involving the same employer. Here the Madden Board (1935-1940)

refused to allow one location to have a unit separate from other locations within the company. This was so despite the fact that the employees at that one location petitioned to be represented by a union different from that preferred by the majority of workers company-wide. In a subsequent case, the Millis Board (1940–1945) granted a self-determination election (a “Globe” election) in the separate plant, the result of which was majority support for a separate unit and representation by a different union than the one that represented workers at the company’s other locations.<sup>15</sup> Here again the latter ruling emphasized employee self-determination.

Considering unit *composition*—that is, what kinds of job classifications should be incorporated into a unit—the question of whether, within a single plant, workers specializing in a particular craft might be represented in a unit separate from other employees was historically very controversial. Early on, if there were no compelling factors to settle such disputes, the Madden Board (1935–1940) allowed the employees to decide by holding elections (“Globe” elections) to discern their preferences. However in keeping with their preference for maximizing unit size if there was a history of bargaining in a larger unit the Madden Board generally refused to allow separation by craft; this became known as the American Can Doctrine.<sup>16</sup> Such refusal to deny separation from a larger unit to craft workers, based simply on the fact that the craft workers had previously been included in a larger unit, was prohibited by the Taft-Hartley amendments to the NLRA. This issue was integrally related to intense competition between AFL unions that had a history of organization based on craft, and CIO unions that were trying to establish collective bargaining on an industrial scale.

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<sup>15</sup> The two cases are *Libbey-Owens-Ford Glass Co.*, 10 NLRB 1470 (1939) and *Libbey-Owens-Ford Glass Co.*, 31 NLRB 243 (1941); see Gross (1981, 233) and Millis and Brown (1950, 148) for details.

<sup>16</sup> The doctrine is named for the case *American Can Co.*, 13 NLRB 1252 (1939) in which the Board refused to allow a separate craft unit owing to a history of bargaining on an industry-wide scale.

Soon after the passage of Taft-Hartley the NLRB adopted the *National Tube Doctrine*<sup>17</sup> that interpreted the ban on allowing craft separation loosely. The Board decided that while prior organization could not be the *sole* reason for denying separation of a craft unit (in the specific case, a unit of bricklayers in a steel mill), it could be a consideration provided other reasons supported the denial. The *National Tube Doctrine* established that if the workers in the proposed craft unit performed tasks that were highly integrated with the work of those in the wider unit, that fact along with a history of prior successful bargaining was adequate to deny separation (Abodeely 1971, 92). Again, this doctrine aimed to preserve unit size and power in bargaining while denying self-determination for a group of employees. Later Boards first shifted the emphasis to permitting separation of craft units under the *American Potash Doctrine*, which prevailed from 1954 to 1966.<sup>18</sup> *American Potash*, a clear departure from the Board's prior decisions gave preference to craft workers' self-determination and separation, provided they could show they were clearly a separate group performing a distinct task in the workplace, and where the union they proposed to represent them had a history of representing workers in their craft. This flip-flopping of Board preferences, for and against plant-wide units versus craft separation, stabilized following the introduction of the *Mallinckrodt Doctrine*, which is still observed.<sup>19</sup> The new doctrine aimed to free the Board from having to observe rigid rules established in prior doctrines and instead allow members to consider the impact of separating craft workers into a separate unit on all employees in the existing unit, as well as on the impact of any change to stable industrial relations. The key point here is that, under the *Mallinckrodt Doctrine*, the NLRB can balance the interests and effective representation of all workers in the

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<sup>17</sup> The doctrine is named for the case *National Tube Co.*, 76 NLRB 1199 (1948).

<sup>18</sup> The doctrine is named for the case *American Potash Corp.*, 107 NLRB 1418 (1954).

<sup>19</sup> The doctrine is named for, and follows the decision in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967).

existing unit as well as the principle of self-determination for craft workers when deciding if they should be represented separately.

The ideology underpinning the fluctuating outcomes in these early cases is perhaps best reflected in statements by two influential Board members. Edwin Smith (1935–1941), a member of the first Board asserted at the end of his term:

[I]f I have made any contribution to the work of the National Labor Relations Board it is, I feel, in constantly stressing the greater appropriateness of the larger unit, a doctrine which in the course of time must establish itself as the majority doctrine of the Board, if labor is to receive the full benefits of collective bargaining which the Act has guaranteed it. (in Gross 1981, 233)

In contrast, William Leiserson (1939–1943), a member of the later Millis Board and more attentive to tradition, bargaining history, and employee choice, argued:

I cannot believe that Congress intended that the necessarily theoretical opinions of individual Board members as to what unit would prove most effective for collective bargaining should be imposed on employees and labor organizations against their will. (in Gross 1981, 233)

Since the time of the Leiserson writing, it is his interpretation of the Board's role that has largely prevailed. Subsequent Boards have not returned to the view that units should be determined with a vision of future effectiveness in collective bargaining. In fact the Board has developed a relatively stable set of factors that it uses to adjudicate unit determination issues, which place emphasis on establishing a "community of interest" and employee self-determination over any vision of maximizing workers' power with respect to bargaining. The factors that contribute to unit determination have remained reasonably settled even as successive Boards have weighed the factors disparately, arguably to the benefit of employers or labor according to the dominant ideology of the Board.<sup>20</sup> I turn now to a discussion of current practices in unit determinations.

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<sup>20</sup> Gross (1995) provides good summaries of the various boards' key decisions on unit determination between 1947 and 1994.

## **Unit Determinations and the Formation of Unions—Current Practices**

The current procedure of the Board when deciding questions of appropriate units, is to first consider the petitioned-for unit, and if that is found appropriate, to end the inquiry (NLRB, 2008; 123).<sup>21</sup> In order for the Board to consider the petitioned unit to be appropriate, it must be viewed to include only employees who have a “community of interest” such that collective bargaining is appropriate. Factors that are taken into account when deciding whether a “community of interest” exists include 1) functional integration, meaning how much interdependence exists between employees performing one task and those in others; 2) common supervision; 3) similarity of skills and functions; 4) interchange and contact between employees; 5) whether employees work at the same site; 6) similarity in working conditions; and 7) similarity in fringe benefits. In deciding whether a community of interest exists, and addressing the question of unit *composition*, the Board weighs these factors considering not individuals, but job categories.

With respect to the scope of an appropriate unit, it has become settled doctrine that a single location unit will be deemed appropriate unless there are mitigating factors that would make a multi-site unit more appropriate. Such mitigating factors include 1) centralization of management; 2) short distance between locations; and 3) frequent interchange between employees at different locations. This issue of multi-site units frequently crops up in cases concerning retail stores or restaurants that are part of regional or national chains and where unit determination can have a strong impact on whether organizing is successful. Again, however, the contemporary emphasis of the Board in defining units is to ensure that common interests between workers exist so that collective representation will be successful and beneficial. With regard to multi-employer units, the general rule is that a single-employer unit is appropriate.

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<sup>21</sup> I rely heavily on the NLRB’s 2008 publication *An Outline of Law and Procedure in Representation Cases* throughout this overview of current board practices.

Thus, to establish a contested claim for a broader unit, a controlling history of collective bargaining on a multiemployer basis must be shown.

A history of collective bargaining is a criterion that the Board may consider when deciding whether a proposed unit is appropriate in all cases, independent of issues of composition and scope. This means that where collective bargaining already exists, the Board is unlikely to overturn the unit engaged in such bargaining unless it hampers employees' rights under the NLRA. Factors that the NLRB will *not* consider when assessing whether groups of workers should be incorporated in a unit include age, sex, and race.<sup>22</sup> Neither will they consider the rate and method of pay or union jurisdiction. Finally, although by statute the Board cannot take the extent to which employees have organized to be a controlling factor when determining the appropriateness of a unit, it is a legitimate factor for consideration as long as other factors exist that make the unit appropriate. Similarly, while the desires of employees to be included in a bargaining unit cannot be decisive in the absence of other factors indicating a "community of interest" exists, the desires of employees "may be the factor that would 'tip the scales'" (in NLRB, 2008, 133).

The process of unit determination is complex. I have sketched only the most salient points here. What I intend to argue is that the criteria developed over time by the NLRB to establish the limits of unions comports quite well with the ideals democratic theorists advance as solutions to the "boundary problem." Before doing so, I would like to comment on the development of the process itself. With respect to democratic credentials, unit determination is generally not subject to procedural democracy and majority rule, except in cases where the NLRB cannot discern

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<sup>22</sup> It is interesting to note that while the history of organized labor with respect to issues of racial equality is mixed, the NLRB has never consider race a valid factor with respect to determining the appropriateness of a bargaining unit (NLRB 2008, 131).

between two equally appropriate units and thus holds a self-determination election allowing workers to choose between them. That said, the procedure for deciding appropriate units has evolved by way of administrative interpretation and adjudication of a statute passed by a democratic legislature. Furthermore, the members of the NLRB are appointed to their roles through nomination by a democratically elected president and confirmation by a democratically elected Senate. And once appointed, board members use democratic procedures to reach decisions in contested cases.

The point I emphasize here is that like many functions in a democratic polity, the task of unit determination has been delegated *through democratic decisions* to a bureaucracy that remains subject to democratic control. This is not to say that the operation of the NLRB is not without partisan rancor. Indeed, the appointment of members to the NLRB was initially—and has recently once again become—highly political (Flynn 2000). So, too, the decisions of the NLRB concerning appropriate units were, as I have described, initially fraught with partisan tensions. Over time, partisan fluctuations in decisions have diminished and a set of factors have been articulated to guide and constrain the process. Clearly, some degree of interpretation remains. Members of the NLRB with different perspectives and viewpoints regarding workplace democracy judge the relevant circumstances in unit determination cases, and ascertain how the factors developed for determining appropriate boundaries apply to them, in disparate ways. Given that there is likely no ideal moral or purely objective standard by which to define boundaries to democratic entities, some partisan discussion and contestation between members of the NLRB is to be expected and is desirable as an integral part of democratic decision-making (Muirhead 2006; Rosenblum 2008). Even so, it is my view that however they are applied in specific cases, the factors considered by the NLRB in unit determination create boundaries that

closely approximate those that would be derived through the application of principles that democratic theorists have proposed as resolutions to the “boundary problem.”

### **The Boundary Problem and Democratic Ideals—Assessing the Union Formation Process**

Consider first the construction of union boundaries and the claim central to the “boundary problem,” namely, that there is no way to form democratic borders using procedural democracy. I would suggest that the process by which the boundaries of unions are determined, while not entirely surmounting this problem, goes a considerable way toward doing so. Recall that it is a group of workers, with the assistance of union representatives, who initially approach the NLRB with a petition to form a union for the purposes of collective bargaining. The employees and their union representatives include in this petition the proposed composition and scope of their future collective bargaining unit—in other words who should be included within the boundary. If the NLRB deems the unit to be appropriate, then there is an election (or alternate decision-making process) within that unit to ascertain if, in fact, a majority of those included would like to form a union and be represented collectively. Thus, in simple terms, a group is proposing to constitute itself as a collective entity and then allowing the future members of that entity to decide in a democratic procedure if indeed it should be brought into being.

Does this mean that democratic theorists are incorrect in suggesting that the boundaries of a group cannot be determined through institutions of procedural democracy, for example, by a vote among those who will potentially become members of the group? To some extent—although not entirely—the way unions establish their borders provides a counter example to that claim. While it is the workers who will become part of the union who initially define its scope and composition, it is the members of the NLRB who ultimately determine if the proposed unit is appropriate. And in some cases, the employer or another group of workers may successfully contest the unit initially proposed. If the NLRB deems the proposed unit *inappropriate*, the

boundary of the unit may become a matter (somewhat) of outside imposition rather than self-determination. That said, given that the NLRB is constrained when adjudicating appropriate units to weighing the various factors that indicate whether a “community of interest” exists, there is a limit to which the ultimate unit may deviate from that originally proposed by the union. And if the unit determined by the NLRB does differ from that proposed by workers, there is still a vote (or alternate decision-making process) among the potential members of the union so delimited that ultimately decides whether or not it will form. Only if a majority of workers within the unit sanctioned by the NLRB support collective bargaining will the individuals within the defined boundaries become a union. If majority support for the formation of the union is not established, then no certification is awarded and employees in favor of union representation have to wait at least a year before they can challenge the majority and petition the NLRB again.

The process of defining the boundaries of unions, then, uses mechanisms of procedural democracy quite extensively, and certainly more fully than is the case in the formulation of most political states, the U.S. included. While there is potential for outside interference, it is workers who initiate the process and set the agenda with respect to who should be included in the group (union). In contrast, as I noted earlier, the boundaries of political societies are frequently the result of outside imposition (e.g., conquest) or determined in other arbitrary ways, for example, by geographical features. Further, in the process of forming unions, it is the entire membership of the proposed collective unit that is entitled to participate in the decision as to whether or not the collective will actually be formed. This is rarely the case in political societies, including the U.S., wherein large segments of the future population were initially excluded from participation (e.g., women, blacks, and those without property). It seems to me that while it is contestable the degree to which the process of unit determination in labor law surmounts the “boundary problem” in

democratic theory, it is certainly a more democratic decision-making process than that which led to the formation of the United States as a political society. But what if we go beyond procedural democracy and make comparisons considering some of the principles that democratic theorists propose as alternate solutions to the “boundary problem.”

First, I take up the principle of all affected interests. This is the notion that everyone whose interests are affected by a decision should be able to participate in the decision making process. Here it is easy to see why the process of forming unions closely embraces this principle. The primary question that the NLRB addresses when deciding if a proposed unit is appropriate for collective bargaining is whether or not a “community of interests” exists. The Board examines the unit that workers propose to see if it includes employees who have similar skills and who enjoy the same kinds of working conditions and fringe benefits under common supervision. They give preference to units that incorporate workers in the same location who enjoy considerable opportunities to interact with one another and whose work is integrated such that they all contribute in some way to a production process or provision of a service. The idea is to ensure that a unit approved by the NLRB is one in which workers have sufficient interests in common to make bargaining as a collective group effective. Thus, when determining units, the rights to association and self-determination of a given group of workers (granted to them by the NLRA), are weighed against the potential for stable industrial relations (the NLRA’s stated purpose).

Including job categories (workers) in a unit that do not share common working conditions may lead to tensions within the unit regarding common goals in collective bargaining and thereby make it more difficult to reach agreement with an employer.<sup>23</sup> Similarly, excluding workers from a unit who share the same terms of employment may also create tensions and

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<sup>23</sup> It is key here that it is not individual workers, but job classifications that are grouped together to form a bargaining unit.

industrial unrest in the workplace. It is plausible in such a circumstance that one group of employees represented collectively might be pitted against other workers who bargain individually. For these reasons, the NLRB will only approve a unit that incorporates workers who have shared interests and that does not exclude a group of workers with equivalent working conditions simply because those petitioning for the unit believe that they do not support collective bargaining.

An example may serve to illustrate this point. If a department store has three primary sets of workers—store clerks, stock clerks and warehouse workers—there may be multiple appropriate units (Gold 1998, 27). The workers might petition for all these job classifications to be included in the same unit, or workers in each job classification might petition separately for three individual units. Alternatively, sales clerks and stock clerks might petition for a unit because they share the same terms and conditions of employment, work under the same supervision, and often perform each other's roles. The same could be true of warehouse workers and stock clerks if they shared working conditions and had common workplace supervision. Any of these four options would be a plausible unit according to the NLRB's standards. Thus they would approve any of the units outlined and grant a representation election if workers presented a petition requesting one. However, if workers petitioned for a representation election in a unit comprised of only some of the warehouse workers, and sales clerks from just a few departments, then the NLRB would refuse. Instead, the NLRB would direct an election in one or more of the appropriate units outlined above, perhaps one among all warehouse workers and another among all sales clerks. In this case, the self-determination of the workers would to some degree be overridden by the requirement that a unit include all workers who share a "community of interest."

The factors that the NLRB considers when determining bargaining units does not guarantee that a union, if formed, will include all of those whose interests are affected by decisions made by the union, but it makes it more likely than not that it will. That is because the primary purpose of the union is to bargain collectively on the workers' behalf with respect to terms and conditions of employment. Indeed, under the NLRA, once a union has formed, it is mandatory for employers to bargain with the union regarding "wages, hours, and other terms and conditions of employment" (29 U.S.C. §§ 151–169). This has been interpreted over the years by the NLRB and the federal courts to include things that "directly affect the employment relationship," for example, rate and method of pay, hours of work and work rules, health insurance and pensions, promotion and grievance procedures, and workplace health and safety (Gold 1989, 46).<sup>24</sup> The fact that the NLRB only approves bargaining units in which workers have a "community of interests" with respect to working conditions, and subsequently the union representative bargains with the employer about things directly related to workers' terms and conditions in the workplace, means that all workers affected by any decisions resulting from this exchange will be included in the union. Thus the workers affected will have an opportunity to participate in selecting their collective representatives, as well as a voice and vote in decisions about the contracts the union negotiates.

This would appear to meet the criteria of all affected interest, at least on the qualified view supported by most democratic theorists, that a democratic boundary should include within its bounds all those who will be "directly affected" by the groups decisions. It also comports fairly well with the proposal made by Robert Goodin that a political entity might be made to conform

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<sup>24</sup> This is not an exclusive list of all topics that have been adjudicated to "directly affect the employment relationship" and thereby be considered mandatory subjects for collective bargaining; see Gold (1989, 46) for further details. Employers and unions may also bargain over additional workplace related issues by mutual agreement. However, they are prohibited from negotiating a closed-shop agreement or any clause in the contract that discriminates on the basis of race.

to democratic ideals by restricting the range of topics upon which it can make decisions. The primary purpose of a union is to represent workers collectively on the quite constrained number of topics that relate specifically to terms of employment. They are not permitted to negotiate on topics beyond that, except by mutual agreement. Of course unions also represent members and workers more broadly in the political arena. Thus their representative role does extend beyond the confines of the workplace to political issues. However, in their political role, unions have no decision-making power with which their members or other workers have to observe. Unlike in the workplace where contracts negotiated by the union are binding on all those in the bargaining unit (that is, after approval by a majority), the workers may voluntarily, but do not have to, participate in union political activities. Thus the range of topics over which unions have binding decision-making power is restricted in such a way as to match Goodin's idea of ensuring that all affected interests are enfranchised, by constraining the scope of decision making.

It is possible that some may object to the notion that NLRB-defined bargaining units comport to the principle of "all directly affected interests" because they exclude groups who will be directly impacted by a union's decisions. These groups include at least the employer and members of the community in which the employer is located. No doubt some could take the view that other groups, such as consumers of the employer's products and services and an employer's competitors, may also be directly affected by union's decisions. In many respects, whether one agrees or disagrees that union boundaries meet the "all directly affected interests" standard will depend on how one defines "directly affected interest." Recall that most democratic theorists define "directly affected" to include those whose basic interests—however those might be conceived—are impacted. For that reason I would not include consumers or employers competitors among those "directly affected." This is because a union's decisions may impact

consumers and competitors to some extent, but not directly impact their basic interests. For example, if a union negotiates a pay increase, consumers may be prevented from purchasing a specific product or service because the employer increases prices, and a competitor may have to raise wages to retain employees. In each case, the union's actions certainly affect consumers or competitors, but it is my belief that actions such as these do not affect their *basic* interests.

In contrast, decisions of unions could potentially impact the basic interests of employers and the communities in which they are located. In the case of the employers, while they are not included within the boundary of the union, the omission is mitigated by the fact that employers and unions must directly engage in bargaining over any decision that might affect the employer's interests. For example, imagine that a union demanded wage increases to a level that would threaten the viability of the firm, and then voted to strike if their demands were not met. In such a situation, the employer's basic interests would be threatened. However, in this particular case, it would also be a situation in which the employer would have the ability to voice concerns and engage with the union and negotiate. And given that the failure of the firm would also threaten the basic interests of workers, it is likely some agreement would be reached. The key point here is that while employers remain outside of the bargaining unit, they retain the ability to influence decisions that affect them.

This example illustrates a limitation of the "all directly affected interests" principle, because, interpreted literally, it would require that a union include within its bounds and give voice to employer representatives. Yet this would, to a great extent, defeat the purpose of forming the union. If unions as organizations are to function as institutions of countervailing power that allow employees to bargain on more equal terms with their employer, then clearly the employer cannot be included within the bounds of the union. The limitation of the "all directly

affected interests” principle is that it offers no criteria by which to exclude potentially dominating groups from a political entity. Of course, that concern may be overcome by ensuring that there are institutions and mechanisms internal to a polity that minimizes the potential for some groups to dominate others.

Another group that arguably may have their basic interests impacted by decisions of a union are residents of the area in which the unionized employer is located. Imagine that a group of workers opt to form a union and, in response to this action, their employer chooses to relocate some or all of the jobs to another plant. In this case, if the employer is a major source of jobs in the community, other smaller businesses and residents may be adversely affected by ensuing economic decline. The same kind of economic hardship might be created in the event of a prolonged strike by unionized workers. Again, the principle of “all directly affected interests” is not entirely violated because a great many of the local residents, though certainly not all of them, are likely to be union members or members of union families. This overlap of boundaries of inclusion means that the interests of union members and the interests of the local community are frequently likely to coalesce. A further mitigating factor here is that it is hard to imagine a unilateral action of the union that would have a significant impact on the community; generally it would be a result of a breakdown in negotiations between the employer and the union. This raises the intriguing question of whether community members should also be accorded rights of participation in decisions of employers.

The extent to which union boundaries enfranchise all affected interests will depend, as I previously stated, to a considerable degree on how one defines “affected interests.” However, when we compare unions and nation states on how closely their boundaries embody the all affected interests principle, clearly nation states fall short. In the case of the United States, there

was no deliberate weighing of factors to see if a “community of interest” existed when its boundaries were initially drawn. In fact, arguably the opposite is true. Certain groups, for example slaves, or those without property, were excluded from the political society based at least in part, on the view that their interests, if given voice and consideration, might prove detrimental to those drawing the boundary. As I noted earlier, even though the nation has become more inclusive as groups have pushed for citizenship rights, there are still groups both within and beyond the geographical limits of the state who remain excluded from the state’s decision-making process, while affected by its decisions.

The boundaries of labor unions approximate even more closely the principle of coercion that democratic theorists have suggested for the construction of democratic boundaries than they do the all affected interests principle. Recall that the principle of coercion is more discriminating because it demands that only those who are *compelled to act* based on decisions of a group, not those who are merely affected by a group’s decisions, be included in the boundaries of the group. A labor union has quite limited ability to compel action. However, because a collective-bargaining agreement covers all workers within an NLRB defined unit, a union does in some way compel all workers in the unit to accord with the terms and conditions that are agreed in the contract. Union members must also abide by the union’s internal rules, which are laid out in the union’s constitution and relate to such things as conduct at meetings, eligibility for office, and penalties for breaking strikes. In most cases, this means that unions are compelling only their members, who have a voice and vote regarding the contract and contents of the union constitution. However, it is possible for workers to be included in a bargaining unit, but choose not to be part of the union. In this case, the union is legally obligated to represent the workers in the same manner as it represents members (for example, in such things as grievance procedures

with employers). But the union is not obligated to include non-members in discussions about, and elections for union representatives, or to include them in debates and votes over approval of contracts.

A worker's choice about whether or not to join the union is often influenced by whether or not a union security agreement is in place. This is related to a further way that a labor union can compel action, that is, in the collection of dues. Since the passage of the Taft-Hartley amendments to the NLRA, closed shops that demand that only members of a union be hired at a workplace have been banned. However, union shops and agency shops are still permitted. There is practically little difference between these two. In a union shop agreement, employers are free to hire workers who are not union members, but new employees are required to join the union within 30 days after commencing work. An agency shop agreement does not require workers to join the union, but does require workers who choose not to join to pay "agency fees," that is, the portion of union dues that are used to support collective bargaining (Gold 1989, 14). The reason there is little practical difference between the two arrangements is that while the law permits union shops, which require workers to join the union, it does not permit the union to pressure employers to dismiss workers who do not abide by the unions rules and regulations and who have been expelled from the union. Under a union security agreement, the only reason a union can demand that an employee be dismissed is for refusing to pay union dues. Similarly, under an agency shop, a union can demand the dismissal of an employee who fails to pay "agency fees." Thus, under both kinds of union security arrangement, a worker can be compelled to pay fees to the union but cannot be coerced into joining the union with the threat of loss of employment.

The Taft-Hartley amendments to the NLRA permitted states to ban union shops and agency shops. In the 22 "right to work" states that decided to enact such a ban, workers who are

employed in a unionized workplace can be compelled neither to join the union nor pay agency fees to cover the costs of bargaining. In these “open shop” workplaces, a union has to bargain for and represent all workers, regardless of their union status. This means that in “right to work” states, the only way unions compel workers who are non-members is that such workers have to abide by the conditions of the contract that the union negotiates. And the union has no obligation to include non-members when they consult with members about the contract or include them in votes to ratify it. The same is true for workers who decide to refrain from joining the union in states that do not have right to work laws, but in those states, unions can generally compel non-members not just to abide by the contract but also to contribute to the costs of negotiating the contract.

In neither situation is the “coercion principle” violated. This is because, while a union has power to compel non-members to act in each instance, it is not the union that is excluding the worker from full membership, but the worker who is opting to exclude him- or herself. Additionally, any workers who refrain from joining a union who were employed in the job when the union formed, would have been included in the boundaries of the bargaining unit, and thus had a voice and a vote in the decision whether to actually form the union, while those workers joining an existing unionized workplace know at the time of accepting employment that terms and conditions of employment are subject to collective bargaining, and thus that they may have to join the union to influence them.

If the boundaries of U.S. labor unions comport quite closely to the “coercion principle,” so too do the limits of inclusion in the contemporary U.S. political state. Currently, very few groups such as permanent resident aliens, disenfranchised felons, and those deemed either “mentally unfit,” or too young to make competent political decisions are compelled to act by, yet excluded

from, the polity. However, as I have previously stated, the political boundaries of the U.S. did not initially track the “coercion principle” very well. Non-white Americans, women, and those without property were of course compelled to act by the state long before they were enfranchised. And even after they were afforded legal citizenship, groups with power and influence often sought to prevent these previously excluded groups from taking advantage of their formal rights. This draws attention to the important distinction between “de facto” and “de jure” rights to participate and to the question of rules and institutions that might serve to disenfranchise and exclude those who are formally included in a political entity, but are in practice excluded from exercising such rights in a meaningful way.

Workers who refrain from joining a union, and who hence lose their rights to participate in decisions that influence their working conditions, are in many ways equivalent to citizens who have the right to, but decide not to, participate in political elections and engage in political debate. These citizens are compelled to abide by the rules and regulations of the polis, as well as to pay taxes to support activities of the state, but for a variety of reasons elect not to participate in the state’s collective decision-making processes. If, in each case, the choice to remain outside of the process of collective decision-making is truly voluntary, the situation is unproblematic from the perspective of the “coercion principle.” However, if structural features of the polity or formal rules or informal norms are the real reason that citizens abstain or workers refrain from joining the union, then there is reason for concern, and a legitimate case exists for action to encourage their future participation. Within the political state, unions as organizations fulfill this task as they promote and facilitate the political incorporation of workers, a group who generally has low levels of participation. However, as I have mentioned previously, this is only beneficial to the extent that as organizations, unions do not operate in ways that systematically thwart

groups of workers from participating within them. Again, this highlights the importance of attending not only to the legal structure that regulates union formation, but also the legal requirements and rules that regulate their internal operations.

The final principle that democratic theorists propose as a proxy for defining democratic boundaries is consent. This is the notion that only those who consent to the formation of a democratic entity should be obligated to observe its decisions. Of course, unless the vote to form a union is unanimous, there will be workers included within the union's jurisdiction who clearly would rather not be subject to a collective bargaining regime. Such reluctant members can hardly be portrayed as consenting to the formation of the union, even though they were included in the decision-making process to do so. Thus the boundary of the union is not predicated entirely upon consent. In this sense, unions and political societies are alike. As I mentioned before, many individuals residing within the boundaries of the U.S. at the time the state was formed were excluded from participation and cannot be said to have consented to the decision. Further, the majority of citizens of nation states inherit their citizenship in the sense that they are born into existing societies. This in no meaningful sense indicates consent. In a parallel way, many workers join a workplace where a union has already formed, and hence have no influence over its formation.

While neither the boundaries of unions nor political societies fully embrace the ideal of consent, unions arguably better approximate it. One reason for this is that exit from unions is much easier than exit from political societies. Although it is not easy to find an alternative job with a non-union employer, it is easier than the process of emigration. Further, as I described earlier, it is possible to refrain from being a member of a union (closed shops are prohibited in the U.S.), although an employee in a unionized workplace will be subject to the terms negotiated

by collective bargaining and, in states that do not have “right to work” laws, will be required to pay fees covering the costs of collective bargaining. Finally, if employees wish, they can contest the collective bargaining regime and seek to decertify the union as a collective representative of the employees by petitioning the NLRB for a decertification election. If a majority of workers support decertification in such an election, then the union is dissolved and workers revert to bargaining individually with their employer. This is kind of exit—essentially the withdrawal of consent for collective bargaining, and hence a union—is rarely available to members of political states.

A recent proposal for “minority unionism” captures what workplace representation may look like if union membership were based entirely on consent. To me, it also illustrates the limitations of the idea. Labor historian Charles Morris argues that a true reading of the NLRA requires employers—where there is no history of majority bargaining—to bargain with “members-only” unions comprised of a minority of employees in a workplace (Morris 2005). This would mean that any group of employees in a workplace could join together and form a union that their employer would subsequently be required to bargain with. Any agreements that emerged from these negotiations would apply only to those workers who voluntarily agreed—that is, consented—to form the union. The NLRB does not currently certify nor require employers to bargain with unions comprised of a minority of workers. Instead, the NLRB’s interpretation of the statute is that it supports only majority unionism wherein a union becomes the *exclusive* representative of *all* workers in a bargaining unit upon a showing of majority support.

Morris and others who endorse his reading of the NLRA believe that minority unionism is not only consistent with the language and intent of the NLRA, but that it would be a way to

revitalize organized labor and increase union membership. I disagree. If unions are to empower workers and minimize domination in the workplace, their strength as organizations of countervailing power is partially predicated on the fact that all workers are represented collectively. Allowing minority unionism would create situations in which workers negotiating in groups represented by one or more minority unions would work alongside others negotiating individually. This would present employers with the opportunity to play one group of workers against others, thus undermining their bargaining power. It may also allow workers with particular experience and skills crucial to the functioning of the workplace to organize and negotiate terms favorable to themselves but detrimental to other workers. This would hardly serve to reduce domination in the workplace. For these reasons, I would argue that union boundaries based entirely on consent would be undesirable as they would hamper the ability of unions as organizations to function in ways that reduce workplace domination.

### **Summary**

The “boundary problem” raises a question that is fundamental to democratic legitimacy, that is, how the limits of inclusion of a democratic entity can be drawn democratically. This is a crucial issue because an organization may function according to democratic procedures and ideals, but if it has been constituted by undemocratic means or excludes groups that should be included according to democratic ideals, its status as a “democratic” entity is questionable. Labor organizations in the U.S. are frequently portrayed as falling short of democratic standards, especially when compared to the larger political state. It is frequently the case that when discussing labor law, members of Congress advocate that institutions and procedures that regulate political democracy be adopted to regulate the formation of labor unions.

In this chapter I examined the process of unit determination, the first stage in forming or constituting a union under U.S. labor law. I argued that the current practices employed by the

NLRB in unit determination combine quite well democratic procedures with an administrative decision that tracks the “all affected interests” and “coercion” principles that theorists have proposed for defining boundaries democratically. Overall, this means that contrary to much public perception, the initial step in union formation more closely approximates democratic standards than the formation of the political state. In the next chapter, I turn to the process for determining whether a majority of workers in units defined according to the procedure described here support the formation of the union.

## CHAPTER 5 AUTHORIZING THE UNION

*As to . . . representation of the workers you cannot have any more genuine democracy than this. We say under Government supervision let the workers themselves . . . go into a booth and secretly vote, as they do for their political representatives, in a secret ballot, to select their choice.*

—Senator Wagner

There are deep-seated tensions at the heart of current U.S. labor law, not least, the fact that its fundamental goals are to a certain extent contradictory. As I illustrated in chapter 2, the Wagner Act pledged the government to encourage collective bargaining in order to enhance the power of workers in the workplace and, in so doing, mitigate industrial unrest. Congress recognized at the time that individual workers might easily be dominated *by their employers* when bargaining over conditions of employment. And it saw unions and collective representation as the organizational solution that would minimize workplace domination. A dozen years later, the Taft-Hartley reforms retained this initial objective but added that the intended purpose of the law was also to facilitate workers' choice to *refrain* from collective representation. The stated motivation behind these reforms was to protect workers (and the public) from coercion and domination *by unions*. The mechanism that has been adopted by lawmakers to reconcile these competing goals—facilitating collective representation while preserving individual choice—is the “representation election.”

A “representation election” is a secret ballot conducted by the NLRB that seeks to determine whether a majority of workers in a bargaining unit (determined by the NLRB using the process described in chapter 4) wish to be represented collectively by a union. A secret ballot administered by a government agency, Congress and the National Labor Relations Board (NLRB) have reasoned, is the most democratic way to settle the question. Herein lies an additional paradox. Organized labor and its allies, as I have mentioned before, believe that the

process of a representation election is one that, far from preserving individual choice, actually subjects workers to coercion by *employers*. As labor historian David Brody writes, “The representation election is the instrument by which labor’s enemies have hijacked the law,” which leads him to ponder why “a labor law democratic on its face is also a bad law for workers” (Brody 2005, 100).

This tension between facilitating the efforts of workers to organize for collective representation while at the same time respecting individual choice is an ongoing challenge for those writing and interpreting labor laws. It is central to the latest attempt to reform labor law with passage of the Employee Free Choice Act (EFCA). In keeping with my argument that competing conceptions of democracy have shaped the nation’s labor laws, I interpret the primary conflict surrounding this latest legislative initiative as revolving around the question of whether or not a secret ballot is essential to democratic decision-making. Opponents of the proposed bill insist that it is. Proponents of EFCA, to the contrary, argue that gauging support for collective bargaining would be better accomplished through the collection of signed union authorization cards. I argued in chapter 4, that those engaged in legislative struggles over labor law have invoked democracy as an ideal that should be embodied in the law, but failed there to specify just what the concept should mean in the context of representation in the workplace. This latest legislative struggle is no different. Defenders of the status quo simply assert that a secret ballot is an essential part of democratic decision-making and hence deride EFCA as anti-democratic.

In this chapter I analyze the current debate using the conception of democracy that I outlined in chapter 3 to assess the arguments that proponents and opponents of EFCA advance. Recall that I argued that institutions, whether they govern the workplace or the larger polity, should seek to embody the democratic ideal of non-domination. A labor union, understood as an

institution of collective representation in the workplace, can promote this ideal if it empowers workers in a way that equalizes their power *vis-à-vis* employers. Of course, as I have previously mentioned, the purpose of unions as organizations of countervailing power will be undermined if they are formed by undemocratic means, or function in ways that counter democratic ideals. In the previous chapter I argued that the first stage of constituting a union, the process of unit determination, closely tracks democratic ideals. In this chapter I address the second stage, that is, how the workers in fact decide whether to form a union and authorize collective representatives. The key question I address is whether the current system of authorizing unions through secret-ballot elections, or the alternative proposed in EFCA that permits union certification through majority sign-up, best approximates the democratic ideal of non-dominated choice by workers.

Drawing upon both the history and theory of American democracy, I argue not simply that the current system of secret-ballot elections for forming unions falls short when compared to democratic standards for political elections, but that in the context of union certification the use of authorization cards better approximates democratic ideals. Three points are central to my argument. First, opponents of majority sign-up tacitly and mistakenly assume that union representation elections are analogous to elections for political representatives. In fact, a union representation election is a process of group formation. Workers in representation elections are deciding whether or not they wish to form a collective for purposes of bargaining with their employer. They are deciding whether to establish a system to represent their shared interests in the workplace. Therefore, mechanisms for certifying unions are better compared with those used in constitution making in the formation of political societies. If the task, described in chapter 4, is to constitute a collectivity for specific purposes, we are concerned here with the processes by which those included in the entity (the union) can legitimately authorize or ratify it.

Second, as I argued in chapter 3, not only are democratic ideals contested, but no set of ideals entails any particular institutional arrangement. The parties to the debate about EFCA fail to grasp this lesson. Instead, they accord a questionable centrality to secret ballot elections. While secret ballots are used in many democratic processes, they are just one among many institutional mechanisms that can be, and are, used for purposes of democratic decision-making. The centrality afforded the secret ballot in the current debate places undue emphasis on the way workers register their preferences about forming a union, and detracts attention away from the prior and equally important process of forming preferences. As I argued in chapter 3, democratic decisions comprise both voting and arguing (or discussion), each of which should take place under conditions that minimize the possibility for individuals to be dominated by others.

Finally, whether secrecy or publicity as it facilitates or thwarts democratic decision-making depends upon the context. While secrecy (in the form of secret ballots) protects voters in elections for political representatives from undue influence and coercion, it is ineffectual in union representation elections. To a great extent the threats (employers may argue they are merely “predictions”) made in union representation campaigns are not levied against particular individuals; rather, they are directed toward potential group members as a consequence of the creation of the collective. A secret ballot offers no protection against group threats. Thus, in the setting of union representation elections, secret ballots do not enhance democratic ideals by eliminating domination during the voting process.

In contrast, majority sign-up as proposed in EFCA can enhance democratic decision-making by deploying secrecy to reduce the potential for domination while workers are discussing and developing preferences about unionization. This is because majority sign-up allows workers and union organizers to keep secret, and thereby exclude employers from debates about union

formation, at least in the initial stages. In this way majority sign-up shields workers from employers' potentially coercive speech. These factors combine to form a positive argument for the democratic nature of the majority sign-up provisions proposed in the EFCA. Further they provide reasons as to why alternatives to the bill, such as expedited elections, or equalizing speech rights in the current election process are inferior.

This chapter proceeds in the following way. In the first section I outline how the passage of EFCA would change the process under which unions are formed and describe how the concept of democracy dominates the public debate surrounding the bill. In the second section I question the analogy, prominent in the public dialogue about EFCA, that equates union representation elections and political elections. I suggest that, instead, representation elections are better compared to constitutional moments. In the third section I present empirical research regarding the kinds of threats that workers face when trying to form unions in the workplace. In the fourth section I explain why secrecy is no protection in voting in workplace elections. In the fifth section I argue that secrecy could enhance democratic discussion among workers regarding union formation. I conclude with arguments about why the card-check process is preferable to other alternatives that have been proposed to amend labor law such as "expedited elections," voting by mail, or early voting at neutral polling sites.

### **"Democracy" and the Debate over Employee Free Choice**

Capital Hill is a long way from Kentucky, but judging by the rhetoric, the ongoing legislative confrontation over labor law reform is just as bitter as the fights to unionize the mines of Harlan County. Headlines from inside-the-beltway publications *Roll Call* and *National Journal* proclaimed a "Colossal Clash" and "Epic Battle" were taking shape over the Employee Free Choice Act, the labor-backed reform bill. "This will be Armageddon," Randel Johnson, vice president of the Chamber of Commerce, told the *New York Times* when questioned about

impending legislative action on the bill (Greenhouse 2008). If business spokesmen stake their position in such apocalyptic terms, labor supporters are equally resolute. Paul Blank, a consultant for the United Food and Commercial Workers, told the *Wall Street Journal* that he expected “political World War III” over the bill (Maher 2008). To back up their hyperbole, both labor and business groups have launched grass-roots campaigns and pledged to spend millions of dollars on media campaigns in support of, and opposition to, the bill’s passage (Stone 2008b).

Labor law reform, as I documented in previous chapters, has always been politically divisive and passage of EFCA, the latest attempt to update a legal framework largely unchanged since the late 1950s, is no exception. While Republicans are in lock step and clearly opposed to the bill, Democrats have struggled to maintain support for the legislation among their more conservative members. First introduced in 2003, EFCA failed to make it out of committee in the Republican-controlled congress. It met the same fate in 2005. By 2007 the Democrats controlled the House and managed to pass the bill only to see it blocked by a filibuster in the Senate. This is a familiar fate for labor law reform. Supporters of EFCA and their foes alike saw the 2008 election crucial to the fate of the reform. Organized labor hoped to push Democrats to a filibuster-proof 60 seats. Their corporate adversaries hoped to thwart their efforts and ensure that labor law reform would remain elusive. Ultimately, Democrats gained eight seats but a stable supermajority of sixty senators remained just out of reach as the partisan composition of the senate fluctuated owing to contested results and the passing or promotion of key Democratic senators.

In the aftermath of the election, faced with a plausible opportunity to pass EFCA, a number of previously supportive senators expressed doubts about the bill. Meanwhile, despite championing EFCA on the campaign trail, President Obama in his first eighteen months in office

did little to exert political pressure on Congress to enact the legislation. Looking to the 2010 mid-term elections and beyond, all parties to the debate are turning to the key senate races and the White House and asking, in the 1931 lyric of Florence Reece, “Which side are you on?” If it turns out the post-election Congress does not look favorably on labor law reform, accustomed as they are to protracted legislative struggles, key labor leaders have pledged to continue to fight for EFCA until such time as the bill becomes law.

Considering the fighting talk and polarizing language surrounding EFCA, one could be forgiven for thinking that the struggle over its passage will be fought with bare knuckles and bullets. But this is not the blatant class war/life and death struggle of the 1930s that inspired Reece’s question. This skirmish has not played out in the backwoods of Black Mountain. Instead, this conflict has been more civilized, more democratic. It has transpired in the halls of Congress, waged with words and ballots. Yet the rhetorical framework shaping the debate continues the pattern I sketched in chapter 2 insofar as it raises questions about the very concept of democracy.

Recall that a key provision of EFCA would mandate that the NLRB certify a union as the exclusive representative of a group of workers in an appropriate unit once a majority of workers has signed authorization cards. This process is frequently referred to as “card-check” or “majority sign-up.” This change would resuscitate an alternative to the current process of union certification through a secret-ballot election administered by the National Labor Relations Board (NLRB).<sup>1</sup> Historically, the NLRB sanctioned a variety of means for ascertaining whether a majority of workers in a proposed unit support unionization. Presently, employees can form

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<sup>1</sup> It is important to note that the proposed bill does not eliminate the NLRB-regulated secret-ballot election as a potential route to union certification; it simply allows workers to choose if they would like to use majority sign-up instead.

unions through the signing of cards, but employers are not obliged to bargain with unions formed in this way, nor do they gain the benefits of NLRB certification.<sup>2</sup> Thus majority sign-up is an effective route to collective bargaining only in the rare event where an employer voluntarily agrees to cooperate.<sup>3</sup>

Although mandatory recognition based on majority sign-up is only one part of EFCA—the bill also increases penalties for employer unfair labor practices and allows for mandatory arbitration of first contracts if unions and employers fail to reach agreement within 120 days—it is the part that has sparked the most controversy. Opponents of the proposed reform have been quick to frame the bill as un-American and especially as anti-democratic. Proponents of the bill counter that it will allow workers to express their “free choice” whether or not to form a union in ways that the current NLRB election process cannot. In that sense, they feel the majority sign-up (card-check) mechanism is preferable to the present secret-ballot process that, on its face, seems democratic but in reality subjects workers to domination by employers to vote against the union.

Even though multiple groups have rallied to the anti-EFCA cause, they have managed to maintain a consistent message. Focusing almost exclusively on the majority sign-up provision of the bill, their campaign has been effective in relentlessly and creatively portraying the legislation as “undemocratic.” While there have been many variations on the theme, the central, simplistic message EFCA’s foes present to the public is that the bill eliminates the secret ballot from the

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<sup>2</sup> Most importantly for present purposes, in its decision in *Dana Corporation*, 351 NLRB 451 (2007) the NLRB modified the usual “recognition bar” that prohibits a decertification petition or rival union recognition petition for a “reasonable time” after a union is certified. The modified “recognition bar” that applies to cases of voluntary recognition of a labor organization suspends the bar on decertification petitions or a petitions by a rival union for 45 days after the employees in the unit receive notice of the voluntary recognition. It also requires employers to post notices in the workplace informing employees of their right to decertify for the 45-day period.

<sup>3</sup> As I make clear in subsequent sections, there are other circumstances in which, under current law, authorization cards may be determinative. As I also make clear, such circumstances are rare, in practice,.

union certification process and since a secret ballot is the “cornerstone” of democracy, it lacks democratic credentials. A few examples will serve to illustrate this point.

The deceptively-named Center for Union Facts, an anti-union 501(c)(3)<sup>4</sup> “education and research” organization, launched in May 2006 with a national ad campaign on Fox News that depicted unions as corrupt organizations run by “fat-cat” bosses supported by dues funded politicians (Maher 2006). Soon after, the group launched what has become a permanent anti-EFCA campaign, producing a series of print and broadcast ads castigating the bill and its supporters as anti-democratic. One accused unions of “shredding democracy,” complete with an illustration of a ballot box turned paper shredder.<sup>5</sup> Another pictured Bruce Raynor, president of UNITE HERE, alongside Idi Amin and Mahmoud Ahmadinejad above the caption “There’s no need to subject workers to an election. . . . Who said it?” School children dressed as mobsters in muscle shirts and sunglasses featured in a third spot that asked viewers to imagine what might happen if “union bosses” ran class elections. A distressed and apparently coerced teacher shakes her head in the background as a student declares “There ain’t gonna be no secret vote. . . . Just sign these cards showing who you like best and my campaign committee will count the votes.” The final shot pans to the campaign committee, a trio of young “enforcers,” as the voiceover declares that “union bosses have a new scheme to do away with secret ballot elections.”

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<sup>4</sup> The non-profit 501(c) organizations are named for the Internal Revenue Service tax codes that afford them tax-exempt status. Unlike Political Action Committees regulated by the FEC, they are unable to donate funds directly to candidate campaigns but can seek to influence elections through issue advocacy. They can retain 501(c) status provided their primary purpose is not to influence political elections. They are not obliged to disclose the source of their funding in the same manner as Political Action Committees or 527 organizations. For further information, – refer to <http://www.irs.gov/publications/p557/ch03.html#d0e3190> (accessed July 31, 2010).

<sup>5</sup> A selection of the group’s advertisements is available at <http://www.unionfacts.com/ads/laborElections2.cfm> (accessed July 31, 2010).

The mobster theme featured prominently in an aggressive \$20 million print, broadcast, and direct-mail campaign that ran during the 2008 election season in states with close Senate races.<sup>6</sup> Sponsored by the Coalition for a Democratic Workplace, whose members include the Chamber of Commerce and National Association of Manufacturers, the campaign starred actor Vince Curatola, a.k.a. Soprano's mob boss "Johnny Sack Sacramoni."<sup>7</sup> The motif of all the ads was that candidates supportive of EFCA were allied with union henchmen (depicted by Curatola) seeking to "eliminate the secret ballot for workers." Those opposed to EFCA were described as heroes attempting to save the secret ballot for working people. The clear intent was to depict EFCA, and those who support it, as antithetical to American democratic practices.

Former Senator George McGovern, the Democratic presidential nominee in 1972, was also enlisted by anti-EFCA forces. He was featured in television advertisements aired by the Employee Freedom Action Committee, another corporate-backed group. In one ad, McGovern, echoed an op-ed he wrote for the *Wall Street Journal*, stating:

It's hard to believe that any politician would agree to a law denying millions of employees the right to a private vote. . . . I have always been a champion of labor unions. But I fear that today's union leaders are turning their backs on democratic workplace elections. (in Sasso 2008).<sup>8</sup>

Evidently, McGovern's "large D" democratic credentials lend credibility to his "small d" claims.

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<sup>6</sup> The most competitive races were in Virginia, New Mexico, Colorado, New Hampshire, North Carolina, Oregon, Alaska, and Minnesota. An analysis of 501(c) organizations projected spending in the 2008 elections—including that of Employee Freedom Action Committee, Coalition for a Democratic Workplace, and American Rights at Work—can be found at the Campaign Finance Institute's website, <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=214> (accessed July 31, 2010).

<sup>7</sup> These ads can be viewed at [www.myprivate.com](http://www.myprivate.com) (accessed July 31, 2010). National Public Radio also provides descriptions and links to these ads as part of its "Secret Money" Project Blog, "The Ads." It can be found at <http://www.npr.org/blogs/secretmoney> (accessed July 31, 2010).

<sup>8</sup> The original publication is George McGovern, 2008, "My Party Should Respect Secret Union Ballots," *Wall Street Journal*, August 8.

Following the 2008 election, corporate groups continued to aggressively campaign against EFCA. The Chamber of Commerce and its allies ran advertisements featuring President Obama exhorting “you were elected by secret ballot—don’t take that right away from millions of American workers,”<sup>9</sup> while American’s for Job Security, a corporate issue-advocacy organization, ran television spots featuring images of Democratic congressional leaders Harry Reid, Nancy Pelosi, Charles Schumer, and Dick Durbin. The voiceover first stated, “Democrats met in Washington recently to elect their leaders and they cast their votes in the American tradition, by secret ballot,” and then claimed that at the same time, elected officials sought to deny workers the same protection. This, the announcer asserted, was “no change,” just a “pay-back to union bosses.”<sup>10</sup>

In a similar vein, Republican Party leaders framed Democratic support for EFCA as a politically-motivated subversion of American democratic values, a repayment for union support. In an op-ed, House minority leader John Boehner wrote of EFCA:

Big Labor allies are pushing hard for speedy votes in Congress on this decidedly undemocratic bill. . . . It will be received warmly at the White House. . . . The irony should not be lost on anyone, of course, that President Obama resides in the White House because of a secret-ballot election—just as all 535 members of the United States Congress hold their offices thanks to the secret ballot. . . . This legislation is not about workers’ rights. It’s about meeting the demands of special-interest allies who helped Democrats take control of Washington.<sup>11</sup>

The uniformity in the message of those opposed to EFCA is impressive but perhaps unsurprising given the vehemence with which they oppose labor law reform. “I have never seen the business community so focused and coalesced on one issue and ready to go to the mat on it,” said Rhonda

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<sup>9</sup> The advertisement can be viewed at <http://www.myprivateballot.com/> (accessed July 31, 2010).

<sup>10</sup> The advertisement can be viewed at the web site of Americans for Job Security, <http://www.savejobs.org/mediacenter.php> (accessed July 31, 2010).

<sup>11</sup> The op-ed can be accessed at Representative Boehner’s leadership web-site: <http://republicanleader.house.gov/news/DocumentSingle.aspx?DocumentID=110818> (accessed July 31, 2010).

Bentz, spokesperson for the 500 corporate groups in the Coalition for a Democratic Workplace (Stone 2008b).

Rather than respond directly to their opponents' claims that EFCA violates American democratic values, proponents of the legislation have so far focused on promoting its economic impact and the role unions play in reducing inequality and improving workers' pay and conditions. Within organized labor, both the AFL-CIO and the Change to Win Federation, along with their allied unions, have educated and mobilized their members in support of the legislation around this economic theme. Early in their campaign for EFCA, John Sweeney, then AFL-CIO president, captured the tone of the proponents' message in the *New York Times*: "We really need fundamental change to counterbalance corporate power and reverse the decline of the middle class . . . and that's why we support the Employee Free Choice Act" (in Greenhouse 2008). After the Democrats failed to gain 60 senate seats in the 2008 election, Tom Woodruff, director of strategic organizing for Change to Win, echoed the economic message stating that "there are a number of Republicans who, in order to save our economy, can be brought around to supporting the act" (in Greenhouse 2008). Richard Trumka, Sweeney's successor as AFL-CIO president, doubled down on this theme in a 2010 speech to the National Press Club: "We must pass the Employee Free Choice Act so that workers can have the chance to turn bad jobs into good jobs, and so we can reduce the inequality which is undermining our prospects for stable economic growth" (Trumka 2010).<sup>12</sup>

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<sup>12</sup> A transcript of the speech is available at *Politico*, [http://www.politico.com/livepulse/0110/Trumka\\_warns\\_Dems\\_not\\_to\\_take\\_workers\\_for\\_granted.html](http://www.politico.com/livepulse/0110/Trumka_warns_Dems_not_to_take_workers_for_granted.html). (Accessed 7/31/2010). An online video of the speech is available at the National Press Club Website, <http://press.org/news-multimedia/videos/cspan/291173-1> (accessed July 31, 2010).

American Rights at Work (ARAW), a pro-labor advocacy group, joined the effort to promote passage of the EFCA, spending an estimated \$5 million in 2008 on a campaign that focused, like their opponents, on states where Democrats were embroiled in tight Senate races (Lengell 2008). Following the lead of organized labor, the group deliberately made the economic benefits of increased union membership central to its EFCA campaign. A spokesman said of the group's response to claims that majority sign up is undemocratic:

We're not trying to respond to their misleading message frames. . . . They've crafted their message to be about secret ballots and intimidation. . . . Those images of intimidation strike a nerve, regardless of the fact that it has nothing to do with this issue. We're trying to switch focus to what unions can do for you in making a better life. (in Northwest Labor Press 2008)

Since the 2008 election, ARAW has continued its advocacy campaign for EFCA and continued to stress the bill's potential to help workers in hard economic times.<sup>13</sup> This economic emphasis in its public campaigning persists in spite of the fact that ARAW has supported research that questions the democratic nature of union representation elections.<sup>14</sup>

Framing EFCA in economic terms instead of in terms of fairness and democracy has so far proven ineffectual for its proponents. Indeed, their adversaries responded by challenging their claims about the economic benefits of the legislation, suggesting instead that if passed, the bill would cause job losses and exacerbate already high unemployment rates. Yet, even as they broadened their framing of EFCA, business leaders continued to press their claim that the bill is undemocratic. The Chamber of Commerce launched a virtual march on Washington to "Save the Secret Ballot" and flew in small-business leaders for a series of Capital Hill lobby days, which they dubbed the "Workforce Freedom Airlift." Taking their anti-EFCA efforts to the states, a

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<sup>13</sup> The group's print and TV ads can be viewed at <http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/> (accessed July 31, 2010).

<sup>14</sup> See, for example, Lafer (2005).

new corporate group, Save Our Secret Ballot (SOS Ballot), is attempting to mandate secret ballots in union certification elections by amending state constitutions through initiative or referenda.<sup>15</sup>

Detractors of the EFCA put forward a clear message. They have uniformly depicted the bill as a violation of American democratic practices pushed by hypocritical politicians elected by the very secret ballots they wish to deny to workers—all this aided by political campaign funding provided by un-democratic union bosses who are demanding the bill as “payback” and are only interested in fleecing workers of their union dues. Surely, such hyperbole and drama play on the public’s limited knowledge of the bill and pander to popular stereotypes of unions. Certainly such rhetoric invokes a superficial analogy between accepted practices in political elections and those that adversaries of the bill suggest are embodied in current labor law. Undoubtedly such language appeals to poorly articulated yet popular visions of democracy. But as former Labor Secretary Robert Reich argued when discussing EFCA with then-SEIU President Andy Stern, “We are talking about public perceptions. . . . one of the perceptions people have is that this is about getting rid of secret ballots as opposed to . . . getting rid of coercion on the part of employers.”<sup>16</sup> This is the crucial point.

Opponents of EFCA have shaped the public debate over labor law reform in a compelling way by doing what philosopher Robert Nozick outlines in an essay titled “How to Do Things with Principles” (Nozick 1993). Nozick contends that we use principles to group actions, and thus to provide arguments and justifications as to why we should treat some new situation or phenomena in the same manner as a situation or phenomena we have encountered in the past.

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<sup>15</sup> Information about this campaign is at the group’s website, <http://www.sosballot.org/> (accessed July 31, 2010).

<sup>16</sup> The full interview is available at Bloggingheads TV; <http://bloggingheads.tv/diavlogs/16661?in=07:25&out=12:04> (accessed July 31, 2010).

Nozick argues that principles operate akin to precedent in legal cases. Faced with a new situation or phenomena, we use principles to depict it as “the same” as some earlier occurrence and as unlike others. Having done so, we then are warranted by our principles to approach the new setting as we have approached those in the past. In this way, we can use principles to convince others that our position or judgment is the correct one. Rather than simply asserting our preferences, we can provide arguments and reasons that others will accept by suggesting that a principle deemed fitting in one circumstance should be adopted in a new case. If those we seek to convince accept the principle in the first instance, we need only to demonstrate how the new situation is like the first in order to persuade others that the same principle should apply. On Nozick’s view, this is an effective argumentative strategy: “Justification by general principles is convincing in two ways: by the face appeal of the principles and by recruiting other already accepted cases to support a proposed position in this case.”

This is precisely what opponents of the EFCA are doing with the principle of democracy—using the general attractiveness of “democracy” to gain support for their position. In doing so, they implicitly, and sometimes explicitly, assume that union certification elections are analogous to elections for political representatives. After all, if they can persuade those whom they are trying to convince to see union certification as akin to political elections, and secret ballots as essential to democracy, then it follows that a secret ballot is essential to union certification. To add a little drama, they deploy what I call the “Hoffa effect,” evoking historical stereotypes of union organizers as coercive thugs, with the clear implication that current union leaders are guided by similarly undemocratic intentions. By conjuring up such caricatures of corrupt unionists and casting them as benefactors of elected officials, the bill’s opponents are in turn

insinuating that political supporters of the legislation at least condone, if not participate in, their coercive deeds.

There are at least two weaknesses in the argument that EFCA's opponents present. First, union representation elections are not equivalent to political elections. In equating the two, EFCA's foes invoke a flawed analogy. Second, a commitment to democracy does not entail a commitment in all instances to the secret ballot. In fact, as I argued in chapter 3, the ideal of democracy does not entail any specific institution or institutional arrangement. Those who equate democracy with the secret ballot are using the "principle of democracy" in a simplistic way.<sup>17</sup> Indeed whether or not secrecy in balloting serves democratic purposes is dependent to a great extent on the context with which it is used. I address the first of these objections in the next section, and take up the second objection in the subsequent one.

### **Questioning the Analogy of Elections for Union Representation and Political Office**

This is not the first time conflict over American labor law has revolved around the concept of democracy. And as I have shown, advocates of unions arguably have invoked "democracy" as much as their foes. As historian David Brody and legal scholar Craig Becker elegantly highlight, Senator Wagner and his allies appropriated the principle of democracy, which Wagner claimed his bill would bring to the workplace, to legitimate passage of the National Labor Relations Act (Becker 1993; Brody 2005, 99-109). It is clear that the senator envisioned something considerably broader than the current opponents of majority sign-up do when he appealed to the ideal of democracy. Indeed, the original Wagner Act did not require a secret ballot election to certify a union. It explicitly stated that the NLRB could use "any other suitable means" to

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<sup>17</sup> I use the phrase "principle of democracy" throughout this section in ways that may seem as if I believe there is some fixed definition or meaning to the term. In fact, I do not. I actually doubt that there is any complete consensus regarding precisely what the concept of democracy entails. In the next section I outline the concerns I have with the way in which opponents of the Employee Free Choice Act use the principle, and I offer some alternatives.

determine majority support and thus certify unions as exclusive representatives of workers. And, until 1939, the Board regularly did so, authorizing unions based on signed cards and petitions.

It was only in the face of intense political pressure and employer resistance to NLRB certifications that the Board changed policy and mandated a secret-ballot election to determine majority support before certifying a union.<sup>18</sup> The passage of Taft-Hartley in 1947 made elections not merely a board policy, but a statutory requirement upon an employer's request. The extent to which lawmakers' thoughts about labor law had, by this time, been influenced by ideas of democracy and the analogy of the union certification process and political elections is captured in one of the few recorded comments on the Taft-Hartley secret-ballot amendment. Democratic Senator Carl Hatch (NM), a legislator who was sympathetic to unions, stated simply that "this is merely an extension of our general voting practices to the field of labor relations" (in Becker 1993, 512).

Once Wagner set it in motion, it seems that the call to bring democracy to the workplace was difficult to control. Adversaries of organized labor and collective bargaining used it as effectively as did their champions. What's more, the principle of democracy was narrowed over time to the point that "industrial democracy" became synonymous with a union representation election. Brody sums up the situation well, "The representation election once in, was in. The democratic resonance was too great. Wagner, indeed, exploited it in just that way, pumping up the industrial democracy rhetoric on behalf of his bill to great effect" (Brody 2005, 151).

Opponents of the EFCA are engaging in precisely the same sort of "principled" argument that Wagner deployed. They are relying on the "democratic resonance" of union certification by

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<sup>18</sup> *Cudahy Packing Co.* 13 N.L.R.B. 526 (1939), a case in which two unions were competing to represent workers, was the first case in which the NLRB required an election to affirm majority support. *Armour & Co.* 13 N.L.R.B. 567 (1939) is the case that extended the election mandate to situations where only one union sought certification. Becker (1993, 501-515) provides a detailed account of the evolution of the election standard as does Brody (2005, 99-109).

secret ballot to make their case. In so doing, they are employing the principle of democracy to justify their political preferences in precisely the way Nozick suggests that principles are used more generally. In order to counter this appeal to democracy, proponents of the bill might ask if the parallel drawn between union certification elections and political elections is appropriate.

The answer is no.

This point is hardly new. Scholars of labor law, federal judges, members of the NLRB, and prominent unionists all have questioned the analogy for a variety of reasons. Indeed, this can be traced at least as far back as the debate over Wagner's original legislation. In the hearings regarding Wagner's bill, the question of whether an employer should be considered a "party" in certification elections was fiercely debated. Wagner and like-minded contemporaries thought employees' decisions about representation had nothing to do with employers. To illustrate their claim, they deployed "international relations" metaphors, suggesting that allowing employers to be "parties" in their employee's selection of representatives would be akin to allowing nations to be party to selection of other nations' negotiators in international disputes (Becker 1993, 528-531). Decades later, labor law scholar Paul Weiler critiqued equating union representation and political elections in similar terms. He claimed that the employer in a union election is akin to a foreign government in an American election; while a foreign government has an interest in the election outcome, it surely is not entitled to take part in the election.

Canada, for example, has a significant interest in which party is elected to govern the United States; selection of one party rather than the other may make life considerably easier or more difficult for the Canadian government in negotiations over defense, trade, natural resources. . . . Yet no one would argue that Canadian government agencies should therefore have a right to participate in an American election campaign in order to try to persuade citizens to vote for a party that would be favorable to Canadian interests (Weiler 1983, 1812).

These metaphors clearly resonate with themes I developed in chapter 4. They also foreshadow a shift in analogy I suggest below. Before doing so, however, it is important to

underscore further important dissimilarities between union certification and political elections. These differences, in turn, help sustain a clearer view of how the interpretation of union certification has shifted over time.

The analogy between union formation and political elections suffers from both analytical and empirical problems, although it is often difficult to keep the two distinct. Analytically, there is a flaw in the comparison with respect to the fundamental purposes of the two processes. Political elections generally aim to select a representative for a predefined constituency, whereas union representation elections aim to establish a system of representation. Therefore an essential difference between the two is that no *individual* is selected as a representative in a union certification process. Instead, workers decide whether in fact they wish to be represented collectively and therefore to inaugurate a union. Thus, in reality, there are no “candidates” in union certification elections in contrast to most political elections.<sup>19</sup> The election of specific workers to fill leadership and representative roles in the union, an analogous process to elections for political office, occurs only *after* a union is certified. Hence, depicting unions and employers as opposing parties in an election is problematic. The equation is vexed for another reason, namely that workers are, to a considerable extent, economically dependent on their employer. This circumstance means that the power relations and opportunities for coercion and domination in union representation are distinct from those experienced in political elections.

A further analytic distinction between political and union representation elections is that if a union is certified, neither it nor its officers gains the right to *govern* the workplace, unlike candidates who gain the right to represent constituents and share in the governing regime upon winning an election. If successful in a certification process, a union wins the right to represent

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<sup>19</sup> Referenda and citizen initiatives are exceptions.

workers in negotiations with employers. To that end, a successful certification process also establishes the union as a collective entity, with limited powers to enforce rules and regulate the collective activity of its members. These critical distinctions between the two kinds of elections also means that union certification elections are not held on a regular timetable as are political elections, nor are there pre-designated constituencies to be represented or publicly available lists of voters. In fact, the constituency for union representation elections is defined in the unit-determination process described in the previous chapter.

Scholars, legislators, and judicial actors have highlighted many of these failings in the union representation/political election analogy, as the legal framework regulating the certification process has developed. And the development of policy has, in turn, generated additional contrasts between the two processes. Yet even as the analogy has been vigorously questioned, it has persisted. One recurring policy theme prompted by the analogy that is pertinent for present purposes has revolved around the status of employers in union representation proceedings. The Wagner Act was silent on the question of whether employers should be viewed as a “party” in union representation elections, leaving the issue open to interpretation by the NLRB. While the Board initially prohibited employers from campaigning as a “party” in representation *elections*, it granted them that status in representation *cases* before the Board, for example, for the purposes of determining bargaining units, or challenging voter eligibility (Becker 1993, 533). This status in board hearings, which employers still enjoy, has enabled them to delay elections and dampen support for unionization primarily by challenging the composition of the bargaining unit (Levitt 1993). The ability of employers to tactically delay proceedings in this way distinguishes the certification process from political elections, where similar stalling strategies are not available to candidates.

The early NLRB provided a number of reasons for prohibiting employers' campaigning in representation elections. The Board noted that employers were not candidates in union certification elections; they did not appear on the ballot or have the right to vote, so treating them as candidates with rights to campaign would be disingenuous. More importantly, the NLRB argued that the economic dependence of employees made employer speech inherently coercive. "It was impossible for the employee's to distinguish between the [employer] qua candidate, and the [employer] qua employer," asserted the Board in the *American Tube Bending Co.* 44 N.L.R.B. 121 (1942), 133-134). By interpreting the Wagner Act in this way, the NLRB sought to preserve for workers their rights of "self-organization" free from any employer interference that the NLRA provided.

Over time, the attempt by the NLRB to grant employers status as party to proceedings surrounding questions of representation and to deny them status in the election process became untenable. The Taft-Hartley reforms exacerbated this difficulty. They not only made an election mandatory for union certification, but also included an employer "free speech amendment." This amendment asserted that employer speech in election campaigns could not violate employees' rights to self-organization so long as "such expression contains no threat of reprisal or force or promise of benefit" (National Labor Relations Act, 29 U.S.C. §§ 151-169).<sup>20</sup> In effect, Taft-Hartley used the political analogy to elevate employers to the status of equal parties (or candidates) in union elections. Architects of the bill did question the comparison, reiterating the earlier NLRB argument that employers were *not* candidates and were *not* included on the ballot. Nevertheless, they justified the status of employers as candidates on the basis of the notion that

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<sup>20</sup> The Supreme Court had ruled prior to the Taft Hartley Amendments that employers' *non-coercive* speech was protected by the First Amendment and therefore could not be judged to violate the Wagner Act in *NLRB v. Virginia Electric & Power Co.* (1941). The extent to which this ruling changed NLRB policy with regard to employer speech is questionable; see Becker 1993, n. 218.

employees needed to be “fully informed” and that the employer was a proxy for the choice of self (or individual) representation, as opposed to the union. In addition, proponents of the employer speech amendments grounded their appeals in claims that prohibiting employers’ speech violated their First Amendment rights.

The NLRB conjured a new analogy for union representation elections in the wake of Taft-Hartley. In doing so, the Board majority aimed to limit the potential for employer speech to unduly influence employees’ decisions. Employees’ selection of representatives, they argued in *General Shoe*, should be considered a “laboratory experiment” in which the “uninhibited desires of workers” were determined (*General Shoe Corp.* 77 N.L.R.B. 124, 1948). By substituting the “laboratory experiment” for the “political election” analogy, NLRB members hoped to highlight the fact that, unlike the electoral arena wherein candidates have roughly equal status, workers in representation elections are economically dependent upon employers. Thus while Taft-Hartley’s “free speech” requirement precluded regulation of any speech that did not amount to a direct threat or promise, framing the representation election as an experiment allowed the NLRB to scrutinize the *conditions* under which the experiment was conducted. Under this new doctrine the NLRB ruled that if employer speech “tainted” employees’ decisions about or prevented their “untrammeled” choice regarding representation, then it could be grounds for overturning an election result.<sup>21</sup> After all, scientists can and frequently do repeat experiments performed under less than ideal conditions. In contrast, and underscoring the consequential shift in the analogy, elections even when conducted in less than ideal circumstances, are rarely re-run.

The NLRB was widely criticized for overriding “democratic majority rule” and distorting congressional intent in the decision that outlined the *General Shoe* doctrine. They thus fell prey

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<sup>21</sup> For a detailed account of the evolution of the doctrine, see Larson Bright (2002), who argues that the standard unfairly restricts employer speech in violation of the First Amendment and against congressional intent. For opposing views, see Andrias (2002).

to the very political metaphor that they sought to displace. Subsequently, even though the NLRB's decision in *General Shoe* remains good law, in the wider debate over labor law the laboratory metaphor has lacked the resonance attached to the political election metaphor. This may in part be due to the fact that trying to effectively delineate what constitutes a violation of "laboratory conditions" has proved difficult. Initially, the NLRB suggested that the location or timing of employer speech—either in a place of "authority" in the workplace, in the employee's home, or immediately prior to the election—might contaminate the proceedings. However, as the composition of the NLRB changed, so the interpretation of what kinds of conditions might preclude workers' choice shifted. Members of later, more pro-business, and conservative Boards did not overturn the "laboratory conditions" doctrine. Instead, they interpreted the circumstances under which employer speech might violate experimental conditions in more restrictive ways. They held that neither compelling employees to listen to anti-union speeches during work time (so-called captive audience meetings), nor precluding union organizers or pro-union workers from speaking at such meetings, nor dismissing employees for leaving them violates workers' rights (Becker 1993, 557-561). Clearly there are no correlates to this sort of campaign speech in political elections; no matter how much political candidates might wish they could compel voters to listen to them, they have no mechanism by which to do so.

The Supreme Court has invoked the political analogy in contradictory ways when adjudicating cases involving union representation. In an early case, one that began to erode the NLRB's policy of employer neutrality in representation elections even before passage of Taft-Hartley, the Court argued that both employer and employee speech should be protected under the First Amendment (Story 1995).<sup>22</sup> This decision traded on the idea that, like democratic

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<sup>22</sup> The case was *Thomas v. Collins*, 323 U. S. 516 (1945). It was actually brought to challenge the conviction of a union organizer who violated a Texas state law by making a speech encouraging workers to organize without

discussion in political campaigns, union representation elections require a “marketplace of ideas.” Justice Jackson stressed this view in a concurring opinion, in which he stated that “the necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation” (in Story 1995).

Legal scholars have questioned the application of the “marketplace of ideas” metaphor in the workplace setting, suggesting that the Court’s concern with the importance of the “free exchange” of ideas has been inconsistent (Andrias 2002; Becker 1993; Story 1995). Too often, they argue, equity in speech has been sacrificed to employers’ property rights or workplace control. The former has justified the prohibition of union organizers or pro-union workers from presenting their views on company property, even though it is often the location in which the election takes place. The latter facilitates captive-audience meetings with workers wherein competing viewpoints are left unspoken and from which workers have no choice of exit. In effect, the Court has allowed employers property rights to justify restrictions on union speech during union representation campaigns; at the same time, it has upheld employers’ ability to campaign during work time. There is no analogue to this kind of inequitable legal regulation of speech in political elections.

Indeed, the Supreme Court itself has expressed reservations about equating employer speech in union campaigns with that of candidates in political settings. In *NLRB v Gissel Packing Co* (1969), it held that while employers’ speech is protected by the First Amendment, the protection is not absolute; rather, it must be balanced against the rights of employees to

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registering as a union organizer in the state. The case challenged the Texas state law that required union organizers to register as a violation of First Amendment speech rights. The Supreme Court found in favor of the organizer and at the same time included language in the decision that implied employer speech in union certification processes also deserved First Amendment protection.

associate. Owing to their “economic dependence” on their employer, the Court noted, workers may be more attentive to employer speech and its “intended implications” than would voters in a political election. Further, the political analogy was flawed, the justices concluded, because what is at question in the two situations is quite disparate. What “is basically at stake [in a union representation election] is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation” (*National Labor Relations Board v. Gissel Packing Co., Inc.* 1969). The decision in *Gissel* upheld the NLRB’s right, in situations where employers’ coercive behavior made a fair election impossible, to order a company to bargain with a union on the basis of signed cards or other evidence of majority support (this has become known as a *Gissel* order). However, in the same ruling the Court made clear that secret ballots should be the preferred method of certifying a union and subsequently the NLRB has rarely issued *Gissel* orders.<sup>23</sup>

In many respects, adopting EFCA would make *Gissel* orders the norm rather than the exception. Legal scholar and newly appointed NLRB member Craig Becker acknowledges, but ultimately rejects, this approach. This is not because he endorses the political analogy. In fact, he vigorously questions it because of the economic dependence of workers on employers—a dependence, he notes, that persists regardless of the outcome of a representation election—and because the right to govern the workplace is not at stake in the union certification process (Becker 1993). Becker nevertheless argues that certification decisions be made by secret ballot, albeit under an amended legal framework. He proposes that employers be stripped of “party”

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<sup>23</sup> According to their 2009 Annual Report, the NLRB issued bargaining orders in 24 out of 1,973 unfair labor practice cases. This is roughly in line with prior scholarly research that documented 144 bargaining orders issued by the NLRB out of more than 4,500 cases in the period 1978–1981, see Bethel and Melfi 1997. It is instructive to note that the researchers selected the 1978–81 period for their study, as they felt the Board during that period would be especially inclined to issue *Gissel* bargaining orders.

status in certification proceedings to foreclose delaying tactics and that representation campaigns be regulated to prevent employers from exerting their economic influence in campaigns.

However, Becker endorses the use of the secret ballot because, if a majority of workers vote in favor of a union, union representation proceedings are “constitutive” of collective representation that is binding on all workers. Thus, because the “majority rules,” he believes the convention of using a secret-ballot election to determine the will of the majority should apply (Becker 1993, 535). What Becker fails to do, however, is examine whether the secret ballot works effectively to further democratic ideals in the context of a union representation election. I return to this point in the next section.

Even as Becker uses the constitutive nature of union representation processes to reject the use of authorization cards, others have used just such an argument to *endorse* the majority sign-up proposal in EFCA. Unlike political elections that function within existing democratic systems, union representation elections, Gordon Lafer contends, attempt to “change the form of government in the workplace from one party rule to something slightly more democratic” (Lafer 2008). To illustrate his point, Lafer offers two new analogies to replace the comparison of union representation and political elections. Unionization, he proposes, is more like the formation of new political parties or the creation of a nation state. To highlight the notion that publicity rather than secrecy is sometimes crucial to foundational processes, and thus endorse “majority sign-up,” Lafer compares union formation with the signing of the Declaration of Independence. A public declaration of commitment to the cause was essential to the process, he contends, as “unlike voting for representatives, this foundational act was not simply a statement of political beliefs. It was a declaration of confidence, commitment, and courage of exactly the type necessary to rally rebellion against an entrenched power” (Lafer 2008, 82).

Former SEIU president Andy Stern argued along the same lines when asked about the framing of EFCA and the sanctity of secret ballots. A union representation election, Stern observed, is a process in which workers were “creating an organization to engage with their employer” (Stern 2008).<sup>24</sup> Stern argued that unlike union representation elections where workers decide if they want to have a union, in political elections voters are deciding who they want to represent them in Congress; they are not voting to decide if they want to have a Congress. Echoing Lafer, he also envisioned union representation processes as akin to the formation of opposition political parties in authoritarian regimes, and thereby rejected equating them with elections for political office in established democracies (Lafer 2008; Stern 2008).

These arguments questioning the frequently-invoked analogy between union representation and political elections are in many ways persuasive. Union representation elections do not involve two “candidates,” and no one is elected to or removed from office on the basis of the result; nor does a victory confer the right to govern in the workplace. Moreover, union representation elections are not held on a regular schedule, nor conducted in a neutral setting between parties with proximate equality of power. In addition, despite the often-drawn comparison, the contemporary legal regulations governing such things as speech rights and access to voters are quite disparate in the two processes, so much so that political scientist Gordon Lafer believes that if other nations held political elections according to the rules for U.S. union representation elections, the U.S. government would deem them illegitimate regardless of whether they ended in a secret ballot. Indeed, he concludes that “the secret ballot turns out to be the only point at which current union election procedures meet the standards of U.S. democracy” (Lafer 2005).

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<sup>24</sup> The interview was conducted for “Bloggingheads TV” and can be found at: <http://bloggingheads.tv/diavlogs/16661?in=07:25&out=12:04> (accessed July 31, 2010).

In suggesting various alternatives to the political analogy, however, it seems that Lafer and Stern do not quite push far enough. They correctly suggest that union certification processes are formative or constitutive moments enabling workers to decide whether they wish to form a collective organization through which they will, in future, bargain with their employer. In this sense, as they suggest, union certification resembles forming a new political party in an authoritarian state. Where this analogy falls short is that, unlike political parties, labor unions once formed are not purely voluntary organizations. Unions bargain on behalf of all the workers, even those who choose not to join (and in states with “right to work” laws, even those who do not contribute to the cost of bargaining, or maintaining the union).

While it is true that on winning a representation election a union does not become the “government of the workplace,” once certified a union becomes *more* than a representative of employees in negotiations with their employer. When a majority of workers vote for collective representation, the workers in essence *become* a union. They form a collective organization that regulates members’ rights and privileges, and which, ideally is governed by its members. This is why Becker endorses the use of secret ballots in union certification. However, as I mentioned, he fails to ask whether the context surrounding union certification makes secret ballots effective in the workplace setting. This is a point to which I return shortly. In fact, in the workplace setting, the closest analogy to elections for political office are elections for union representatives once a union has been formed. It is here that those concerned with workers’ right to secret ballots should direct their attention. This, as I have previously mentioned, is why it is crucial to keep matters of union formation distinct from those of their subsequent governance; the institutions and mechanism that facilitate democratic decision-making in the two circumstances are not necessarily the same.

The “constitutive” nature of the union certification process that scholars highlight suggests to me that a more appropriate analogy is to a constitutional convention. Just as societies are created and existing governmental systems are altered in constitutional moments, so a union is formed and the workplace regime altered following a successful union certification election. Lafer’s equation of the process of union certification with the Declaration of Independence of course points in similar directions. However, it falls short in two ways. The first is that, unlike the colonists, workers are not truly breaking away from the workplace and forming an entirely separate enterprise in the process of forming a union. The second is that by invoking the public signing of the Declaration of Independence as characteristic of a democratic moment, this analogy directs attention to the willingness of *individuals* to stand up in the face of potential danger and intimidation.

In contrast, the alternative vision of union representation elections as “constitutional moments,” draws attention to the *collective* nature of the enterprise. This is important. It allows us to see that potential threats made by those opposed to the formation of a group (or union) are not merely addressed to individuals, but also at group members (workers) as a consequence of its formation. As I will show, the secret ballot is ineffective against these kinds of threats. However, the mechanism of secrecy can be effective in constitutional moments; for example, the American Constitutional Convention took place behind closed doors in part to avoid the potential peril wrought by publicity. And, importantly, such secrecy also enhanced the proceedings by providing a context in which genuinely democratic discussion could take place between similarly situated participants (Elster 1998). This is how majority sign-up could work in union certification. It would enable workers (at least in the initial stage of organization) to use secrecy to exclude their employer and the employer’s potentially coercive speech from discussion about

collective bargaining. Majority sign-up, in effect allows workers to shift the mechanism of secrecy from the point where they register their preferences for union formation to the point wherein they are discussing and forming preferences about union formation. Overall, this makes the process of union formation more closely approximate democratic ideals. This is because, in the context of the workplace, secrecy does not offer workers protection from domination during the casting of ballots, but does protect them from potential coercion while they are discussing unionization. I elaborate on these points in subsequent sections. However, before doing so, I would like to address a possible objection, namely, that excluding employers from union formation would violate democratic ideals.

This objection arises to a great extent because the analogy drawn between political elections and the process of union formation is so deeply rooted. As I have shown, it was invoked during the passage of the nation's first comprehensive labor law and is even encapsulated in the name— representation election—of the process that currently structures union formation. The prevalence of the analogy is one reason that employers are frequently viewed as co-equal participants in the process with unions, as though they were opposing candidates in an election. Even though the status of employers as candidates or parties has been questioned repeatedly, employers retain their rights to campaign in representation elections and have standing in cases related to them.

Shifting to the more appropriate metaphor of union formation as a constitutional moment clarifies the fact that democratic ideals do not underwrite including employers in the formation process. Democratic principles demand only that those who will become part of the union have a voice and vote in its formation. And the “coercion” principle and “all directly affected interests” principle, described in chapter 4, in fact to varying degrees justify the exclusion of employers

from the bargaining unit and, hence, the union formation process. This is because decisions made by a union, should it form, can coerce or directly affect (that is, threaten the basic interests of) its future members, but not their employers. Employers will not become “members” of the union should it form; hence they should not be included as a participants in the process of union formation. The majority sign-up process, as I have mentioned previously, makes it easier for groups of workers to keep among themselves the question of whether to form a union.

### **The Secret Ballot—What Is It Good For?**

What follows from shifting the metaphor and suggesting that union certification processes are more analogous to constitutional moments than to elections for representatives in an existing polity? Certainly it does not mean that union certification processes should not be conducted under conditions that approximate democratic ideals. Instead, it means that determining just what those conditions might be is complicated, and that they may differ from those we commonly associate with elections for political office. Opponents of EFCA equate democracy with a secret ballot. This is an impoverished view of what democracy requires even in a political election. As I argued in chapter 3, the concept of democracy does not entail any specific institution, the secret ballot included. Rather, institutions should be viewed as “the machinery,” in the words of Dewey, or “mechanisms” to quote Vermeule, that facilitate democratic ideals. Recognizing the contingent nature of democratic ideals and institutions in this way presses us to ask whether a particular institution is actually appropriate to furthering democratic aims in a particular setting. In this section I will raise that question specifically with regard to the secret ballot.

Opponents of EFCA take for granted that the secret ballot is an essential and foundational element of representative democracy, but as I have suggested earlier, and as a brief glance at history and theory will attest, that is not the case. The secret ballot was introduced toward the end of the nineteenth century, first in Australia, from where it was later adopted in the United

Kingdom and United States. In each case, the innovation of voting in secret was introduced to serve a specific purpose, namely, to prevent coercion and corruption. But its introduction was not universally acclaimed; it was much debated before its inception and has been questioned since. No less a defender of representative government than John Stuart Mill denounced the secret ballot because he believed publicity served to ensure that citizens cast their ballots with a view to the public good rather than private interests. Mill's argument was predicated on a weighing of the threats he observed at the time:

Thirty years ago it was still true that in the election of members of Parliament the main evil to be guarded against was that which the [secret] ballot would exclude—coercion by landlords, employers and customers. At present, I conceive, a much greater evil is selfishness. . . . A base and mischievous vote is now, I am convinced, much oftener given from the voter's personal interest. ([1861] 1991, 211)

Political theorists Geoffrey Brennan and Philip Pettit have recently revived Mill's reasoning (Brennan and Pettit 1990). They claim that “unveiling the vote” and making voting a public act will serve to ensure that voters more carefully consider their voting decisions and are able to supply reasons for their choice of representatives. Brennan and Pettit believe that this will encourage public-spirited voting and deter casting of ballots for self-serving or arbitrary reasons. Of course, these views are predicated on the notion that voters can discern what constitutes the public good, and further, that they should vote in accordance with it or else face the sanction of public pressure.

Mill's father, James Mill, thought differently about the secret ballot. The elder Mill argued that secrecy would protect voters from coercion, and prevent them from willingly “selling” their votes; thus it would facilitate the casting of ballots in the public interest. “Not only is there no degradation in secret voting, but it saves from all the degradation inseparable from prostitute voting” (in Gosseries 2005, 18). Despite their differences, both Mills—father and son—underwrite their arguments with the notion that voting is a “trust” and that, when casting ballots,

voters should consider not self interest, but the public good. The idea that democracy should aim to uncover the common good is one that, as I explained in chapter 3, many theorists contest and that I find problematic. In fact, Lever (2007) rejects Mill's idea that citizens are performing "an act of trust" when voting, and doubts the existence of a clearly defined public good that voters should consider to the exclusion of other grounds for voting. On this basis she supports the use of the secret ballot by citizens, but not by public officials. Elected representatives, Lever asserts, do serve a public trust, and should vote publicly as this allows citizens to hold them to account for their votes—something that is not and should not be expected of the general public. Each of these theorists has endorsed or rejected the use of the secret ballot, dependent upon what they view as appropriate democratic aims and the relevant threats they see to those aims in a specific context. My aim here is not to establish that any of these views is "correct," but merely to illustrate to some extent the range of positions that political theorists have adopted on this issue. The clear consequence is that anyone who simply asserts that the secret ballot is essential to democratic decision-making would have to address the views of those who think otherwise.

If the virtues of secrecy in voting are debatable in theory, the practical implementation of the secret ballot was also subject to questionable political motivations and consequences. In Britain, the secret ballot was adopted in 1872 when the Ballot Act passed through parliament on its third attempt. Passage of the Ballot Act was eased by the expansion of the franchise, which took place in 1832 and 1867. A larger franchise limited the opportunity of landed elites to control election outcomes by bribing or blackmailing voters. In turn, it enhanced the ability of emerging manufacturing interests to manipulate voters in towns where a small number of companies dominated the economic landscape. These facts along with increased public discontent and awareness of corruption in elections, diminished opposition to the secret ballot in

parliament (Crook and Crook 2007; O’Gorman 2006). By many accounts the introduction of the secret ballot in Britain, did reduce corruption, but it also presented difficulties for illiterate voters, many of whom spoiled ballots or sought assistance from poll workers, something that undermined the secrecy of the system (Crook and Crook 2007, 466). Still other accounts suggest that eliminating the public and celebratory nature of voting also depressed turnout, a trajectory common to Britain and North America when the secret ballot was adopted across the Atlantic (Teuber 1980).

In the United States, because states largely dictate voting regulations the secret ballot was not introduced uniformly, but adopted state by state in the 1880s and 1890s (Cowley 2006).<sup>25</sup> As was the case in Britain, the introduction of secret voting had previously generated opposition on the basis of its potential to undermine public-spirited voting. Such objections were overcome, to a great extent, due to the rise of political party machines in northern cities. Party bosses were able to coerce poor urban voters with promises of reward or threat of punishment if they voted in accordance with or opposition to party dictates. Even though the secret ballot may have been an appropriate remedy for such practices, it also served to disenfranchise many poor and immigrant voters who were illiterate and could no longer effectively cast their vote. In the South, corruption by party machines was less problematic. However, after passage of the Civil Rights Act and following the end of reconstruction, Southern elites found the secret ballot served the “American democratic tradition” of disenfranchising black voters, many of whom had difficulty reading the often deliberately complex ballots (Cowley 2006).

What I seek to illustrate here is that the secret ballot is not fundamental to the American system of representative democracy. Its introduction was in fact an historical contingency, one

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<sup>25</sup> The secret ballot in the U.S. actually refers largely to what is deemed the Australian ballot. This means that not only are votes cast in private at neutral polling places, but also that ballots are printed at public expense.

that in some cases served to undermine as much as to augment democratic ideals. It is a mode of voting that might also be rendered obsolete by a changing historical context. In the U.S., since 1998 the state of Oregon has cast ballots entirely by mail and has done so without any significant problems with coercion (Gronke 2005). Other states are looking to the Oregon model as they seek to make voting more convenient and to utilize modern technologies. The implication of this brief historical discussion and my earlier theoretical discussion is that any assessment of the secret ballot as an institutional mechanism of necessity will be contextual. I am not truly concerned here with the debate about whether secrecy enhances voting in elections for political representatives. My question is whether the secret ballot allows workers to make un-dominated choices in union representation elections. Does it in fact protect workers from the threats they face in that context? My answer to that question is no, it does not.

To understand why secrecy fails to protect workers in the process of constituting a union, it is helpful to ask how the secret ballot works. The answer is quite simple. The secret ballot ensures that no voter can verify how he cast his ballot. Lacking the ability to prove how he voted, the voter cannot “sell” his vote for profit or benefit. Conversely, he is freed from any potential blackmail by those that may seek to coerce him to vote according to their wishes. Ultimately, then,

the mandatory secret ballot is a scheme to deny the voter any means of proving which way he voted. Being stripped of his power to prove how he voted, he is stripped of his power to be intimidated. Powerless to prove whether or not he complied with the threat, he knows—and so do those who would threaten him—that any punishment would be unrelated to the way he actually voted. (Schelling [1960] 1980, 19)

This mechanism may work effectively in political elections wherein an individual voter is selecting a representative and might be coerced or bribed by someone with power or influence over them. But what about the union certification setting, where the purpose is to decide whether to constitute a union? An adequate response to this question requires us to identify the sorts of

threats most commonly operative in that context, and assesses if the secret ballot actually works to deter them.

### **The Secret Ballot in the Workplace—Is It Working?**

The constitutive nature of union certification and the fact that it is a process of group formation means the kinds of threats (and bribes) that workers might face differ in two ways from those that citizens may encounter when electing representatives. First, the potential threats workers confront typically are directed not at individuals but at the group should it form. And second, employers typically articulate these threats repeatedly and significantly prior to the election. These characteristics combine to undermine the usefulness of the secret ballot as a way of protecting workers. A brief consideration of the “threats” workers face during union certification will demonstrate why this is so.<sup>26</sup>

Numerous scholars have documented the multiple tactics employers adopt to deter union formation (Bronfrenbrenner 1994, 1997, 2000, 2009; Eaton and Kriesky 2001, 2008; Levitt 1993; Logan 2002; Mehta and Theodore 2005). Union deterrence is a widespread and professionalized practice reflected in the fact that faced with a union organizing campaign, the overwhelming majority of employers hire “union avoidance consultants” to advise them on strategy (Bronfrenbrenner 1997; Mehta and Theodore 2005).<sup>27</sup> A common avoidance strategy recommended by consultants and deployed in over 85% of representation elections is the use of “captive audience meetings.” During these meetings, which are held during work time, management offer workers “predictions” about the consequences of certifying a union. These

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<sup>26</sup> I use the term threat, although employers—with assistance from their consultants—are unlikely to explicitly make threats, as they are “unfair labor practices” prohibited by the NLRB. What they do make are carefully couched predictions that from an employee’s position are indistinguishable from threats, thus I use the term threat without qualification in this section.

<sup>27</sup> Mehta and Theodore (2005) found that 83% of employers hired consultants while Bronfrenbrenner (1997) found that employers hired consultants in 71% of her sample.

“predictions” are thinly veiled threats or bribes that skirt the legal prohibition against employers making “threat[s] of reprisal or force or promise of benefit,” during certification campaigns. One very common “prediction” that managers make is that they anticipate having to close or relocate the plant should workers vote to form a union. This occurs in more than 57% of campaigns (Bronfrenbrenner 2009, Mehta and Theodore 2005).<sup>28</sup> Employers issue such threats most often in manufacturing industries where capital is mobile (71% of campaigns) but they also do so regularly in what we think of as “non-mobile” sectors such as retail (58% of campaigns) and hospitality (33% of campaigns; see Bronfrenbrenner 2009).

Plant closing threats cause the entire group of workers rather than any particular individual to fear they will lose their livelihood completely should they decide to go ahead and form a union. Another common strategy adopted by employers during captive meetings is to “warn” workers that working conditions will deteriorate should they elect to form a union. These warnings typically incorporate a variety of claims: 1) that union organizing efforts will create a hostile relationship with management that will persist if the union prevails; 2) that collective bargaining will mean that workers may lose current pay levels and benefits; and 3) that if it is formed the union will force workers to strike and collect hefty union dues (Bronfrenbrenner 2009; Levitt 1993; Logan 2002).<sup>29</sup> None of these threats are directed at individuals. They are leveled at workers as a group. They are actions or consequences that employers “predict” will follow if employees vote to unionize and that will negatively impact all of the workers, not as a consequence of the actions of any identifiable individual, but due to a decision of the majority.

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<sup>28</sup> The latest figures are from Bronfrenbrenner (2009). Earlier data documents employer threats to close plants in 52% (Bronfrenbrenner and Hickey 2004); 50% (Bronfrenbrenner 1997); 49% (Mehta and Theodor 2005); and 29% (Bronfrenbrenner 1994) of election campaigns.

<sup>29</sup> This is not an exhaustive list of this kind of union avoidance strategies; Logan (2002) and Levitt (1993) provide more detailed and comprehensive accounts.

The secret ballot is ineffective in the face of such threats. That is because casting a ballot in secret works to protect individuals from retaliation for their vote choices by preventing them from credibly revealing how they voted, and foreclosing the potential for others to find out. However, in the case of union certification, because the process is one of group formation and threats are leveled toward the group, it is irrelevant that a particular individual can conceal how he voted. If the majority votes for collective bargaining, the union forms. The majority decision is not concealed by secret balloting. And if employers' threats are carried out, all workers bear the consequences regardless of their individual vote choice. The purpose of predicting plant closing and other dire eventualities is to dampen support for the union and to intimidate workers in a manner that the secret ballot does nothing to prevent. Studies show that this strategy is effective (Bronfenbrenner 2009; Mehta and Theodore 2005): this is true despite the fact that relatively few plants actually close as a result of unionization, the consequences of which can only truly be discerned once employers and workers begin to bargain collectively.<sup>30</sup>

Another common tactic used to thwart unionization is for employers to “promise” to raise wages or improve working conditions (studies document this occurs in 46–59% of campaigns) so as to obviate the necessity for collective bargaining (Bronfenbrenner 1994, 1997, 2009; Bronfenbrenner and Hickey 2004; Mehta and Theodore 2005).<sup>31</sup> Again, the secret ballot is ineffectual in combating this kind of “bribe” because it is directed at employees generally, rather than at specific individuals. That individual employees cannot demonstrate their compliance with employers' wishes because of the secret ballot does not diminish the effectiveness of this

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<sup>30</sup> Most recent data show that about 15% of plants close after a successful union drive, while earlier studies document much lower rates of 1–4% (Bronfenbrenner 2009). For data on the effectiveness of these strategies see (Mehta and Theodor, 2005); (Bronfenbrenner 2000).

<sup>31</sup> The number of campaigns in which employers suggested that they would improve working conditions range from 59% (Mehta and Theodor, 2005) to 46% Bronfenbrenner (1994). Other studies document 48% (Bronfenbrenner and Hickey 2004); 64% (Bronfenbrenner 1997); and 56% (Bronfenbrenner 2009).

suggestion of reward. Employers are not “buying” selected individual votes, but rather seeking to diminish enthusiasm for unionization among workers generally.

Another action that employers take to deter support for unionization is to unlawfully dismiss workers who are involved in organizing efforts. While this is less common than the tactics previously described, it occurs in about one-third of all union organizing campaigns (Bronfrenbrenner 2000, 2009; Mehta and Theodore 2005). While this act primarily impacts an individual employee, it is one that also aims to send a cautionary message to employees as a group. The purpose of firing key organizers is to dampen the general enthusiasm for the union. As it is unpredictable whether, and indeed which, employees involved in organizing the union may be fired, the credible possibility of losing one’s job would deter many workers from becoming union organizers. While dismissal for union organizing is unlawful, the route to reinstatement for workers illegally fired is a long process administered by the NLRB. And the maximum compensation that workers can claim is back pay, less any wages they have earned in the interim. These very minimal sanctions for illegally dismissing workers for union organizing are widely held to be insufficient to deter employers from doing so, and indeed a part of EFCA proposes increasing them. It is unclear how effective increased penalties might prove, not least because as legal scholar Paul Weiler has argued, even if the compensation for the individual illegally fired was adequate, this would in no way repair the damage inflicted on the group of workers trying to form a union, as the chilling effect of the firing erodes support generally (Weiler 1983, 1769).

Whether the dismissal of workers involved in organizing is seen primarily as an individual or group threat is somewhat inconsequential to my argument here because in either case, the secret ballot does not shield employees from such intimidation. If employers want to deter union

formation by illegally firing pro-union workers, they must do so before the election. In other words, such firings, if they are to be effective, must occur prior to the casting of votes. In this event, the secret ballot becomes irrelevant because the worker is no longer employed when the vote regarding unionization takes place; most recent data record only 5% of dismissed workers are reinstated prior to the vote (Bronfrenbrenner 2009).<sup>32</sup> Voting in secret also does nothing to protect workers who may wish to aide organizing efforts, but who fear dismissal and thus refrain from doing so. Neither does the knowledge that they will vote in secret relieve workers' fears that they may be fired if they associate with union organizers. Thus they are likely to refrain from doing so even if they are interested in inquiring about unionization.

A further frequently deployed union avoidance strategy is for supervisors to conduct one-on-one meetings with their employees; such encounters have been documented in 77%–91% of campaigns (Bronfrenbrenner 1994,1997, 2009; Bronfrenbrenner and Hickey 2004; Mehta and Theodore 2005).<sup>33</sup> During these meetings, in addition to imparting their employers' views about unionization, supervisors are instructed to question workers about their position toward the union. Anti-union consultants argue that supervisors, the source of authority most proximate to workers, are best situated to accurately uncover workers' preferences regarding the union. And, on the basis of the information they gather, accurately predict vote tallies in the run-up to the election. Of course, the secret ballot in no way thwarts this kind of intrusive and coercive interrogation. In fact, the point of the exercise is to uncover the voting intentions of workers,

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<sup>32</sup> Earlier studies documented, 3% (Bronfrenbrenner and Hickey 2004); 48%; 11% (Bronfrenbrenner 1997); and 12% (Bronfrenbrenner 1994).

<sup>33</sup> The percentage of campaigns in which employers use this tactic has varied across studies from a high of 91% (Mehta and Theodor, 2005); to 77% (Bronfrenbrenner 2009). Other studies document 78% (Bronfrenbrenner and Hickey, 2004); 82% (Bronfrenbrenner 1997); and 79% (Bronfrenbrenner 1994).

which the secret ballot is supposed to keep private. That one-on-one meetings are so widely used is testament to their effectiveness.

If the secret ballot is, as I have just argued, ineffectual against the most common ways that employers seek to coerce workers during representation campaigns, does it nevertheless protect workers from intimidation by union organizers and fellow workers? The potential for such intimidation is, after-all, a common motif in the campaign against EFCA. In actuality, the fact that union organizers and colleagues have no power over workers prior to unionization limits their ability to coerce or bribe them during the certification process. Union organizers cannot compel attendance at meetings or make predictions that threaten workers' employment status or working conditions. Indeed, it is difficult to imagine a credible way that union organizers or fellow workers could make threats against workers as a group, and it is questionable how they could coerce *individual* workers to vote in accordance to their dictates. Remember, secrecy works to protect individuals because it undercuts the utility of threats directed toward them prior to voting, because they cannot, after the fact, reveal how they voted. This begs the question of how fellow workers and union organizers might punish workers for their votes if, in the absence of a secret ballot, they could determine how they voted.

If the union is successful, union organizers do gain some power over workers as their collective representative and, in theory, could threaten to treat those who did not support the union punitively. However, any contract that the union negotiates through collective bargaining covers all workers, regardless of their stance in the certification process. Further, union staffers have incentives and a legal obligation to represent all workers fairly, especially if workers have effective means to hold their elected representatives to account. Workers can do this in several ways. In the extreme, even a minority of workers in a bargaining unit can initiate decertification

proceedings, a process that requires signed cards from just 30% of the workers. Alternatively, individual workers can appeal to the NLRB or the courts if they feel the union is not representing them fairly. Finally, workers can vote union representatives out of office, replacing them with others who will better promote their interests.

This last possibility is where proponents of workers' rights and advocates of the secret ballot (which are what opponents of the EFCA profess to be) ought to be directing their attention. Why? Because once the union has formed, an entrenched officialdom does have potential coercive power over their constituents, and a secret ballot, combined with an open and contested election, can facilitate accountability of representatives to those they represent. Unlike in union certification processes, the threats workers may face when electing union officers are often individual level threats against which the secret ballot offers some protection. Indeed, the 1959 Landrum-Griffin Act that oversees union governance *mandates* a secret-ballot election for almost all posts. Whether this provides adequate accountability is a question for another time.<sup>34</sup>

If union organizers lack credible ways to threaten workers in the event of a union victory, what if they lose? In such cases, the power of organizers and union partisans is virtually nil. They could threaten to physically harm or harass workers who voted "no" to the union, but such threats would be both illegal and costly to carry out. It is unlikely in the event of loss for the union that they would be undertaken, which means their coercive nature prior to the vote is dubious. They are, in a sense, empty threats. Indeed, what incentive would organizers have to physically intimidate or harass those who voted against unionization once the campaign has failed? Union organizers, even those of beefy stature and quick temper, simply leave town. And

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<sup>34</sup> The Landrum-Griffin Act (1959) mandated that unions hold regular secret-ballot elections for some union representatives, primarily on the local level. However, in many unions, higher-level officials are elected by delegates who have been elected by members. Thus they are one step removed from the accountability of the rank and file. Whether these requirements and practices are sufficient to allow union members to control the union and ensure accountability is a debatable question.

of course, if physical intimidation or social pressure is exerted on workers *prior* to the election, then the secret ballot once again becomes irrelevant.

Upon careful examination, it seems that the secret ballot does not protect workers from domination in the union certification process and thereby ensure that the process is democratic. It is ineffective against the kinds of threats and coercive power deployed by employers. And because, regardless of the outcome, union organizers and supporters have limited power over workers, they lack credible ways to threaten or bribe workers in ways that might necessitate a secret ballot in the first place. In the context of the ongoing debate over EFCA, then, it seems as though opponents of the proposed legislation are under some burden to explain precisely how it is the secret ballot affords the protections they claim. Conversely, supporters of the proposed legislation seem to be missing political opportunity to the extent that they fail to highlight that burden.

Of course, even if opponents of EFCA conceded that the secret ballot does not function to democratize the union certification process, they might still question whether majority sign-up offers any improvement. Opponents of EFCA claim that it exposes workers to potential intimidation by union organizers and peers who might coerce them into signing a card indicating support for the union. Given the relative lack of power and leverage union organizers and colleagues have over workers, it is difficult to see how they could do this, save for resorting to illegal violence. And workers subjected to such violence could seek legal recourse. Nevertheless, empirical studies of union certification campaigns in which employers voluntarily agreed to use majority sign-up procedures find little, if any, evidence of workers being coerced by organizers or peers to sign cards. By their own account, opponents of majority sign-up can document only forty-two cases of intimidation over sixty years. As a point of comparison, in 2005 alone the

NLRB awarded 30,000 workers back pay owing to illegal anti-union employer discrimination (Lafer 2008).<sup>35</sup>

One study that specifically compared employees' experiences under majority-sign up and NLRB secret-ballot campaigns reinforces this conclusion. In each kind of campaign researchers found that "management's pressure on workers to oppose unionization was significantly greater than pressure from co-workers or organizers to support the union" (Eaton and Kriesky 2008, 22) More importantly, they found that "union representatives were not more likely to exert undue pressure on workers under card check regimes. . . . 94% of workers who signed cards in the presence of union representatives . . . did not report feeling pressured into signing the card" (Eaton and Kriesky 2008, 22). In sum, majority sign-up seems not to invite intimidation in the ways its opponents allege; even if it did, in the event that EFCA passes, the NLRB retains the power to establish procedures whereby a neutral arbiter verifies the fairness of the card-signing campaign. Verification by a neutral arbitrator of the authenticity of signed cards is a common feature of the few majority sign-up campaigns that employers voluntarily agree to. The arbitrator can readily confirm that employees signed cards willingly, should a question of union coercion arise. This kind of verification also means that employers need not be apprised of whether any particular worker signed a card—thus foreclosing any retaliation they might be inclined to take.

As the above discussion illustrates, the secret ballot does not protect workers from the most prevalent sources of domination they face in the union certification process. And there is scant evidence to suggest that majority sign-up exposes them to the kinds of coercion its opponents suggest. This alone might be grounds enough to endorse EFCA. However, there is another reason that majority sign-up offers workers a more democratic way to certify a union than the

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<sup>35</sup> This vast inequity in reported intimidation cannot be explained by the lower incidence of majority sign-up campaigns, although the disparity may be mitigated a little by this fact.

current process that includes a secret ballot election. That is because it facilitates a more democratic context within which workers can *form* preferences about unionization.

### **Majority Sign-Up Works to Enhance Democratic Debate**

To this point, my argument has been critical. I have focused on showing that the opponents of the EFCA are wrong, particularly as they identify democracy with the secret ballot. In order to make a constructive case for majority sign-up, I would like to turn attention away from voting and the mechanisms by which workers preferences for unionization are aggregated. I will shift focus to an equally important component of democratic decision-making, which is the formation of preferences through discussion and debate. Doing so will allow me to illustrate how majority sign-up, contrary to its opponents claims, will actually promote democratic ideals by facilitating workers' un-dominated choice in union certification proceedings. That is because if workers certify a union by signing authorization cards, it allows them, at least in the initial stages of the process, to refrain from disclosing their efforts to their employer. In this way, the mechanism of secrecy can be used to protect workers while they are discussing and arguing about the merits of constituting themselves as a collective organization.

Theorists of democracy who study the process of preference formation differ about precisely what constitutes genuinely democratic discussion. For deliberative democrats—"deliberation"—denotes only a specific kind of speech and exchange of ideas, under very precise conditions. Deliberative democrats disagree among themselves about the types of argument that should, in the ideal, be permissible in democratic discussion; for example, some hold that self-interested arguments are not valid in a truly democratic discussion, while others see them as unavoidable (Bohman 2002; Freeman 2000; Guttman and Thompson 1996; Mansbridge et al. 2010). Theorists also differ about the ultimate purpose of debate in democratic decision-making. While some believe it is plausible to deliberate to a commonly accepted outcome, others view

the process as one that merely clarifies issues and provides information on which participants will subsequently vote (Bohman 2002; Freeman 2000; Guttman and Thompson 1996; Mansbridge et al. 2010). Regardless of these differences, there is general agreement among theorists that democratic discussion should take place, as far as is possible, under conditions of equality. That is, deliberation presupposes circumstances where every individual is given equal respect and opportunity to express their views, present arguments in an attempt to persuade others to adopt their position, and where no one is subject to domination. The absence of coercive power has been identified by theorists as the criterion that most clearly distinguishes democratic from other kinds of debate; it demands that “participants should not try to change others’ behavior through the threat of sanction or the use of force” (Mansbridge et al. 2010). Theorists also converge on the essential requirements that participants in democratic discussions should provide reasons that support their perspective, be willing to consider the arguments of other participants, and be open to the possibility of changing their views. In this way, the process is one that involves information sharing and exchange, not simply rationalizations of interests or rhetorical posturing. Just as theorists disagree about the beneficial effects of secrecy when voting, theorists who focus on democratic discussion hold divergent views about how secrecy and its converse publicity facilitate these goals. Publicity, some suggest, pushes participants to provide reasons and arguments as to why they hold the preferences they do. It also serves to ensure that they adopt alternatives that are aimed toward the public good, rather than being merely self-serving. Simone Chambers refers to the former as the “Socratic dimension” of public reason, the latter the “democratic dimension” (Chambers 2004). Publicity facilitates the “Socratic dimension” because parties to public debate anticipate having to account for and justify their preferences, and so examine their beliefs, and prepare arguments in advance to defend their

views. Publicity enhances the “democratic dimension” of public debate on Chamber’s account because it is difficult to make flatly self-serving claims in public discussion. Thus participants incline toward making claims and staking positions on the basis of some articulation of the “public good.” Of course this view is contestable, first because, as I have previously mentioned, not everyone is in agreement that democracy should aim toward the common good, or even that a unique common good exists; and second, because there is not consensus on the idea that self-interested reasons are difficult to articulate in public.

While democratic theorists commonly argue that publicity enhances democratic discussion, others also insist that in some contexts, secrecy, which shields participants from broad public view, improves democratic debate. Following the reasoning of founder James Madison, theorists argue that keeping debate private makes participants more willing to change their views in the face of a compelling argument (Gutmann and Thompson 1996, 114). The quality of debate is elevated as participants allow themselves to be persuaded by others and change their mind in the face of superior reasoning. Additionally, secrecy is valued by deliberative democrats in so far as it forestalls pandering to outside interests and the use of demagoguery and rhetoric (Elster 1998). Absent an audience or the ears of constituents or potential endorsers, participants are, so it is argued, more attentive to the substance of the debate and less concerned with maintaining an appropriate public position or persona.

Thinking theoretically about democratic discussion helps illuminate why, in the less than ideal context of union certification, majority sign-up is preferable to the status quo. A brief look at the kinds of discussion and debate that characterize the current process will demonstrate why.<sup>36</sup> Under the Wagner Act, as currently enforced, employers have much more opportunity to

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<sup>36</sup> For a full discussion of the current legal framework concerning captive audience meetings, see Masson (2004). For a more complete accounting of the regulation governing communications in representation campaigns, see

campaign and make appeals to workers than do their colleagues or union organizers. As noted above, employers frequently hold “captive audience meetings” and “one-on-one” sessions where they offer their “predictions” about the consequences of unionization. In each case, the power inequities between employers and their dependent employees are readily apparent. In fact, union organizers are generally, and legally, barred from the workplace. While workers can discuss the organizing campaign on company property, they are permitted to do so only in restricted areas and at limited times. Generally they cannot challenge, question or respond to their employers’ predictions during captive audience meetings, or one-on-one meetings.

This kind of dialogue hardly approximates democratic debate. There is a clear problem with power inequity and undue influence. If employers do not directly threaten employees for fear of falling afoul of the law, their predictions, clearly have the potential to coerce. Employers do not engage in an exchange of ideas with employees regarding unionization. In fact, they use their “property rights” and control over employees to exclude opposing voices and ensure that they do not have to respond to questions or challenges. Clearly, employers are not approaching the process with a willingness to be convinced by argument into changing their preferences.

In this context, neither secrecy nor publicity promotes democratic discussion. The public nature of captive audience meetings perhaps encourages employers to couch their arguments against collective bargaining with claims of concern for the common good, understood as beneficial to workers as well as the company. Yet to employees denied the ability to probe and challenge employers’ arguments, such concern simply appears as rationalization. The public nature of a captive audience meeting does not mean that workers and employers engage in a

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Andrias (2002) and from an opposing perspective, Larsen Bright (2002). Lafer (2005) provides an account of how speech rights in union certification elections differ from those in American political elections.

meaningful exchange of ideas; not only do workers often not have an opportunity to speak, but it is extremely unlikely that an employer would be convinced by workers of the benefits of a unionized workforce. If an employer were so inclined, it is likely that they would agree either to recognize a union through a card-signing process or would remain neutral and refrain from holding captive audience meetings during a representation campaign. The empirical studies cited earlier show that these latter eventualities are rare.

The relative privacy under which one-on-one meetings take place does not make them more hospitable to democratic discussion. These meetings are held behind closed doors, between workers and their supervisors, so again there is a clear and deliberate power differential that characterizes the exchange. They resemble nothing so much as an interrogation. Privacy does not allow supervisors to exchange ideas and genuinely consider the relative costs and benefits of unionization with their subordinates. The supervisors' aim in such exchanges is to uncover their subordinates' thoughts and position regarding the union, and if possible deter them from supporting its formation. Even supervisors who are sympathetic to the union cause, and perhaps are convinced by arguments for the union as presented by workers are not in a position to acknowledge that fact. Nor, given that workers generally know the purpose of "one-on-one" meetings, is it likely that most would feel comfortable or confident attempting to reason and debate over the merits of collective bargaining with their supervisor.

By contrast to these common practices, majority sign-up arguably offers greater possibility for democratic debate. This is because it enables workers to keep their efforts to unionize secret from their employer, and allows for a genuine exchange of views between similarly-situated workers and union organizers. To gain employees' signatures endorsing the union, pro-union workers and union organizers must convince their colleagues through argument

and debate that collective bargaining would indeed be beneficial. The relatively equal standing of the parties makes it plausible for skeptical workers to raise their concerns and objections and to assess any response before making a decision. Thus they benefit from public discussion about the merits of unionization but are shielded from the potential of coercive speech from their employers.

Empirical studies demonstrate that the majority sign up process does indeed work in this way to reduce considerably, if not eliminate, the coercive speech of employers (Eaton and Kriesky 2001, 2008). At the same time, as has already been documented, it does not expose workers to intimidation by union organizers or colleagues as those opposed to EFCA suggest. Another objection to majority sign-up is that absent management speech, workers will be inadequately informed about their decision. Recall that one of the reasons for including the employers' speech rights amendment in Taft-Hartley was to ensure that workers were adequately informed of arguments both in favor of and against collective representation. However, empirical studies shed doubt on fears that workers will lack information, absent employer speech. Surveys documenting workers' experiences where employers agreed to recognize unions formed by majority sign-up show that the vast majority of those who signed cards in support of the union report that they had adequate information about the certification process, about the union, and with regard to management's view of unionization (Eaton and Kriesky 2008, 22). Workers who reported that they lacked information typically chose not to sign cards.

A final objection to majority sign-up is that it may allow organizers and pro-union workers to exclude from the process colleagues who are known to oppose the union. In order to certify a union through majority sign-up, 50% plus one of workers in the workplace must sign authorization cards (this is a higher approval threshold than in an election, unless turnout is

100%). So it is possible that a minority of employees may not be consulted regarding the union. However, this is not as troubling as it may appear. Those opposed to EFCA underwrite their arguments with claims to the American democratic tradition. So let's think about a foundational moment in the formation of the American republic: the Constitutional Convention.

A small minority of Americans took part in the Constitutional Convention wherein, by agreement of the delegates, debate was conducted in secret. Secrecy, it was argued, would allow delegates to speak freely, engage in honest discourse, and change their mind if they saw fit. James Madison, who is frequently heralded as "Father of the Constitution," wrote of the practice, "No Constitution would ever have been adopted by the Convention if the debates had been made public" (in Guttman and Thompson 1996, 114). Deliberations at the Convention were kept secret, not only to improve the quality of debate but also to avoid potential threats from those unalterably opposed to such a constitutional event.

However, to ensure that citizens approved of the Constitution and to enhance the democratic legitimacy of the endeavor, it did not take effect until it was popularly endorsed through the ratification process. Even then, as I have previously noted, a number of citizens were excluded from the process. Union certification is not subject to ratification in quite the same way. However, a mechanism is in place that ensures that workers have the ability to question and challenge the constitution of the union. If a group of workers believes that the union has formed unfairly, they can petition for a decertification election. Such a petition represents a form of minority rule insofar as it requires the support of only 30% of workers;<sup>37</sup> a successful petition triggers an NLRB decertification election wherein votes are cast by secret ballot. Generally, there is a bar to decertification for one year after union certification by election. But as the law

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<sup>37</sup> Rules of this sort are relatively common; see Vermeule (2007).

currently stands, when a union is formed through majority sign-up, there is a 45-day period in which there is no such bar. This mechanism, while not a positive ratification process, ensures that workers have the ability to question and challenge the inauguration of the union.

### **Summary**

In this chapter I have presented an argument that challenges the claim that the Employee Free Choice Act is undemocratic, and that those who endorse it are acting to undermine American democratic principles in the workplace. In doing so, I contested the claim that union certification processes are analogous to elections for political office. Instead, I suggest that a better analogy can be drawn between union formation and the framing of constitutions. Union representation elections are “constitutional moments.” Shifting the analogy in this way draws attention to the fact that the major threats in union representation campaigns are directed toward workers as a group, as a consequence of forming a union. The secret ballot that opponents of the Employee Free Choice Act mistakenly champion as fundamental to democracy affords no protection from such threats. Conversely, the majority sign-up process enhances the democratic nature of union formation as it allows workers to deliberate democratically and minimizes the opportunity for employers to engage in coercive speech.

CHAPTER 6  
CONCLUSION – AMERICAN LABOR UNIONS AND AMERICAN DEMOCRACY

*What does labor want? We want more schoolhouses and less jails; more books and less arsenals; more learning and less vice; more leisure and less greed; more justice and less revenge; in fact, more of the opportunities to cultivate our better natures.*

—Samuel Gompers

In this dissertation I have argued that the framework of labor law developed to regulate the formation of American unions has been shaped significantly by competing conceptions of democracy. However, policymakers of all political persuasions, even as they have rested their claims on the mantle of democracy, have not been clear about just what democracy entails. This lack of clarity has contributed to a conspicuous failure, namely, that legislators have failed to adequately distinguish processes for forming unions from those that regulate the operation of unions once formed. Thus policy problems such as union corruption and entrenched leadership that would have most appropriately been redressed by changing the regulation of internal union operation and ensuring that members had mechanisms to hold leaders to account, instead were addressed by amending the regulations structuring union formation. These reforms, particularly the employer free speech rights included in Taft-Hartley, empowered employers and gave rise to a union avoidance industry that has made it more difficult and intimidating for workers to form unions (Levitt 1993; Logan 2002, 2006; Smith 2003).

In response to declining union density and increasing employer intimidation of workers during organizing campaigns (Bronfrenbrenner 2009), unions have been attempting for more than a decade to amend labor law to allow workers to form unions through the signing of cards. As I have explained, passage of Employee Free Choice Act (EFCA), the proposed legislation that would allow workers to choose this alternative route to union certification, would actually be a return to the original provisions of the Wagner Act. It would also mean that workers could

choose to form unions without a showing of majority support in a National Labor Relations Board (NLRB)-administered secret-ballot election. This has generated a great deal of controversy and has drawn heated opposition from business groups and many legislators, who have characterized the proposed bill as undemocratic and have accused its endorsers of attempting to subvert American democratic ideals.

Whether these critics of EFCA are motivated by genuine concern for workplace democracy and workers rights or are merely a strategic use of a principle—democracy—that is almost universally acclaimed in the contemporary political milieu, is debatable. Yet I have chosen not to adjudicate the sincerity with which those opposed to labor law reform make their claims. Instead, I have taken their objections at face value and refuted their arguments on their own terms. Democracy, as I have argued, cannot be identified with any specific institution. Rather, what is “democratic” depends on the ideals one believes that democracy should embody, and the context within which institutions seeking to embody those ideals will operate. I advance a more expansive understanding of democracy that I suggest should seek to not to derive a unique “common good,” but rather to ensure that collective decisions are made in circumstances that minimize domination. This more expansive conception of democracy, I argue, demands consideration not only of the aggregation of preferences, but also the way preferences are formed and the context within which institutions structuring preference formation and aggregation operate.

Based on this more complete understanding of what democracy requires, I have argued that in the context of union formation—a process that is constitutive of a group—the current mechanisms of unit determination combined with the amendments proposed in EFCA that would allow workers to choose to demonstrate majority support for union formation through the signing

of cards, actually more closely approximates democratic ideals than does the status quo. The unit determination process tracks as far as possible the desires of workers who will form the union, and ensures that the parameters of the group are defined on the basis of shared interests, while the majority sign-up mechanism allows workers to develop preferences about union formation in conditions that minimize the potential for domination. As critics of the proposed reforms note, giving workers the ability to sign cards to form a union also makes it possible for them to do so absent a secret-ballot election. However, as I have shown, this does not make the process any less democratic. Unlike a political election where citizens select a representative and individual voters may face threats and bribes from which the secret ballot offers protection, union certification is a process of group formation wherein the most prominent threats are leveled at the group, and from which the secret ballot offers no protection.

Making this argument about the formation of unions presents two corollary arguments that I have so far mentioned only briefly. First, some may object that the formation of unions has negative political and economic consequences that we may wish to avoid. I suggest, to the contrary, that unions act as institutions of countervailing power and that their formation generates beneficial consequences for the nation's political economy and bolsters political democracy. Second, simply facilitating union formation is insufficient; we must also ensure that unions embody democratic ideals once they have formed, to represent the collective interests of their members. The beneficial consequences of union formation would be mitigated if unions functioned contrary to the democratic principles that I argue they promote. I would like to elaborate and sketch out, if not fully develop, each of these arguments in this concluding chapter. Before doing so, I would like briefly to address some concerns that have been raised about the efficacy of majority sign-up to facilitate union formation.

## **Will Labor Law Reform Promote Union Organizing?**

Union membership in the U.S. currently stands at 15.3 million, which translates to union density of 12.4% (Bureau of Labor Statistics 2010). This level of membership is considerably lower than the mid-century peak, when about one-third of the private sector workforce was unionized (Troy 1965). It also reflects a dramatic decline in union membership in the private sector, where density has dropped to 7.2%, a decline that has been masked considerably by strong public sector unionization where union density in 2009 stood at 37%. Aggregate measures of union density also mask strong regional variation in union membership, which ranges from a high of 25.2% of the workforce in New York, to a low of 3.1% in North Carolina. As I highlighted in the introductory chapter, researchers have documented a number of reasons that account for this decline, among which are “ossified” labor law and an increasingly hostile environment for organizing workers into unions (Estlund 2002). This is what advocates of EFCA hope to redress. Yet skeptics doubt that labor law reform can have much impact on declining membership rates because, they argue, the legal framework makes little difference to union success in organizing campaigns (Troy 2000, 2001). Additionally, they argue that workers in the contemporary era have little desire to join unions and, without demand from workers, any legal changes will have little impact (Farber and Kruger 1993, Flanagan 2005).

In fact, empirical research gives us good reason to doubt each of these assertions. Cross national studies of union membership show that there has been a decline in union density in many developed economies, which tracks (with some lag) that in the U.S. since the mid-twentieth century (Lipset and Katchanovski 2001). The trend is particularly marked in other Anglophone nations such as U.K., Canada, and Australia. However, in none of these cases is the decline so marked as in the U.S. The relatively smaller decline in Canada compared with the U.S. is especially revealing, as it is the nation with the most similar economic context, but with

quite different labor laws (indeed, many Canadian provinces permit union certification by card-check). Researchers comparing the divergence in union membership in the two nations have concluded that labor law is a significant factor and that the labor law reforms proposed in EFCA can be expected to lower the costs, and increase the likelihood of success, of union organizing drives in the U.S. (Godard 2003). This finding has been corroborated by studies that have compared success in union organizing drives between provinces in Canada that allow card check and those that mandate elections. Researchers found that under card-check regimes unions were between 10% (Johnson 2002) and 19% (Riddell 2004) more successful than when secret ballot elections were mandatory, and that employers' anti-union campaigns were only half as effective (Riddell 2004). Similar conclusions about the potential of majority sign-up to improve union organizing success have been derived by comparing organizing in the public and private sector in the U.S. The high rate of union membership in the public sector can be attributed, at least in part, to less vigorous opposition by employers during union organizing drives (Freeman 1998). And where U.S. states have enacted mandatory card-check recognition for public sector unions, the number of union organizing efforts has increased, and has met with greater success (Gely and Chandler 2010).

It seems that changes in labor law can create a more favorable environment for union organizing, but this would be futile if, as some skeptics contend, the decline in union membership reflects a lack of demand for collective bargaining and union representation by American workers (Farber and Krueger 1993, Flanagan 2005, Lipset and Katchanovski 2001; Potter 2001). Those who assert that union decline is due to lack of demand base their claims on the fact that non-union workers are either satisfied with their working conditions or doubt that unions can improve them (Farber 1990; Farber and Krueger 1993), or else that the individualistic

ethos of American culture dampens support for collective bargaining (Lipset and Katchanovski 2001). Contrary to both lines of argument, there is, however, considerable evidence to suggest that many American workers would choose to join a union, given a reasonable opportunity to do so.

A comprehensive study of worker attitudes toward workplace representation conducted in 1995 showed that if they had a chance to join a union, 32% of non-union workers would elect to do so, while 90% of already unionized workers wished to remain union members (Freeman and Rogers 1999). Subsequent surveys have documented an increase in the desire for union membership; in 1997 a comprehensive survey of workers in the U.S. revealed that 48% of non-union workers indicated they would definitely or probably vote for a union if an election were held in their workplace (Lipset and Meltz 2004), while an annual survey by Peter Hart Associates indicates that since 1997, over 40% of non-union workers have expressed a desire to join a union, with a peak of 53% in 2005. A Zogby poll documented a somewhat lower desire for unions at 3 % of non unionized workers (Freeman, Boxal, and Haynes 2007, 37). Some of the variation in these survey findings is attributable to question wording, and of course responses on surveys may not be reflected in subsequent behavior; nevertheless, they indicate a significant unmet demand for union membership. This is especially so given that those indicating a desire for unions generally are not evenly distributed across workplaces, but concentrated among those where workers indicate higher levels of dissatisfaction with management (Freeman, Boxal, and Haynes 2007).

Two additional findings in these surveys suggest that a change in labor law may indeed increase union membership. First, a larger number of workers (upwards of three-quarters in most surveys) indicated that they desired a greater “voice in the workplace” and some form of

workplace representation, than those who indicated they would join a union. But when asked about the features of such an alternative form of workplace representation, most workers choose characteristics that resembled unions; essentially, they wanted a “union in all but name” (Freeman, Boxal, and Haynes 2007, 37). Additionally, 12% of workers who did not respond positively when asked if they would like to join a union indicated that they would favor union membership if their employer did not oppose the union. Thus a less hostile environment for organizing may prompt these workers to join. Another indication that there is an untapped demand for union representation is the success of Working America, the AFL-CIO affiliated voluntary organization established to represent workers who could not join a union at work. Launched in 2003, the organization has grown to a membership of about 2.5 million, and has contributed significantly to the labor movement’s political and policy advocacy (Snyder 2005).

There is also considerable evidence to refute the notion that workers view unions as ineffective and outdated institutions, a claim that is often used to explain workers’ decreasing demand for unions. The Gallup organization has been conducting an annual survey of the public’s approval of unions since 1936. While the most recent survey data from August 2010 records an historic low of 52% approval, it still indicates majority support for unions at a time of high unemployment, when approval levels tend to fall (Jones 2010). Approval of unions in the Gallup poll has consistently hovered around 60% since the 1960s but fell to closer to 50% at the onset of the “Great Recession” in 2007. This data is corroborated by a 2003 Peter Hart survey of union members, which found that 60% believed their union was effective in increasing pay and improving working conditions, while 72% rated the union’s performance overall as “excellent” or “very good” (Freeman, Boxal, and Haynes, 2007, 37).

Finally, the explanation most commonly associated with Seymour Martin Lipset, that it is American individualistic culture that explains lower levels of unionization in the U.S. than in Canada, actually provides support for the idea that labor law reform would boost membership. In fact, Lipset, who along with his co-author Noah Meltz surveyed workers in the U.S. and Canada, found more favorable attitudes to unions among U.S. workers despite significantly lower rates of union membership (Lipset and Meltz 2004). Their explanation for this paradox rests on the fact that there is less government support for unionization in the U.S. than Canada. They argue that it is the individualistic culture of the U.S., along with its institutional checks and balances, that explains the less extensive government role in industrial relations in the U.S., compared with Canada. Thus what is portrayed as a cultural explanation for low U.S. union density is one that relies quite heavily on the institutions and mechanism of labor law.

If labor law reform will increase union membership, what might we expect would follow from such an increase? This is the question to which I turn in the following sections. I address the economic and political consequences of unions separately for ease of presentation, but of course in reality there is considerable interaction between the two. The literature on the various ways unions impact the political economy is vast; thus I provide a general overview, rather than a comprehensive analysis.

### **Increasing Economic Security and Reducing Inequality**

The primary purpose of unions is to improve the terms of employment of their members through collective bargaining. This is among the most controversial activities of unions, and one that labor economists have referred to as their “monopoly face,” because “most if not all unions have monopoly power that they can use to raise wages above competitive levels” (Freeman and Medoff 1984). Even with the recent declines in union density, the “union advantage” regarding

worker's wages and other benefits remains significant, if not as extensive as it once was, either in terms of the number of workers who benefit or the magnitude of the wage differentials.

In 2009, the median weekly income for a full-time worker who was union member was \$908, compared with \$710 for non-union workers (Bureau of Labor Statistics 2010). The wage gap among women was slightly wider than among all workers, with women union members receiving \$840 compared to a median of \$628 for their non-organized counterparts. The wage premium was slightly higher for Hispanic workers (union \$774, non-union \$516) than for whites (union \$934, non-union \$728) or blacks (union \$774, non-union \$516). These aggregate pay differentials for union and non-union workers may to some extent be explained by differences in the kinds of jobs and skills that union members possess when compared to other workers. However, the "union advantage" in pay and working conditions is substantiated by more nuanced data that compares union and non-union workers who are similarly situated, that is, who have the same work experience, education, industry, occupation, and marital status. In 2007 the overall union wage premium (measured as the additional wage per hour that union workers received over similarly situated non-union workers) was 14.1% or \$1.50 (Mishel, Bernstein, and Shierholz 2009, 201). Again, this aggregate figure masks variation across race and gender; with the highest premiums going to Hispanic workers, with 23.4% (\$3.53) for men, and 18.7% (\$2.38) for women; while black males received a premium of 22.7% (\$3.29) and black females 14.5% (\$1.82); and white workers received the lowest differentials at 15% (\$1.86) for men and 9.1% (\$0.81) for women (Mishel, Bernstein, and Shierholz 2009, 201).

These differentials in pay are considerable; however, economists document that union pay differentials have been declining over time, at least in part as a result of declining union membership (Blanchflower and Bryson 2007). The union premium for similarly situated workers

rose consistently to a peak of around 22% in the mid 1980s but has declined fairly steadily since, except for a few increases during recessionary periods. In that sense, union wage premiums act in counter-cyclical ways as union workers generally are better able to resist wage cuts in times of high unemployment, and non-union workers are able to demand higher wages (despite their lack of collectively bargaining power) when the labor market is tight (Blanchflower and Bryson 2007). Economists document that both the declines in union membership and declines in the union wage premium have impacted blue collar and low wage male workers more than others; thus falling unionization has contributed to increases in wage inequality between high school and college educated workers since the 1980s (Mishel, Bernstein, and Shierholz 2009, 205).

Indeed, because unions have been shown to reduce wage inequities generally—by increasing the pay of union workers who are predominantly lower and middle class, and by reducing differentials among unionized workers—declining union membership has contributed significantly to increasing economic inequality in the U.S. since the 1980s. Estimates of the impact vary from 33%, in a study that factors not just the direct effect of unions on the wages of union workers but also their impact on the wages of unorganized workers (Western and Rosenfeld 2009) to 20 percent in a study that does not account for these factors (Freeman 2007). The latter study likely underestimates the effect of declining unionization on increasing inequality as it is widely accepted that unions establish wage norms and expectations within regions and industries, and that non-union employers often bid up wages to close to union scale in an effort to remain “union free,” (Card, Lemieux, and Riddell 2007; Western and Rosenfeld 2009).

In addition to increasing workers’ pay, unions also negotiate for better benefits and increased job security. While most workers in the U.S. are “at will” employees—meaning they

can both leave or be dismissed from their job at any time for any reason, or even for no reason—union workers are “just cause” workers. This means that the union negotiates, as part of the contract, procedures the employer must follow to establish that a just cause exists before a worker can be dismissed. Researchers have demonstrated that most employees are unaware that there are few legal prohibitions on employers’ ability to fire workers without cause (exceptions are for discriminatory firing based on racial, age, gender, or religious beliefs), and that most believe “at will” employment laws to be unfair (Freeman and Rogers 1999). They have also documented that the ability to command respect and retain dignity at work, attributes that are facilitated by the knowledge you cannot be fired at will, are important motivators for workers seeking union representation (Dine 2008, Erem 2001, Lopez 2004, Tait 2005). These intangible benefits are hard to measure empirically, but surely have beneficial consequences for workers not only at work, but also with respect to political participation, something I address in subsequent sections.

The benefits of union membership on such things as workers’ health care, pensions, and paid time off are easier to measure, and are generally greater than those related to wages. Union workers are 28% more likely to receive health insurance than their non-unionized counterparts. And among workers who have employer-based health insurance, union workers benefit from employer contributions that are on average about 11% higher (Mishel, Bernstein, and Shierholz 2009; Mishel and Walters 2003). When it comes to employer-provided pension plans, approximately 75% of union workers are covered, compared with only 45% among non-union workers (Budd 2007; Mishel, Bernstein, and Shierholz 2009). Finally, unionized workers receive on average three weeks of paid vacation compared to the average of 2.35 weeks that unorganized workers enjoy (Mishel, Bernstein, and Shierholz 2009). Not only do union workers receive these

greater benefits at work, but they also have a better awareness of, and knowledge about, their benefits and are more likely to use them than are non-union workers (Budd 2007). In addition to these benefits that accrue directly to union members, unions have been critical actors in coalitions that have successfully pushed for public policies that improve working conditions and benefits for workers generally—a topic I address below.

Of course, the advantages in wages, job security, and employment benefits that union workers receive are not without cost. Hence another clear consequence of unions, which their impact on mitigating inequality surely indicates, is that they reduce profits (Freeman and Medoff 1984; Hirsch 2007). As I mentioned earlier, this redistributive aspect of collective bargaining is often referred to as the “monopoly face” of unions, following a seminal study by Richard Freeman and Medoff (1984). It is often seen by economists as a negative outcome. They claim the ability of unions to exert the collective power of their members to collect “rents,” in the form of increased wages and benefits, distorts the labor market, pushing up the costs of production and undermining the “efficiency” of the competitive market mechanism. Provocatively, Freeman and Medoff (1984) argue that this monopoly face of unions is offset by their collective-voice face. What they mean by this is that unions facilitate communication between workers and management, and thus enhance productivity in several ways: first by creating a more motivated workforce; second, because workers, given the opportunity, suggest ways to make work more efficient; and finally, because union workers are less likely to quit their jobs, and hence save employers the time and costs related to recruitment and training (Freeman and Medoff 1984).

The question of whether the benefits of the collective-voice face of unions entirely offsets the monopoly face of unions has been much debated by economists since the time of Freeman and Medoff’s original study (Hirsch 2007). It has been met with much skepticism and it is

unlikely that the debate will be settled conclusively in the foreseeable future. For my purposes, this is in many ways unproblematic. That is because there are reasons that can justify the benefits that unions reap for workers, despite the fact that they may exert some “costs” in terms of reduced profits and “efficiency.” That such benefits are generally beyond the scope of purely economic analysis is well stated by labor economist Bruce Kaufman:

Unions in theory and practice have both a positive and negative face. . . . Most economists believe, as a generalization, that the negative side outweighs the positive side, at least with respect to resource allocation and efficiency. When other non-economic outcomes are introduced, such as income and wealth inequality, social justice, and workplace democracy, the verdict of economists may become more favorable. . . . But this conclusion is highly tentative since modern day economists typically refrain from making pronouncements on what are perceived to be normative issues. (Kaufman 2004)

That unions have beneficial consequences beyond those directly related to improving their members wages and working conditions is, I have argued, a reason that we should endorse their formation. My focus in the next two sections will be on the positive impact I believe unions have on political democracy—even as I acknowledge that disaggregating the political and economic effects is in reality quite difficult. I first address organized labor’s activity in political campaigns and then explore how unions seek to influence the policy process.

### **Increasing Political Participation and Workers Voice in the Electoral Arena**

Organized labor’s political action in the electoral arena falls into at least two distinct but somewhat overlapping categories. First, unions educate and encourage their members, as well as other citizens, to participate by voting. This “get out the vote” activity increases turnout generally, not just among union members and their families, perhaps because mobilization efforts also spark mobilization by opposing groups. Second, unions use their financial resources as well as their “human resources”—their members—to support issue campaigns and the campaigns of candidates who endorse the legislative goals of organized labor. By pooling and distributing resources in this way, unions help to ensure that the political power and voice of

workers is present in election campaigns, and that candidates who represent the policy preferences of workers can compete in a political environment where candidates opposed to such policy goals are generally well funded and supported by business and corporate interests.

### **Organized Labor and “Turnout”**

The act of voting is generally considered one of the fundamental aspects of political democracy. It is the mechanism through which citizens elect representatives and then subsequently hold them to account. Once considered a privilege for the elite, it is now almost universally accepted that the right to vote should be open to all classes and groups of citizens. Yet at the same time, it is widely acknowledged that participation in voting is, in fact, significantly skewed toward the affluent and well educated (Jacobs and Skocpol 2005). Labor unions have long played a role in encouraging their members to cast their ballots, and insofar as this increases participation generally and reduces inequities in the composition of the electorate, it ranks as a positive consequence of union membership. Indeed, researchers have documented that unions’ political mobilization efforts have a positive impact beyond their membership, to union family members and citizens of communities in which union mobilization efforts are undertaken (Leighley and Nagler 2007, Radcliffe 2001, Radcliffe and Davis 2000). Some critics of unions object that their advocacy efforts are highly partisan and thus question their positive political impact. However, research documents that, while there is a bias toward voting for Democratic candidates by union members, this is far from monolithic (Pew 2005). In addition, unions have found that educating members on issues and candidates is a more effective way of mobilizing members than endorsing candidates or directing members how to vote. Thus their contemporary approach to member mobilization focuses on empowering members with the knowledge to decide for themselves which candidates will best represent their interests (Francia 2006, Rosenthal 1998). Each of these consequences—increasing turnout, mitigating inequities in

the electorate, and educating members regarding vote choice—comports well with the democratic ideal of ensuring that collective decisions are made in ways that minimize domination.

A glance at aggregate turnout by income group indicates how the U.S. electorate is biased toward those with greater material resources, and highlights the potential for unions to enhance turnout. In the 2008 presidential election, the U.S. Census Bureau reported a monotonic correlation between income level and voting; while 52% of citizens with family incomes of less than \$20,000 voted; 65% of those in the middle earnings group with family income between \$40,000 and \$50,000 cast a ballot, and voters in families earning over \$100,000 turned out at a rate of 80%. Thus, insofar as unions raise the income of their members, they are likely to promote electoral participation. Indeed, the success of unions in raising their members into middle income brackets may be eroding their historic ability to remediate biases in the electorate (Leighley and Nagler 2007), a trend that would likely be ameliorated with labor law reform. But of course the effect of unions on the electorate goes far beyond their purely economic impact. Indeed, organized labor has historically directed significant resources toward educating and mobilizing their members, and the working class more broadly, an enterprise that has taken on renewed vigor in recent years in the face of membership declines.

John Sweeney became president of the AFL-CIO in 1995 in the organization's first contested election. He did so running on a platform of revitalizing the labor movement through increased political mobilization and attention to organizing. It is in the former task that his presidency was most successful. The renaissance of labor's political mobilization efforts has been widely recognized to the extent that labor strategies were quickly emulated by business interest groups (Boatright et al. 2006, Francia 2006). And even when the labor movement

fractured in 2005 as several prominent unions, frustrated at the lack of progress in organizing, abandoned the AFL-CIO to form the Change to Win Federation, they largely maintained the political mobilization efforts and approaches that had proved effective in activating union voters. Despite their divisions, the member unions of each federation cooperated and engaged in joint political action at the local, state, and national levels, coordination that was ultimately endorsed by leaders of both federations (Chaison 2007, Hurd 2007).

The model of political action introduced by Sweeney, one that remains popular across the labor movement today, is in many ways a return to “old style” campaigning. Facing declining membership numbers, organized labor in the 1970s and 1980s had adopted political strategies that were “top down” leadership focused, and that emphasized candidate endorsements and financial support of political campaigns through political action committees. In the 1990s a new cohort of union leaders argued that in order to rejuvenate the ranks of unions, organized labor would have to exert political clout in order to gain passage of legislation that would create a more hospitable and less intimidating context for union formation. Thus unions experimented with different strategies to increase electoral turnout among their membership and among working class voters. The most effective way to get their members to the polls, union leaders discovered, was to adopt “member to member” and “labor to neighbor” campaigns. Each of these approaches involves engaging more active and politically-aware union members in the process of educating their peers—as well as friends, neighbors and extended family—about elections and political issues (Asher et al. 2001; Francia 2006; Frank and Wong 2006; Rosenthal 1998). Labor leaders found that workers were much more receptive to being approached by their peers regarding the importance of voting than they were to appeals from union leaders. This was especially so when peers provided information about the candidates and their issue positions

along with reasons about how voting, and particularly supporting union-backed candidates, might impact their lives and that of their families (Frank and Wong 2006; Rosenthal 1998).

That organized labor found this member-driven approach to politically mobilizing the rank and file effective, is consistent with work by political scientists that has found that face-to-face, get-out-the-vote campaigns generally have a greater impact than elite endorsements, “robo-calls,” or direct mail (Gerber and Green 2000). The impact of labor’s enhanced electoral efforts is reflected in aggregate data that shows the union-share of the electorate is considerably higher than the union-share of the workforce. While union membership has declined to around 12% of workers, turnout among union members and their families has remained consistently higher. Exit polls indicate members of union households comprised 18.7% of the total electorate in 1992, increasing to 24.6% in 1996, and 26.7% in 2000, dipping slightly to 24% in the enthusiastic 2004 electorate, and maintaining at 21% in the turbulent milieu of the election in 2008 (Freeman 2003; Meyerson 2004; Pew Research Center 2005; AFL-CIO Vote 2008).<sup>1</sup> These aggregate figures are somewhat contested, as is generally the case with exit poll data. However, they are reinforced by theories and academic studies that show that the likelihood that *individual* union members (and members of union households) will turn out to vote is higher than that of similarly situated citizens who are not in union households.

Two distinct, but somewhat interrelated, theoretical approaches are used to explain why union membership increases political participation. Some scholars adopt a resource mobilization/civic volunteerism model (Rosenstone and Hansen 1993; Verba, Schlozman, and Brady 1995) that explains participation based on the resources that individual citizens possess

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<sup>1</sup> Freeman’s paper suggests these figures may be somewhat inconsistent owing to issues with survey design and, especially, changes in question wording; nevertheless, he concludes that turnout is higher in union than non-union households.

and whether or not they have been asked to participate. Under this view, unions are believed to increase turnout by providing members with civic skills, enhancing members' sense of political efficacy, and by employing collective resources in mobilization efforts directed at workers.

Union workers are also more likely to take the time to participate politically because of intangible factors such as enhanced job security, which allows union workers to more confidently take time out to vote, and more tangible material advantages for union members such as better pay and working conditions that mean they may be less likely to have multiple jobs. Researchers have found that having available time is a key factor in explaining both voting and political participation more broadly (Verba, Schlozman, and Brady 1995).

An alternative theoretical explanation for the effect of union membership on political participation adopts a Downsian (1957) rational choice approach. Here the idea is that voting is a "costly" activity because it requires voters to take the time and effort to understand the issues and candidates. Thus citizens frequently fail to vote as they weigh the "costs" against the potential benefits they perceive might accrue from voting, and decide the costs are too high. Unions act to reduce the "costs" of voting by providing education on issues and candidates, as well as highlighting the benefits to members of voting for recommended politicians. Thus they enhance turnout by impacting the cost-benefit ratio for individual voters. Uhlaner (1989) refines this rational choice approach by emphasizing that when individuals are incorporated into recognized groups, the potential benefits of voting accrue not simply to the individual, but also with respect to group empowerment. This highlights an additional mechanism through which unions can impact their members' calculation of the costs versus benefits of voting, that is, by educating members about the political "capital" that accrues from strong group turnout. This idea comports quite well with the member-to-member mobilization strategies described earlier that unions have

recently adopted. To a considerable degree these strategies center on union members reinforcing to their fellow workers that political participation is important, not only for individual reasons but also because the power of the labor movement and working class more broadly is enhanced when turnout among them is strong. The passage and favorable implementation of preferred policies is generally the goal of political activity, and relative group strength is surely a relevant factor to success, a point to which I return below.

Empirical studies of union turnout effects substantiate these theoretical ideas and reinforce aggregate data on union member participation. They also underscore the effectiveness of organized labor's revitalized political operations. Prior to 1994, researchers exploring the effects of union membership on voting found a consistent impact with respect to vote choice, but a smaller and less reliable effect on turnout (Delaney, Masters, and Schwochau 1988, 1990; Juravich and Shergold 1988; Sousa 1993). These studies, which focused predominantly on presidential elections, in the main concluded that union membership generally had a negligible effect on the likelihood of casting a ballot (Juravich and Shergold 1988; Sousa 1993). One exception is a study that used data on validated, rather than self-reported, voting and found a significant impact on turnout, with union members about 7% more likely to vote than non-members *ceteris paribus* (Delaney, Masters, and Schwochau 1988). However, this positive impact on turnout held only for general and not primary elections, and did not extend to those living in union households who were not themselves union members.

In contrast, research on union endorsements and get-out-the-vote drives demonstrate a consistent and positive impact on vote choice, with union members between 15 and 20% more likely to cast a ballot for the unions' favored candidate than non-members, controlling for other pertinent factors (Delaney, Masters, and Schwochau 1990; Juravich and Shergold 1988; Sousa

1993). This vote choice effect was found to a lesser extent in non-members who resided in union households (Delaney, Masters, and Schwochau 1990), and was found to be stronger when union information was delivered through personal contacts, rather than electronic communication (Juravich and Shergold 1988).

These findings, along with those I outline below from research post-1995, uncannily mirror the change in union strategy I described earlier. It is unsurprising that labor's traditional "top-down" approach to political action focused on union endorsements and union leaders educating members how to vote, and resulted in minimal effects on turnout but stronger influence on vote choice. In contrast, the new grassroots approach centered on activating union members and getting them to the polls seems to have a more positive impact on turnout that is reflected in academic research. However, it may be that some of the differences in findings reflect the fact that later studies generally employ larger data sets and more sophisticated analysis, and hence more readily detect organized labor's impact on voting participation.

A study that examined the effect of union membership on participation using aggregate data to compare levels of union membership and voter participation cross nationally and among the fifty U.S. states, uncovered surprisingly consistent findings from the two data sources (Radcliff and Davis 2000). Looking over time across western industrial democracies, the researchers found that a change in union density of 5% lead to a 1% change in voter turnout (holding other factors constant). Data from U.S. states gave practically identical results, although the impact of union density was slightly higher in midterm than presidential elections. This study provides statistical support for the view that union density increases turnout not only of union members and their families but also among the wider public, and hence results in a more balanced electorate. The authors demonstrated that higher union density is associated with the

presence of parties and candidates with more liberal or left-leaning ideology, a factor that encourages voting among lower socioeconomic groups that are generally the least likely to participate.

A number of relatively recent studies have used individual-level data to discern whether union members are more likely to vote than their non-union counterparts. Radcliffe (2001), using pooled data from the National Election Study (NES) for the period from 1952 to 1992, found that belonging to a union increased the likelihood of voting by 2%, controlling for other relevant factors. An unusually comprehensive study conducted by labor economist Richard Freeman employed multiple data sets spanning the decade from 1990–2000, including the Current Population Survey (CPS), which has a significantly larger sample size than the more commonly used NES data. His findings indicate that union members are 12% more likely to vote than non-members, and that non-members in union households are 3% more likely to participate (Freeman 2003). According to Freeman, a significant proportion of the turnout differential can be explained by systematic differences in union member's socioeconomic characteristics. Thus, he determines the “union vote premium”—the increase in likelihood of voting owing to union membership, holding other factors constant—is 4%, while he estimates that living in a union household increases the likelihood that an employed person will vote by 2%, holding other significant factors constant (Freeman 2003).

These findings are corroborated by a further study that utilizes pooled NES data from 1964–2000 to uncover not only the union impact on voting generally, but also disaggregate the effect on the basis of social class (Leighley and Nagler 2007). Here the authors found that union membership increased the probability of voting for an “average” voter by 7%, and that the effect was stronger among lower income (7.3%) and middle income voters (6.8%) than for high income

voters (4.3%). Leighley and Nagler (2007), like Radcliffe and Davis (2000), also found that union mobilization efforts have a spillover effect and thus union mobilization efforts impact turnout beyond the direct effects on their members. States with higher union density had higher turnout (controlling for other relevant factors). The summary findings of this study indicate that declining union density between 1964 and 2000 reduced overall turnout in U.S. elections by about 3%, and slightly increased the class bias in the electorate. The impact of declining density on class bias in the electorate was lower than the researchers anticipated because while low income voters are more responsive to union mobilization on an individual level, higher union density in a state had a more marked effect on turnout levels of middle and high income voters. This may be because strong unions and their mobilizing efforts generate opposition and spark mobilizing campaigns among groups with divergent views, thus creating a more competitive political milieu that stimulates voters.

It is quite clear that academic studies support the popularly held belief that unions enhance turnout among the electorate generally, and especially among their membership. Thus, as unions have historically drawn their membership from lower and middle income, unskilled or semi-skilled workers (who are among those who are least likely to vote), they have played a significant role in reducing class bias in the electorate. However, as the American Political Science Association Taskforce on Inequality highlights, declining levels of union membership have to some extent eroded this capacity, despite the valiant and successful efforts of unions to mobilize their remaining members (Jacobs and Skocpol 2005). A further significant factor in this regard is that the ranks of organized labor are becoming increasingly middle class and professionalized as more public sector, and fewer private sector, workers are unionized (Asher et al. 2001; Francia 2006). Thus unions' traditional role of politically mobilizing the working class

is being undermined as the profile of their members changes. This demographic shift in union membership is to a considerable extent owing to the fact that the context for union organizing among low income, private sector workers is much more challenging than in the public sector. Reforming labor law would remediate this problem and, in so doing, indirectly increase the likelihood that the U.S. electorate mirrors the U.S. population. This is firmly in keeping with my argument that unions have a role to play as centers of countervailing power in American democracy.

When it comes to vote choice, union members differ somewhat from their non-union counterparts. In fact, there is a sizeable “union advantage” in favor of Democratic candidates. Exit poll data shows that since 1980, union members have supported Democratic candidates at levels from 11% to 12% higher than the population at large, which means that in the last three elections, approximately 60% of union voters cast their ballots for the Democratic nominee (Pew 2005). In congressional elections, the “union advantage” in favor of Democratic candidates is more pronounced; 80% of voters in union households supported Democrats in 1990 compared with 55% among the population at large—an exceptional differential of 26%. More generally, the union vote gap in favor of Democrats in off-year elections is around 15 % (Francia 2006).

At the individual level, regression analysis demonstrates that union membership is quite strongly associated with party identification, being a better predictor than income and education of the likelihood of affiliating with the Democratic Party (Pew 2005). Of course, there is no doubt some selection bias at work here, with those workers more likely to join unions also more likely to favor Democratic policies. In fact, statistical analysis of the factors that indicate whether union members follow union endorsements, which are by and large awarded to Democratic candidates, suggests that party identification and ideology had the strongest effect (Asher et al.

2001). So it seems that while union workers are more likely to support Democrats, it is because they believe those candidates are most likely to represent their interests and support their policy preferences. While some opponents of unions find the partisan bias in union member's political support objectionable, it in fact seems that they oversimplify matter. The point of democratic processes is to enable citizens to give voice to issues that they deem important. When we examine patterns of political opinion and behavior, we find that this is precisely how union members respond.

One contemporary debate among political scientists has focused on the relationship between the white working class and the Democratic Party. In a highly provocative work, Thomas Frank claimed that working class whites had abandoned the Democrats to vote for socially conservative Republican candidates (Frank 2004). His scholarship was quickly challenged, and a subsequent study, which classified "working-class" by income group instead of education level, found that the Democrats maintained strong support among that demographic group (Bartels 2006). Putting aside issues of the definition of working class, it is possible to reconcile these two seemingly opposing views by recognizing that the white working class is diverse and that voters select candidates for various reasons. A study that examined how working class whites cast their ballots in the 2004 presidential election found that a majority of those stating that economic issues were their number one concern voted for John Kerry, while those who stated moral issues were their priority voted for George Bush (Francis and Bigelow 2010).

What does this have to do with unions? Well, the study also showed that white working class voters from union households were considerably more likely than those who were not in union households to state that economic concerns were "what mattered most" when considering their presidential choice. In fact, among non-union working class whites, "moral issues" were the

most frequently cited factor influencing vote choice. What this shows is that unions seem to be effective in focusing the attention of their members on economic issues, and in educating them as to why union-endorsed candidates are more likely to represent their interests in that regard (Francia and Bigelow 2010). In this way, organized labor facilitates the informed vote choice of union members and makes it more likely that the concerns of workers will be represented politically. In the terms of political scientist E.E. Schattschneider, unions appear to diversify the accent among the choir of actors with power in the chorus of American politics.

### **Organized Labor and Campaign Resources**

Another way that unions contribute to diversity in American politics and thereby encourage participation is by directing resources to candidates' campaigns, not just in the form of volunteers, but also in financial contributions. The latter is frequently criticized by opponents of unions as a misguided use of membership dues, which supports candidates contrary to the preferences of union workers. In fact, union campaign expenditures have historically been closely regulated in ways that have either barred or permitted only limited use of union treasury funds. Thus all of the financial contributions unions make directly to political campaigns are funded by voluntary contributions from their members. However, unions also influence elections by supporting candidates indirectly, through voter mobilization and political advertising; in some cases, these efforts are funded by union members' voluntary contributions, while in others they are paid for out of union treasury funds. A quick glance at the fluctuating campaign finance regulatory regime will be helpful here.

The war-time Smith Connolly Act (1943) temporarily banned unions from using treasury funds to make donations to the campaigns of candidates for federal political office. This ban was made permanent with passage of the Taft-Hartley Act (1947) and arguably placed unions in the same situation as corporations, which had already been prohibited from contributing to

campaigns under the Tillman Act (1907). The Federal Election Campaign Act (FECA) passed in 1971 and amended in 1974 permitted unions, as well as corporations, to establish “separated segregated funds,” the official name for Political Action Committees (PACs). Union PACs can solicit funds from their “restricted class,” which is their membership, for the purpose of supporting candidates for federal office. Union treasury money, however, cannot be given to PACs for purposes of campaign donations, although it may be used to cover the operating costs of PACs. Of course, all money donated to PACs, as well as given by PACs to campaigns, must be reported to the FEC and is subject to limits.<sup>2</sup> Individual members of a PAC’s restricted class can give \$5,000 per election to their PAC, while PACs are limited to giving \$5,000 to a candidate per election. These regulations were retained even after the significant changes in campaign finance regulation wrought by the passage of the Bi-Partisan Campaign Finance Reform Act in 2002 and are unaffected by the recent Supreme Court decision in *Citizens United v Federal Election Commission* 558 U.S. 50 (2010).

Highlighting this regulatory regime is important, because despite much popular belief to the contrary, union contributions to federal political candidates do not come from union members’ dues, but rather are drawn from PACs to which members donate funds voluntarily.<sup>3</sup> This is an institutional mechanism through which union workers can amplify their voice in the political arena through pooling financial contributions. In addition to direct contributions to campaigns, PACs can also use their funds to promote the election of federal candidates through “independent expenditures.” These expenditures are most often directed toward media and direct mail advertising; they are not subject to spending limits, but as “independent” expenditures they

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<sup>2</sup> The rules governing corporate and labor PACs are contained in the Federal Election Commission Guide “Corporations and Labor Organizations,” <http://www.fec.gov/pdf/colagui.pdf> (accessed August 3, 2010).

<sup>3</sup> Campaign finance at the state and local level is subject to state-level regulation, which varies considerably regarding the use of labor union money.

may not be undertaken in coordination with the candidate the PAC aims to support. If the PAC and candidate coordinate on advertising campaigns, then monies used for them are considered campaign contributions and are subject to the donation limits detailed above.

There are ways that unions can indirectly contribute financial resources to aide candidates' campaigns that do entail the use of treasury funds. One is relatively uncontroversial and involves the use of treasury funds to cover "communications costs," which is how the Federal Election Commission (FEC) classifies money spent by unions to communicate with and educate their members about candidates. These expenses are reported to the FEC but are not subject to spending limits. More controversially, unions along with corporations and other interest groups have, over the last decade, found various ways to circumvent the campaign finance regulatory system and to influence federal elections. Initially they did so by donating money in unregulated amounts to political parties. Popularly referred to as "soft money," these funds could not be used to make donations to candidate's campaigns but could finance political advertisements that promoted a candidate, without directly urging voters to cast their ballots in the candidate's favor (often referred to as "issue advocacy") or for generic voter mobilization efforts. These soft money donations were prohibited by Bipartisan Campaign Reform Act (2002), but unions and other interest groups worked around the ban by establishing new tax-exempt political organizations called 527s and 501(c)s.

The 527 and 501(c) groups, named for their tax codes, cannot contribute directly to federal candidates but can engage in grassroots campaigns, and up until recently, could run political advertisements so long as they were not within 30 days of a primary or 60 days of the general election. However, following the Supreme Court decision in *Citizens United v Federal Election Commission*, any restrictions on independent political advocacy (that is, advocacy that is not

coordinated with the campaign of a federal candidate) has been deemed to violate First Amendment speech rights. Thus, in future election cycles unions, corporations, and non-profit groups will be permitted to spend their funds on political advocacy without restriction, thus eliminating the prior 30- and 60-day exclusions.

Campaign finance excites much controversy and is frequently criticized as corrosive of democracy because it amplifies the political voice of corporations, interest groups, and the wealthy at the expense of average citizens. Others, of course, hold the view that a “marketplace” approach to political donations ensures that free speech rights are meaningful and facilitates a robust competition of ideas that is appropriately democratic. I do not intend here to adjudicate the various views about what kind of campaign finance regime would best realize democratic ideals, not least because contemporary labor unions have to operate in the extant regulatory system. Given the current regulatory environment in the U.S., labor unions play an important role in countervailing the sizeable, and increasing, financial power of business. It is not that unions entirely offset the influence of corporate money in campaigns; in fact, corporate groups outspend them by significant margins. The point is simply that union contributions, along with those from public interest and more liberal ideological groups, often serve to ensure more equitable funding among candidates and, in so doing, promote a more diverse candidate pool and more competitive elections. A quick summary of recent campaign contributions and a brief overview of research on how unions allocate their campaign dollars will illustrate this point.

According to FEC data on PAC registrations, the number of both corporate and union PACs peaked in the mid 1980s, when labor PACs numbered about 385, compared to around 1,750 corporate PACs—a ratio of 4.5:1 (Federal Elections Commission 2008). By 2008, the number of labor PACs had fallen steadily to 273, while the number of corporate PACs was

1,601—a ratio of 5.8:1. This imbalance in the ratio of corporate to union PACs is indicative of the imbalance in their campaign expenditures, but it is an imperfect measure. This is because while PAC contributions to candidates' campaigns are subject to a legal maximum, there is a wide variation in the amount PACs choose to give to candidates, as well as the number and type of candidates a PAC will support. For example, during the 2008 electoral cycle, according to the FEC, the overall total of PAC contributions to Congressional candidates came to \$389 million. Of that amount, corporate PACs gave approximately \$144 million (37%) compared to \$61 million from labor (15%). Thus the ratio of corporate to labor donations was roughly 2.4:1—a disparity roughly consistent with previous election cycles, but significantly smaller than the raw PAC counts might suggest (Federal Elections Commission 2009). Thus when it comes to direct contributions to campaigns, union money does serve to counter the campaign funding of corporations, and does so in ways that defy the relative strength of unions. Having said that, these figures likely underestimate the total PAC contributions from business interests, as the FEC classifies PACs connected to trade associations, health associations, and ideological groups in distinct categories. More than a few of these groups have connections to and represent business interests, but they are not counted in the FEC's totals for corporate contributions.

Even though overall, labor is outspent by business when it comes to PAC contributions, the way unions allocate their campaign donations differs from that of business in ways designed to ensure workers have candidates (and ultimately legislators) to represent their interests. The different approaches that business and labor adopt to maximize the impact of their funds have been referred to as “access” versus “ideological” strategies (Endersby and Munger 1992; Gopoian 1984; Hurd and Sohl 1992; Rudolph 1999). Corporate PACs' access-oriented strategy means that they direct funds largely to incumbents, and members of the majority party in

Congress as a way to make sure they are heard by legislators who are making policies that may impact their businesses. PACs that adopt an access-oriented strategy direct funds to members on committees that oversee the policy areas of interest to them and will alter the partisan balance of their contributions according to which political party controls Congress. A comparison of donations from PACs associated with business interests in the 2004 and 2008 election cycle illustrates this phenomenon. The Center for Responsive Politics documents that in 2004, when Republicans controlled Congress, business directed 66% of its contributions to Republicans and 34% to Democrats. By 2008, when Democrats controlled Congress and were fighting for a filibuster proof 60 Senate seats, the corresponding figures were 51% to Republicans versus 49% to Democrats.

Organized labor's "ideological" or "electoral" strategy differs from the corporate approach because rather than using funds to gain access to legislators, unions aim to use them to influence who the legislators are. In other words, labor's goal is to influence the composition of Congress to make it more likely that worker-friendly policies will pass. This means that while union PACs give money to many pro-labor candidates who are generally but not always Democrats, they also target their contributions to provide additional support (as far as the contribution limits allow) to those who are competing in close races. Such candidates could be pro-labor incumbents facing serious challengers or pro-labor challengers with a chance of winning a seat. The partisan distribution of campaign contributions from labor PACs in 2004 was 87% to Democrats and 13% to Republicans. Thus, even though Republicans were the majority party in Congress, labor PACs overwhelmingly supported Democrats. The comparable figures for 2008 were 92% to Democrats and 8% to Republicans. By targeting campaign resources in this manner, labor PACs play a vital role in promoting diversity in the candidates that run for political office and

maintaining a competitive electoral system; each of these are functions vital to a democratic polity.

Despite the millions of dollars that corporate and labor PACs give to campaigns, PAC contributions represent only a moderate amount of total campaign receipts. In fact, of all the contributions congressional candidates received in 2008, the amount that came from PACs represented about one-third of the total for those running for a seat in the House, and just one-fifth for the Senate (Federal Election Commission 2009). However, in addition to their direct PAC contributions, labor PACs often support candidates by engaging in “independent expenditures.” The advantage of this kind of expenditure for PACs is that there are no spending limits, so independent expenditures are almost always highly concentrated on a few critical and often tightly fought races. They are used for media buys or mobilization campaigns, and as the name implies, have to be conducted entirely independently of a candidate’s campaign.

In 2008, the FEC reported that PACs spent \$135 million on independent expenditures. Of that total, \$98.8 million was directed toward the presidential campaign, while \$21.7 million and \$14.6 million went to support or oppose candidates for the House and Senate respectively (Federal Election Commission 2009). According to the FEC, only a relatively small proportion of PACs—41 labor and 24 corporate—engaged in any independent expenditures in 2008. The total amount of corporate independent expenditures was low, just \$221,000; in contrast, labor PACs spent \$58.6 million (a significant amount of which went to the presidential race). The relative strength of labor PACs’ independent expenditures compared to that of corporate PACs’ again illustrates the two groups’ contrasting approaches to financing campaigns. Labor is committed to ensuring that workers’ policy priorities are addressed in the legislative process, and in 2008 that meant directing funds to key Senate races to try to get a filibuster-proof majority and

aiding the election of a presidential candidate who publicly backed labor's goals (Orr and Francia forthcoming).

A final way that unions use financial resources to support campaigns is by forming tax-exempt political organizations such as the 527s and 501(c)s which I mentioned earlier.<sup>4</sup> Generally only the larger, national-level unions form these groups. Their spending patterns mirror those of labor PACs, such that resources are targeted to try to impact the composition of the legislature or to support a labor-friendly presidential candidate. These organizations cannot contribute to federal campaigns or attempt to directly impact a federal election, but they can “educate” the public about political issues and engage in “get-out-the-vote” efforts. In 2008 labor-backed 527s featured prominently. According to a study by the Campaign Finance Institute, four were among the top ten highest spenders, including organizations with ties to AFCSME (\$32.8 million), SEIU (\$29 million), Change to Win (\$13.9 million), and UNITE-HERE (\$6.4 million; Campaign Finance Institute 2009). Each of these groups, along with America Votes (a 501(c) supported by unions) focused their efforts on “the ground war.” This means that rather than directing money toward broadcast advertisements and other forms of media, they instead hired organizers and concentrated on voter registration and get-out-the-vote efforts in swing states.

In directing their money toward voter mobilization, labor-backed groups were playing to their advantage. Even though union membership is declining, with approximately 15 million members, organized labor is among the few political organizations that have a significant membership base that can be activated. The federal organizational structure of organized labor

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<sup>4</sup> A crucial difference between 527s and 501(c)s is that 501(c)s do not have to disclose the names of donors from whom they receive money. This may partially explain why labor groups are much more prominent among top-spending 527s, while business groups favor 501(c)s.

means that unions have a presence in all states and most electoral districts.<sup>5</sup> This contrasts with the increasingly professionalized nature of many political groups, in which membership amounts to little more than financial contributions, and the organizational structure is centralized and professionalized (Skocpol 2003). Critics lament this trend away from member-based to professionally-organized political advocacy, suggesting that it is one reason why civic engagement has declined in the U.S. (Jacobs and Skocpol 2005). Insofar as unions are returning to a member-driven electoral strategy, they are, despite declining numbers, contributing to the development of civic skills and social cohesion among their members and in the communities in which their members reside. Their efforts have been lauded as an example of how to revitalize American democracy in the face of declining political participation, especially among citizens of limited means (Skocpol 2003, 267). This face-to-face, educative approach that unions have adopted also fits squarely into Dewey's vision of democratic political organization that focuses on education and enables citizens to recognize themselves as a "public" with shared interests and political goals ([1927] 1954).

In sum, organized labor's engagement in the electoral arena has a positive impact on the functioning of American democracy. Unions educate and mobilize their members and other working-class citizens to vote, and their actions support higher levels of turnout generally. Union campaign efforts serve to enhance the civic skills of their members and, insofar as their ranks are drawn from lower income groups, they ameliorate inequities in the electorate. Unions effectively pool the financial resources of their members to support candidates who pledge to represent the policy preferences of their members and the interests of working Americans more broadly. In

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<sup>5</sup> Union density across states varies widely, with a high of 25% in New York to a low of just 3% in North Carolina. For state-by-state density figures, see Bureau of Labor Statistics "Union Members Summary" <http://www.bls.gov/news.release/union2.nr0.htm> (accessed September 10, 2010).

order to best advance their political goals, organized labor adopts an “electoral” strategy that aims to influence the composition of Congress, rather than ensure access to members who are likely to be elected. This means that organized labor is often willing to support candidates who challenge incumbents and thereby diversify the pool of prospective legislators, thus increasing electoral competition.

Given that a public realm characterized by a diverse range of political perspectives and policy preferences strengthens democracy, organized labor’s campaign resources, which are often arrayed against those of corporate interests, help maintain a strong and vibrant democracy. However as the ranks of unions are depleted, and their membership becomes skewed toward the middle class and professionalized public sector workers where the organizing environment is less hostile, organized labor’s political power is waning. This is evident in the electoral arena, where the ability of unions to redress class inequities in the electorate has to some extent declined, even as their revitalized approach to mobilizations has allowed them to “punch above their weight” with respect to union member share of the electorate. Yet the declining power of unions seems to be more pronounced and problematic when it comes to the policy realm, wherein the political power of business is increasing and organized labor seems to be having difficulty leveraging their vital campaign support into meaningful legislative victories.

### **Organized Labor and the Political Voice of Workers in Public Policy**

Assessing the role that organized labor plays in the passage of public policy is a large and complex topic. It is also one that is significantly understudied; we have much more research and knowledge regarding labor’s electoral activity and the voting habits of union members than we do about how labor uses its resources in the legislative arena (Masters and Delaney 2007). That said, the conclusion I draw from existing research can be illustrated effectively by two anecdotes regarding recent events and the political power of unions.

In the fall of 2009, the Obama White House opened up its visitors log and revealed that Andy Stern, then president of the Service Employees International Union (SEIU) was its most frequent visitor (Shear 2009). This garnered much press attention and great consternation from conservative groups who complained that an “unholy union” between organized labor, President Obama, and Democrats in congress was pushing a pro-labor agenda that included a “union friendly stimulus,” “union friendly health care reform,” and “card-check legislation” (Spruiell 2009). Many other reports on Stern’s White House visits included details of labor spending in the 2008 election, the clear implication being that unions had “bought” legislative favors and were being handsomely rewarded for their campaign support.

In truth, the returns that organized labor garnered for its impressive electoral efforts on behalf of President Obama and congressional Democrats are less than clear. As I have already stated, labor law reform—the top legislative goal of the labor movement—was filibustered in the senate, and the executive branch exerted no political pressure to avert such an outcome. Health care reform, which was certainly a labor priority, was enacted into law. Yet in its final form, the legislation lacked a “public option,” a provision that unions dearly wanted, but included a tax on “Cadillac health insurance” that unions opposed vigorously and were ultimately able to amend but not eliminate.<sup>6</sup> Finally, the stimulus package was surely supported by labor and clearly benefitted many union members—particularly in the public sector as stimulus funds enabled states to avoid worker layoffs—but it was not a narrow piece of “special interest” legislation. On the contrary, the stimulus package was enacted with the intent of stabilizing the economy and providing broadly-dispersed benefits. The pattern that emerges here, marked by victories where

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<sup>6</sup> The “Cadillac Tax” is a tax on “premium” health insurance plans that are provided to workers by their employers. Unions were able to win some concessions with regard to this provision that increased the value at which health insurance plans will be taxed, and pushed back the implementation of the tax from 2013 to 2018.

organized labor backed bills aimed at general social or economic reform and losses when unions pushed for more narrow labor specific legislation, precisely characterizes labor's recent legislative record.

The second anecdote that I feel captures unions' contemporary role in the policy arena comes from the state of California. Proposition 19 is a 2010 ballot initiative that proposes to legalize and tax personal marijuana use in the state, as well as to regulate its cultivation. The controversial proposition is supported by a poorly-funded plethora of progressive reform groups, including the California National Association for the Advancement of Colored People. It has recently won endorsements from a number of labor unions, including the states powerful SEIU affiliate. A *New York Times* reporter noted the significance of this endorsement: "At the very least, the support by the S.E.I.U., which claims over 700,000 members in the state, could make it easier for other groups to rally around the measure. More practically, it means access to the union's considerable campaign apparatus, which could finance mailings, telephone calls and leaflets" (Nagourney 2010).

Passage of Prop 19 may offer unions as organizations some limited self-serving benefits; for example, a small number of employees working in medical marijuana cultivation have recently joined the Teamsters union, while employees at marijuana dispensaries have signed up with the United Food and Commercial Workers. But unions are supporting the initiative primarily because they believe it represents good public policy that will benefit the kinds of citizens they aim to represent. Unions and their coalition partners are pitching the proposition as one that will create jobs, generate revenue from taxes, and save the state money on law enforcement, all while reducing the prison population (Berman 2010). They are also drawing attention to dimensions of the policy proposal that touch on equity and civil rights. The official

longshoreman's union endorsement proclaims that "peoples' lives are ruined for a lifetime because of criminal records incurred from using a drug that is used recreationally by people from all walks of life. Those criminal records fall disproportionately on the backs of workers, poor people, and people of color" (Berman 2010). In keeping with the diversity of the labor movement, something that is frequently overlooked when assessing labors political activity, this sentiment is not wholly endorsed within organized labor. Indeed, a few unions, mostly connected to law enforcement, oppose Prop 19, while others including the influential prison guards union are remaining neutral. Whether labor's support will prove effective in successfully passing this reform remains unclear. What is clear is that the support of labor has been integral to the ability of the coalition supporting Prop 19 to mount an effective campaign. This is characteristic of the important role labor has played in contemporary progressive politics, that is, lending organizational support, legitimacy, and campaign resources to coalitions pushing for reform at the state and local level, in addition to national politics.

In what follows, I briefly summarize academic research that supports the views represented by these two anecdotes, first, that unions have historically been successful in working with political allies to pass social and economic reforms of general concern, but have frequently failed in attempts to pass labor specific legislation, and second, that organized labor has aided and supported the formation and political campaigns of progressive coalitions that would likely not have thrived without labor support. In each of these scenarios labor plays a role in invigorating our democracy by expanding the range of issues that enter the realm of public policy debate and facilitating the passage of legislation that helps maintain a more equitable society. In the final section, I highlight some recent research that questions how long unions can effectively represent

the political voice of Americans of moderate means without winning a legislative victory to reform labor law that would give labor a fighting chance to reinvigorate its ranks.

### **Labor's Policy Record—Broad Based Victories and Narrow Defeats**

Labor's role in the passage of public policy is not easy to discern, not least because of the complexity of the policymaking process itself. As a recent American Political Science Association taskforce report on the effects of inequality on American democracy highlights, there is a significant shortfall in our understanding of how political resources translate into policy outcomes generally (Jacobs and Skocpol 2005). In part, this is because fragmentation and specialization in political science research forecloses our ability to understand the broad contours of policy enactment. This is a concern that certainly captures the state of research on organized labor and the policy process. Yet common sense would lead us to conclude that a vibrant union movement serves to promote the passage of legislation that is beneficial to working Americans and citizens with limited resources. The available evidence that we have from academic studies supports that view. In addition, the presence of organized labor helps ensure that regardless of the policy outcome, the policy preferences of Americans of limited means are at least presented in the policy debate.

Each of these outcomes is beneficial to the overall health of American democracy. Policies that promote economic security surely increase political participation. This is something that political scientists have demonstrated convincingly, as I outlined above. Diversity in policy options also serves to empower citizens. As the political science literature on power informs us, “non-decisions” or the ability of some groups to set the policy agenda, along with the failure of other groups to insert their policy goals into the legislative arena, is a crucial aspect of political power (Bachrach and Baratz 1962; Lukes [1974] 2005). Of course, even though the presence of unions has such positive consequences for democracy, it does not mean that there are not

occasions when the actions of labor leaders have run contrary to the interests of those they represent, thereby negating such beneficial outcomes (Buhle 1999) and hence the importance of ensuring that the internal operations of unions are democratic, a topic I address below. Yet even when unions are responsive to their members, cohesion within the ranks of labor regarding policy preferences and political strategy is not guaranteed. Indeed, in some cases the policy preferences and legislative actions of organized labor can be characterized by discord and diversity, though research indicates that labor is more successful when power is centralized and policy aims are coordinated (Dark 1999).

Despite the presence of considerable division within and among labor unions regarding policy preferences, the fundamental point remains that organized labor ensures that working Americans have some input into the policy process. That is important to the strength of democracy. After all, democracy does not seek to guarantee a specific outcome, but rather aims to ensure that everyone is able to participate in collective decision-making on equal terms. Unions' role in representing the political voice of citizens of limited means is especially important, as research demonstrates that other organized interests active in the policy arena, even those thought to be "progressive" in political orientation such as environmental and women's groups, are largely supported by, and therefore reflect the preferences of Americans of considerable means (Verba, Schlozman, and Brady 1995). Studies also show that the political power of business is increasing, especially with regard to lobbying and the legislative arena (Drutman 2010; Hacker and Pierson 2010; Orr and Francia forthcoming), which only serves to underscore the necessity for groups of "countervailing power" that will help maintain balance with the political system. To date, organized labor is the most successful institution in that regard, even as it frequently falls short of enacting its policy agenda.

The goal of enacting public policy is a two-stage one in a representative system. That is, because the passage of policy is dependent upon the composition of the legislature, groups that aim to pass policy agendas must first ensure that members of the legislative body are supportive of their aims. Unions have largely relied in this regard on electing Democrats, to the extent that organized labor has been classified as the “electoral wing” of the Democratic Party (Greenstone 1977). The extent to which this relationship has been beneficial to labor has been vigorously debated by academics,<sup>7</sup> and skepticism about the benefits that organized labor had reaped from its electoral efforts on behalf of Democrats played a role in the recent schism within the labor movement. However, there is no doubt that the relationship has historically garnered significant benefits for labor. On the broadest level, recent research by political scientist Larry Bartels has demonstrated that those at the bottom of the economic ladder (below the fortieth percentile of income) have fared better under Democratic administrations than under Republican ones in the post-World War II era (Bartels 2008).

This comports with the generally accepted view that the working class made considerable gains subsequent to the New Deal era, when labor’s support for the Democratic Party solidified. Having previously retained an official position of political neutrality, organized labor—and particularly the CIO—rallied hard for Roosevelt’s reelection in 1936, largely to protect the gains labor made after passage of the Wagner Act (Dubofsky 1994, Zieger 2002). Labor’s stance on other landmark legislation passed during the New Deal that aimed to benefit the working class was mixed. The Social Security Act (1935), which provided pensions and unemployment insurance, and the Fair Labor Standards Act (1938), which established the minimum wage and regulated hours of work, won the support of only some unions and labor leaders (Dubofsky

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<sup>7</sup> A review of this debate can be found in Dark (1999).

1994, Quadagno 1984). Those who were reluctant to endorse the legislation feared that government regulation and protection would undermine the “demand” for unions and self-organization. An argument that some contemporary labor economists assert explains at least a proportion of the declining labor density in recent years, especially as government regulation has expanded to include health and safety regulations and anti-discrimination policies (Bennet and Taylor 2001).

If labor was initially skeptical of some of the New Deal programs, studies show that since they were enacted, labor’s enduring relationship with the Democrats has served to maintain and even expand existing broadly progressive social policy, while failing to secure particularistic benefits, especially labor law reform (Dark 1999; Freeman and Medoff 1984). A meta-analysis of studies exploring labor success in the policy arena from 1947–1980 found that, for the most part, researchers observed that those legislators who were supported by labor’s electoral efforts voted in accordance with labor’s stated preferences in public policy (Freedom and Medoff 1984). However, that did not necessarily mean that unions got the policy outcomes they desired; rather, the party composition of Congress and the executive branch played a significant role in determining their success (Freeman and Medoff 1984). Further, the majority of votes counted as labor victories came on legislation not directly related to labor policies. On votes pertaining to labor issues, unions won more frequently in general policy areas such as minimum wage increases or protecting prevailing wage legislation than on matters related to labor law, where labor registered only one victory (extending the NLRA to cover non-profit hospitals), and two significant defeats in the Taft-Hartley and Landrum-Griffin bills that I outlined in chapter 2. Summarizing the legislative record of labor through 1980, Richard Freeman and James Medoff wrote that

measured by resources used in the political arena, influence on congressional voting, and contributions to passage of general social legislation, unions are a political powerhouse. . . . Measured by ability to obtain special interest legislation favorable to unions over the opposition of business groups, however, unions are far from a powerhouse. The reality is that unions have considerable political power in some areas. The myth is they can use that power for the purpose of strengthening unionism and union economic power without general public consent. (Freeman and Medoff 1984, 206)

A subsequent meta-analysis assessing research on organized labor's legislative record from 1996–2002 found that legislative outcomes reflecting labor preferences were somewhat reversed. Labor was on the winning side on general social policy only 28% of the time, yet labor got the outcome it desired two-thirds of the time on matters directly effecting unions (Masters and Delaney 2007). On closer examination, this is not as dissonant from the earlier trend as it might appear; Republican control of Congress made passage of progressive social policy difficult, and goes some way toward explaining labor's poor record generally, while all of the "victories" that labor enjoyed on matters directly related to unions were successful efforts to resist retrenchment in legislation favorable to labor. Here the institutional rules of the legislature, especially the requirement of a super-majority to avoid a filibuster, worked to advantage organized labor, just as they have frequently thwarted organized labor's efforts to amend labor law.

These summary findings of predominantly quantitative research comport well with political scientist Taylor Dark's qualitative study exploring labor's legislative record and alliance with the Democrats. Dark observes that labor has repeatedly failed in its efforts to reform labor law, something that the Democratic Party under the administrations of Johnson, Carter and Clinton tepidly supported but were ultimately unwilling to wholeheartedly champion (Dark 2002). Institutional impediments such as the filibuster, labor's geographical concentration, and lack of representation in Southern states are additional factors that account for these losses. At the same time, Dark documents labor's important role in pushing social reforms and the broad Democratic Party agenda. During the Johnson administration, such landmark legislation as the

Civil Rights and Voting Rights Acts, Medicare, and other Great Society programs such as the War on Poverty owe much to union lobbying in Congress, and union institutional support beyond Congress, even if they were not universally embraced by the labor movement (Dark 2002, 53-59). While the Carter era was a lean one for progressive policy, unions supported minimum wage increases that largely benefitted workers who were not organized. The later Clinton administration saw passage of the Family and Medical Leave Act, the “motor voter” law, and further minimum wage increases, all of which were heartily backed by labor and aimed to benefit a broad constituency rather than a narrowly self-interested one (Dark 2002, 165-178). Of course, labor suffered some infamous defeats during the Clinton years, most notably on the North American Free Trade Agreement (NAFTA) and permanent normal trade relations (PNTR) with China, both of which were vociferously opposed by unions. Such losses were perhaps indicative of the waning power of labor lobbyists and the rise of corporate power, which I address below.

The pattern that emerges from this brief overview of labor’s legislative record is one that reflects quite well how labor serves to strengthen democracy. On multiple occasions labor has endorsed and provided significant resources to support progressive policies aimed to benefit citizens with limited means. When working in these broad coalitions, labor has enjoyed numerous successes, the results of which have promoted economic equality and citizen participation. However, labor’s efforts to secure labor law reform have almost always failed; lackluster Democratic support and institutional impediments have made this goal elusive. How long labor can support campaigns for progressive policies without securing legislation to aide its institutional survival is in question, a concern I address briefly in the next section.

Before moving on to discuss the apparent weakening of labor lobbying power, I would like to touch on a further area of labor success in contemporary public policy. As labor leaders in the 1990s responded to declining union density and sought ways to invigorate their ranks, many advocated and implemented a “social movement” strategy that saw unions working at the state and local level to build community coalitions in support of a range of policies, only some of which directly benefitted labor (Clawson 2003; Levi 2003; Reynolds 2004). These coalitions have scored some significant victories in passing, among other things, local-level “living wage” laws and “big box” ordinances that require that companies guarantee some set of reasonable terms of employment for prospective workers before permission to build large retail stores is granted (Reynolds 2004). Union-community initiatives have supported campaigns for immigrants’ rights and have helped establish workers’ centers in immigrant communities (Fine 2006; Fine and Tichenor 2009), as well as supported efforts to protect the environment while creating green jobs (Reynolds 2004).

Labor community coalitions, in addition to any policy gains they have made, have in many cities proved vital to generating a strong basis for community engagement and have encouraged civic participation, often in marginalized communities. In more than a few locations they have led to the establishment of permanent community organizations that support research, outreach, and education efforts related to pressing political and social concerns (Reynolds 2004). On a number of occasions these coalitions have supported labor-organizing efforts as leaders of community groups, along with clergy from religious organizations who have encouraged their members and congregations to participate in protests and boycotts to support workers in recognition battles with their employers. Even as labor has benefitted in this way, labor’s institutional support has enabled community groups in lower income neighborhoods to thrive,

and has supported their efforts to enhance the political knowledge and efficacy of citizens in lower income communities. In this way, unions have served to increase political participation among demographic groups that are least likely to participate, as well as to facilitate the emergence of new issues into public policy debates, each of which serve to strengthen democracy.

### **The Decline of Labor's Lobby Power?**

When J. David Greenstone explored labor's legislative operations in the mid 1960s, he encountered a well-staffed highly, professional organization that had extensive resources to undertake research; to conduct outreach among, and communicate with, allied interest groups; and to assist the Democratic whips with communication among different factions of the party (Greenstone 1977). Indeed, Greenstone argued that the legislative departments of the various labor unions were more coordinated on social welfare issues than the Democratic Party. He observed that labor lobbyists were among the most knowledgeable about policy matters because they were able to specialize in specific issue areas, and he noted that labor lobbyists—owing to their independence from any specific party faction—were often better informed about legislators' positions on votes than Democratic whips. All of this amounted to a considerable lobbying force, about which Greenstone quotes a fellow lobbyist, who observed that “labor has more persuasive power—and more personnel—than any other group. I lobby alone; we have a one man office here (Greenstone 1977, 356). In the mid 1960s, as I noted above, labor's lobby power was invaluable when it came to exerting pressure on legislators to pass broad progressive policy—including civil and voting rights legislation, Medicare, and reapportionment—even though it was insufficient to leverage support for labor law reform, primarily because of the institution of the filibuster.

When Taylor Dark reflected on the changes in the legislative role of organized labor and its relations with the Democrats from the late 1960s through the Clinton administration, he observed growing conflict, specifically on issues related to trade, as well as “labor’s somewhat reduced centrality as an agent capable of mobilizing support for major social reforms” (Dark 2002). He also reported that, overall, “the level of cooperation between the administration and labor was quite impressive, although always limited by the continuing dispersal of power in the Washington community” (Dark 2002, 188). Since the Clinton era, it seems that the lobby power of labor has diminished even further, as the relative strength of groups lobbying in the District of Columbia has become increasingly skewed toward corporate interests, and the resources that labor devotes to lobbying have been restrained by continually declining union density.

If labor punches above its weight in the electoral arena, where it uses people power to offset the financial resources of business, in the legislative ring organized labor is more like a flyweight taking on an opponent that is packing an increasingly powerful punch. While data on lobbying expenditures has only quite recently been made available in comprehensive form, it still shows that corporate spending is rapidly outpacing that of labor. The Center for Responsive Politics reports that in 1998, the total amount spent on federal lobbying by all labor organizations was \$23 million. Meanwhile, lobby expenditures across all business sectors reached an impressive \$1.2 billion, of which the Chamber of Commerce—one of labor’s primary political foes—alone contributed \$17 million. By 2009, these figures were even more out of balance as unions spent a total of \$43 million on lobbying at the federal level, while business spent \$2.9 billion, of which \$144 million came from the Chamber of Commerce.

The business community’s advantage in lobbying is further reflected in the relative amounts business and labor devote to lobbying versus spending to influence elections. In a recent

survey of organized interests, business corporations reported spending, on average, an approximately equal amount on lobbying as they did on campaign spending, while trade groups spent three times as much on lobbying as campaigning, and in a contrary pattern, unions spent almost ten times as much on their campaign efforts as they did on lobbying (Bamgartner et al. 2009, 199). This pattern, while puzzling, is consistent with the pattern I described earlier regarding how the two sets of interests disperse campaign funds. In other words, it reflects labor's desire to change the composition of Congress, and business groups' more pragmatic approach of ensuring access to legislators. Indeed, labor's disproportionately small lobbying expenditures may reflect the fact that labor sees no benefit in lobbying broadly and so focuses on electing legislators favorable to labor's policy goals. However, given that we have relatively scant research on labor's contemporary lobbying activity, it is hard to truly account for the anomaly.

Given the massive inequities in financial resources that labor and business devote to lobbying, it is unsurprising that one of the most comprehensive surveys of lobbying to date - encompassing 98 different issue areas in the period from 1998–2002—found that the number of lobbyists representing business outnumbered those representing labor by six to one (Baumgartner et al. 2009). The imbalance of political voice is further illustrated by the fact that the majority of labor lobbyists represented six large unions, while corporate lobbyists came from a much broader range of organizations, many of which specialized in a specific policy area. Contemporary unions, it seems, marshal a competent but small squad of all-purpose players on the lobbying field who are outnumbered by a much larger corporate squad with lots of special teams. In contrast to the 1960s, labor lobbyists are now likely to be working on a wide portfolio of issues simultaneously, while corporate lobbyists can afford to work more intensely and focus

on a single policy area. To illustrate this point, a recent study of lobbying related to taxes noted that over a thousand lobbyists list taxes among the policy areas on which they lobby. However, when debates were ongoing about the estate tax, a policy that had broad implications regarding income distributions, organized labor had only one union lobbyist working on the issue, and that lobbyist was working on the policy only one-quarter of the time (Hacker and Pierson 2010).

The growing imbalance between corporate and labor lobby power is the result not only of a decline in membership and hence of the institutional capacity of unions in the political arena, but also comes as a result of significant increases in the resources that large corporations and business interests are willing to devote to politics (Drutman 2010; Vogel 1989). Business initially ramped up its political operations in the 1970s and 1980s in response to what it saw as “threats” in the form of such things as health and safety, environmental, and consumer protection laws. However, more recently business has expanded its lobbying activity not as a defensive move, but rather in a more “entrepreneurial” style, actively seeking to win benefits from public policy. This is partly a result of corporate lobbyists “educating” their CEOs and company directors about the benefits accruing to companies as a result of lobbyists’ activities (Drutman 2010). The rise in corporate lobby power and the decline in labor’s lobbying prowess is further revealed by a survey that asked corporate lobbyists to state who they saw as their major opposition. Unlike the lobbyist from the 1960s I quoted earlier, who was impressed by labor’s lobbying prowess, not one of the contemporary corporate lobbyists saw the labor lobby as their major opposition. Rather, members of Congress (26%) and “other industry lobbyists” (21%) were cited most frequently as the primary foes of business lobbyists (Drutman 2010).

Of course, the resource imbalance in favor of corporate lobbyists does not mean that corporate interests always get the policy outcomes they desire. Indeed, the presence of

inequitable resources is often mitigated by the fact that both corporate and labor groups almost always work in coalitions when advocating for policy change, and very often, different sets of corporate interests take opposing “sides” in a policy dispute (something reflected in the data above relating to corporate lobbyists’ primary opposition). Indeed, a recent comprehensive study of policy change in Congress pointed to a strong bias toward the status quo in public policy, with those advocating for change getting their desired outcome only about 40% of the time (Baumgartner et al. 2009) To the extent that the status quo is beneficial to corporate interests, no change is to some degree a victory for business. Perhaps of more concern, the study demonstrated that for the small subset of issues that pitted a unified business lobby against organized labor, business interests prevailed about 80% of the time. On those issues where labor allied with other public interest groups against business, the success rate of business fell to about 50% (Baumgartner et al. 2009). All of this data on policy change likely underestimates the true lobby power of business, as scholars studying business influence highlight that many corporate lobbying victories come in venues outside of Congress. Corporate lobbyists make significant gains lobbying for such things as small rules changes in federal bureaucracies or favorable decisions from regulatory agencies (Smith 2001). There is relatively little research regarding labor’s activity in these areas.

The trends described here indicate that the ability of labor to act as a countervailing power to business in the lobbying arena is declining even if, for the moment labor allied with public interest groups can compete on somewhat equal terms with business in the legislative realm. If labor continues to suffer losses on policy related to labor’s institutional survival, it is likely that union lobby power will erode further, to the extent that organized labor may cease to serve as an effective partner to public interest groups on broader economic and social issues. Insofar as our

democracy is strengthened by competition among various groups in the policy arena in Madisonian style, this is a troubling trajectory. This trajectory is even more disturbing when we consider that political scientists as early as the 1960s, when labor was relatively strong, noticed a bias toward the more affluent in the interest group system (Schattschneider 1960). Labor's relative decline surely has exacerbated this problem in ways that we as yet do not fully understand. Indeed, recent scholarship by Jacob Hacker and Paul Pierson urges political science to return its gaze to the study of relative group power, something they assert is important in providing political explanations for the increasing economic inequality in contemporary American society (Hacker and Pierson 2010). Hacker and Pierson argue that the rapid rise in income accruing to those in the top 1% of the income distribution at the same time income levels at the median and below are stagnating is the result of political choices, not merely market forces. Insofar as such inequities undermine democracy, they urge political scientists to conduct research into the policy dynamics that have contributed to such unequal economic outcomes. To do so, they suggest that political scientists need to shift from exploring the dynamics of American politics from the perspective of individual behavior and place more emphasis on the behavior of groups. A contemporary study of labor in the lobby arena would surely be helpful in this regard.

### **Future Research—How Democratic are U.S. Unions?**

In this dissertation I have argued that in legal and political debates regarding labor law, questions of union formation have too frequently been entangled with concerns related to how unions as organizations are governed once formed. This, I posit, led policy makers to respond inappropriately when faced with genuine problems with union leaders who were corrupt and unresponsive to their members. Instead of addressing these real concerns by empowering workers and providing mechanisms for them to hold leaders accountable for their actions,

legislators instead amended labor law in ways that made the formation of unions more difficult and less democratic. Proposals to amend the current law to allow workers to form unions through majority sign-up, coupled with the existing process of defining bargaining units, I argue, will bring the union formation process in closer conformity with democratic ideals. That is because such a union formation process will minimize the likelihood that workers will be subjected to coercion and domination as they develop and record their preferences about union formation.

My concern with the union formation process and how well it embodies democratic ideals is driven in part by my belief that unions as organizations strengthen political democracy. In the political realm, unions have historically served effectively as organizations of countervailing power that have given political voice to those groups in society that are least likely to participate in the political process. Unfortunately, union density in the United States is declining in ways that has impaired, and is likely to increasingly thwart, the ability of the labor movement to represent the interests of citizens with limited means in the political arena. Reforming the legal framework that regulates union formation in ways that make it more democratic, therefore, has two potential beneficial consequences for workers. First, it will allow them to choose whether they wish to be represented collectively in the workplace without fear of retribution. And second, in so far as studies demonstrate that—absent fear of retaliation from employers—more workers would support unionization, labor law reform would increase union density and enhance organized labor's ability to represent workers in politics.

Even as I have presented an argument that calls attention to the positive impact unions have on democracy, I acknowledge that a complete evaluation of unions in that regard would also require consideration of unions' internal operations. I have not addressed this issue here. Instead, I am suggesting that a question of vital concern for future research is how well the legal

framework that structures union governance comports with democratic ideals. After all, as I have frequently stated, any democracy-enhancing consequences of unionization would be compromised if they resulted from the actions of organizations that did not embody democratic ideals. The Landrum-Griffin reforms to labor law went some way toward ensuring that unions functioned democratically. The reforms contained provisions mandating regularly scheduled elections for union officers, guaranteeing all union members the right to nominate candidates and run for office, and prohibiting incumbent officers from using union funds to campaign or distribute information on behalf of candidates, without offering the same to their opponents. They also required extensive financial disclosure and mandated that unions file their constitutions with the department of labor, all measures aimed at reducing corruption in unions and empowering union members.

How effective these measures have been is a question for future research. Some studies involving surveys of union members indicate that unions are much more democratic than the often-invoked image of the “union boss” reflects (Freeman and Medoff 1984). Union members in surveys have reported both high levels of involvement in union meetings and participation in union elections; over a two-year period, three-quarters of members reported attending a meeting and the same number turned out to vote in union elections (Freeman and Medoff 1984). However, the surveys that form the basis of that research are rather dated, having been conducted in 1977. More recently, political scientists Maryann Barakso and Brian Schaffner have studied the internal governance of numerous interest groups active in American politics and have found that labor unions in their sample were among the most democratic of any interest organizations (Barakso and Schaffner 2008). Of course, that unions are more democratic than other interest

groups does not necessarily mean that they approximate democratic ideals, and a number of studies highlight, that there may be reason for significant concerns about union democracy.

Seymour Martin Lipset's classic *Union Democracy* highlights the difficulty of maintaining viable and meaningful competition for elected office within unions, and importantly for present purposes, suggests that the mode by which unions form is influential with respect to how they will be governed (Lipset 1956). More recently, labor lawyer Thomas Geoghegan has documented the struggles of opposition groups within such unions as the United Mine Workers and the Steelworkers as they sought to compete for office against leaders with entrenched power (Geoghegan 1992), while Margaret Levi and her coauthors have illustrated how the internal culture of unions, as well as variation in their internal rules, can serve to make them more or less democratic, despite the fact that Landrum-Griffin establishes some common standards for internal governance (Levi 2003; Levi et al. 2009).

Such contradictory findings point to the need for a comprehensive analysis of union governance and an evaluation of the effectiveness of the Landrum-Griffin requirements. For example, a common complaint regarding the current legal structure is that, while it requires direct participation of union members in elections for officers at the local level, it allows offices above the local to be filled by a vote of delegates chosen by rank and file members; this indirect process, critics contend, diminishes the accountability of union leaders to their members. The veracity of this claim could surely be investigated, particularly as many unions go beyond the minimal requirements of Landrum-Griffin and have direct elections for all officers. In addition, an investigation of the kinds of internal institutions that foster competition for office within unions, and whether in fact competition serves to empower those represented would be insightful. This is a question that Lipset addressed a half-century ago. At that time, he argued

that the manner in which unions formed was a critical factor in explaining their subsequent internal governance. A contemporary evaluation of whether forming unions by majority sign-up processes makes them more or less likely to function democratically, once formed, than those that are initiated through the NLRB secret-ballot process, would surely inform the overall debate about labor law.

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Susan Orr was born in 1968 in Manchester, England. The youngest of two sisters, she grew up in Manchester and completed her high school education at The Kingsway School, Cheadle, in 1985. Susan completed an apprenticeship in electronic engineering after high school, before pursuing a career in sales and marketing. She moved to the United States in 1994. Susan completed her Bachelor of Arts in economics at Rollins College in Winter Park Florida, in 2002, and joined the graduate program in political science at the University of Florida the same year. Susan currently teaches in the Political Science Department at the College of Brockport, an institution in the State University of New York system.