

Democracy in the Workplace: Union Representation Elections and Federal Labor Law

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INTRODUCTION

On May 15, 1935, as nearly a year of congressional dispute over the National Labor Relations Act (NLRA or Wagner Act) drew to a close, Senator Robert F. Wagner invoked the most hallowed of American political ideals in its defense. "[T]he national labor relations bill does not break with our traditions," Wagner affirmed of the law that would bear his name. "It is the next step in the logical unfolding of man's eternal quest for freedom. . . . Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate the common man"¹ For Wagner, the right of workers to organize and engage in collective bargaining that was guaranteed by the NLRA constituted nothing less than a fulfillment of the nation's dedication to free institutions.

Yet the Wagner Act, of course, did break radically with certain of the nation's most entrenched traditions. It controverted the codes of the common law and of classical liberalism, both of which defined trade unions as the very antithesis of individual freedom as embodied in the rule of liberty of contract.² To confer legitimacy on the new legislation, therefore, its proponents located it within a different, yet even more deeply ingrained, American tradition: democratic government. "That is just the very purpose of this legislation, to provide industrial democracy," Wagner declared.³ The cornerstone of the Wagner Act, as set forth in its central section, was workers' right to

1. 79 CONG. REC. 7565 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2321 (1949) [hereinafter NLRA LEGISLATIVE HISTORY].

2. Wagner himself criticized this legal and economic tradition. *See id.* at 7565-67, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2321, 2321-25. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37-97 (1991) (discussing judicial nullification of labor and other social legislation under the doctrine of freedom of contract in the late nineteenth and early twentieth centuries); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 36-59 (1985) (discussing judicial hostility to unions in the nineteenth century).

3. *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 642 (1935) [hereinafter 1935 Senate Hearings] (statement of Harvey J. Kelly, American Newspaper Publishers Association), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2028.

"representatives of their own choosing."⁴ In the years following the Act's passage, amidst fierce political and legal conflict over its construction and amendment, the crucial right to choose representatives came to hinge exclusively on a mechanism at the core of political democracy—the representation election. "Industrial democracy" became synonymous with the union election.⁵

This Article examines the law governing union elections from 1935 to the present. Focusing on the connection between the electoral device and the right to representation, it deciphers how the ideal of political democracy has shaped the evolution of the law. It shows that union election rules bear the stamp of an analogy between political representation and labor representation—an analogy that in turn has fostered the conception of the union election as a contest between employers and unions. This conception, the Article argues, has subverted labor's right to representation, for it rests on a fiction of equality between unions and employers as candidates vying in the electoral arena. The model of political democracy provided the framers of the Wagner Act with compelling language and imagery with which to assail the problem of "economic despotism." Since then, however, lawmakers have elaborated the political model into a web of union election rules that obscures inequality in the workplace.

Despite the election's centrality to contemporary labor law, it has hardly been a focal point of legal scholarship. Only three major studies center on union elections.⁶ Notably, all of them document the confusion and impotence of the rules regulating elections. According to these studies, union election rules are not only internally inconsistent⁷ and based on assumptions contrary to empirical evidence,⁸ they are also routinely violated

4. National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 157 (1988)).

5. See *infra* Part I. As shorthand, this Article uses the term "union elections" to mean union representation elections. The term refers to elections through which unions seek to represent employees, not to elections of union officers. In contrast, the Article uses the term "political elections" to mean elections of government officials. This distinction is not intended to suggest that union elections do not involve political questions.

6. See JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

7. See Bok, *supra* note 6, at 42-45.

8. GETMAN ET AL., *supra* note 6, at 115-16. The Getman study attempted

with near impunity.⁹ Yet the labyrinth of rules continues to expand, growing increasingly complicated.

By exploring the founding purpose of the Wagner Act to democratize the employment relation, and by following the doctrinal implications of that conception, this Article offers a new perspective on the muddle of contemporary labor law. Unlike previous scholarship, it examines how the election emerged as the linchpin of the right to representation. It also analyzes the fundamental legal tensions created by transposing the device of the representation election from the political realm into the workplace, probing the theoretical roots of the legal failure disclosed by other studies.¹⁰ This Article traces the contradictions and inefficacy of labor law to its legitimating metaphor—the analogy between democratic politics and labor representation. The core defect in union election law, it finds, is the employer's status as a party to labor representation proceedings, a status contravening workers' express right to "rep-

to test the Board's assumption that prohibited campaign conduct influences voter behavior and concluded that the assumption is erroneous. *Id.* Subsequent scholars, particularly William Dickens, have contested Getman's findings. See Weiler, *supra* note 6, at 1784 & nn.50-54 (citing William T. Dickens, Union Representation Elections: Campaign and Vote (1980) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology)). A summary of this and other research appears in Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 45, 54-59 (Thomas A. Kochan ed., 1985). This Article does not take sides in this debate, and it presents no new empirical research. Rather, it points to empirical evidence demonstrating that the particular reforms proposed would have an effect and, in the case of regulation of campaign conduct, argues that the rules should not be based on judgments about effects. See *infra* at notes 104, 350, 362-63 and text accompanying notes 474-75.

9. Weiler, *supra* note 6, at 1778-81. Weiler's thesis, that unlawful employer opposition to union representation has played a major role in the decline of unionism, recently has been criticized in Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991). Weiler responds in Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991).

10. Bok cites a lack of empirical research as a possible explanation for the incoherence of union election law. See Bok, *supra* note 6, at 40-41. Getman and his colleagues performed this research, but they did not speculate on why the Board has adopted rules based on faulty empirical assumptions. See GETMAN ET AL., *supra* note 6, at 33-137. Weiler suggests that the primary barrier to meaningful reform is the assumption "that the employer is legitimately entitled to play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats." Weiler, *supra* note 6, at 1813. He criticizes this assumption, but does not trace its origins. See *id.* at 1813-16.

representatives of their own choosing."¹¹

To focus on political metaphors, on analogies, is not to suggest anything intrinsically limiting about the language of democracy. Historians have shown the malleability of the rhetoric of industrial democracy—how it was voiced by labor insurgents a century ago, then adopted by Progressives such as Louis Brandeis in the early years of this century, and then refashioned to advertise the corporate welfare programs of the 1920s.¹² This Article does not argue that the analogy between political and labor representation dictated the content of union election rules. It does, however, treat the analogy as more than a figure of speech. Analyzing how Congress, the courts, the National Labor Relations Board (NLRB or Board), and partisans of both labor and management deployed political metaphors in construing the Wagner Act, this Article reveals the discursive power of such metaphors to structure conceptions of union election law. The political analogy facilitated a style of argument that presumed the equality of employers and unions as players in the union election process. Within the changing configurations of twentieth-century politics, legislators and judges have not only justified their law-making in democratic terms but have also molded the rules to fit the potent image of industrial democracy.

By grafting representative democracy onto the employment relationship, the Wagner Act confronted lawmakers with a new variant of a problem at the heart of liberal political theory—the problem of reconciling the dependence of wage earners with the personal independence deemed essential to citizenship. The right to labor representation merged the asymmetrical worlds of the workplace and polity, uneasily joining the hierarchies of the employment relation with formal civic equality. The juncture was far from stable, as the discussion below of the contradictory rules regulating employer speech demonstrates.¹³ The political election failed to supply a coher-

11. 29 U.S.C. § 157. Thus, unlike Weiler, who attributes the failure of collective bargaining to the inefficacy of the remedies for unlawful employer activities, *see* Weiler, *supra* note 6, at 1787, this Article argues that lawful as well as unlawful employer activity is distorting the process of labor representation.

12. *See, e.g.*, DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920*, at 57-62 (1978); Steve Fraser, *The "Labor Question," in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 55, 58-59 (Steve Fraser & Gary Gerstle eds., 1989); Nelson Lichtenstein, *Introduction to INDUSTRIAL DEMOCRACY: PAST AND PRESENT* (Nelson Lichtenstein ed., forthcoming 1992) (manuscript at 2-23, on file with the *Minnesota Law Review*).

13. *See infra* Part III.

ent model for securing employees the freedom of the industrial franchise and for containing undue employer influence. Challenging the logic of rules shaped by a simple political analogy, this Article illuminates fundamental differences between the systems of political and labor representation. In light of these differences, it concludes that employers should be stripped of any legally cognizable interest in their employees' election of representatives.

The Article has four parts. Part I reveals how notions of democratic government infused the debates over the Wagner Act as well as its construction and amendment. It shows that although representation was the centerpiece of the legislation, the Act did not specify how workers would select their representatives. Rather, it was only amidst sustained opposition to the project of "industrial democracy" that the Board construed the Wagner Act to transform the government supervised election into the privileged method of forcing employers to recognize their employees' chosen representatives.

Part II focuses on the most perplexing and fundamental issue in union election law: the right of employers to participate in their employees' election of representatives. It begins by probing the problem of political enfranchisement and employee dependence—a problem of longstanding concern to legal and political theorists. It then analyzes how Supreme Court doctrine and legislative reform, drawing on the example of political elections, transformed employer campaigns from unfair labor practices into protected speech and thereby assigned the employer a status tantamount to that of candidate in the union election.

Part III argues that the employer's anomalous presence in the union election renders political analogies inapt, a conceptual mismatch that underlies much of the incoherence of the law. It focuses on the tension between employees' free exercise of the franchise and employers' rights of free speech. It reveals how the Board, in regulating employer campaigns, first abandoned the political model for a scientific one, but then oscillated between the two. Likening union elections both to freewheeling political contests and to experiments run under stringently regulated conditions, the Board thus formulated a jurisprudence that swung back and forth from countenancing employer coercion to prohibiting employer speech, while also ensnaring unions in its regulatory web.

Finally, Part IV critically scrutinizes the analogy between

political and labor representation, peering beneath the level of metaphor. It identifies crucial differences in the procedures, functions, and results of political elections and union elections, arguing for a more nuanced analogy between political and industrial democracy and describing the regulatory changes entailed in such a reconception. On account of the asymmetry between representation elections in the workplace and the polity, Part IV concludes that employers should have no legally sanctioned role in union elections.

I. "INDUSTRIAL DEMOCRACY"

The ideal of industrial democracy figured prominently in the legislative debates that preceded the passage of the Wagner Act, and the Act cut deeply into employers' legal authority in the workplace. But the statute did not spell out precisely how the new system of labor representation was to operate. Only as employers persisted in refusing union recognition, and as Congress moved to amend the Act, did the Board designate the key mechanism of political democracy—the election—as the foundation of labor law. Once the election became integral to labor representation, political metaphors gained heightened credence and were voiced on all sides during subsequent debates over the regulation of union elections.

A. THE WAGNER ACT

The National Labor Relations Act was a radical piece of legislation, its precursors in the early New Deal notwithstanding.¹⁴ Indeed, its enactment is perplexing, for it drew virulent business opposition and garnered only moderate support from President Roosevelt.¹⁵ Historians have demonstrated that a

14. Karl Klare has called the NLRA "perhaps the most radical piece of legislation ever enacted by the United States Congress." Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978). The Act's precursors are discussed in IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 18-83 (1950) and JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 1-148 (1974).

15. Irving Bernstein stated that the Act "had qualities of a historical accident." IRVING BERNSTEIN, *TURBULENT YEARS* 787 (1970). Howell Harris also asserts that the Act's passage "may have been quite accidental." Howell Harris, *The Snares of Liberalism? Politicians, Bureaucrats, and the Shaping of Federal Labour Relations Policy in the United States, ca. 1915-47*, in *SHOP FLOOR BARGAINING AND THE STATE* 148, 168 (Steven Tolliday & Jonathan Zeitlin eds., 1985); see also BERNSTEIN, *supra* note 14, at 57-128 (describing business opposition to and presidential ambivalence concerning the Wagner Act).

complex of motives brought together the coalition that secured the Act's passage.¹⁶ At the forefront of the goals professed by its proponents was democratizing the workplace, a goal that Wagner and other legislators labeled "industrial democracy."¹⁷

The nonunion workplace was a despotic blot on the democratic landscape of the nation, contended diverse supporters of the legislation in congressional hearings during 1934 and 1935. Employing metaphors drawn from the sphere of politics and government, they contrasted the status of the employee to that of the citizen. As Robert L. Hale of the Columbia Law School testified, without the NLRA an employee in a nonunion company was a "non-voting member of a society."¹⁸ An engineer in the automotive industry cited the American Revolution as precedent, explaining that one of its main causes was "that we had to live under a government without any voice in it [I]n the industrial field it is just about this way with us workers in Detroit now."¹⁹ Wage earners had political rights, a local union official testified, but "[i]ndustrially they find themselves practically disfranchised."²⁰ "In the midst of a political democracy," he stated bluntly, "you have an industrial autocracy."²¹

According to such arguments, the Wagner Act would enable workers to carry the rights of citizenship into the factory. The Senate Report on the bill made explicit the analogy between industry and government, equating labor organization

16. See, e.g., BERNSTEIN, *supra* note 14, at 112-28; GROSS, *supra* note 14, at 130-48; Kenneth Finegold & Theda Skocpol, *State, Party, and Industry: From Business Recovery to the Wagner Act in America's New Deal*, in STATEMAKING AND SOCIAL MOVEMENTS 159 (Charles Bright & Susan Harding eds., 1984); David Plotke, *The Wagner Act, Again: Politics and Labor, 1935-1937*, 3 STUD. IN AM. POL. DEV. 105 (1989); Theda Skocpol, *Political Responses to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155 (1981).

17. 1935 Senate Hearings, *supra* note 3, at 642 (statement of Harvey J. Kelly, American Newspaper Publishers Association), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2028.

18. *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 51 (1934) [hereinafter 1934 Senate Hearings] (statement of Prof. Robert L. Hale, Columbia Law School), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 81.

19. *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 96 (1935) (statement of William E. Dennison, Society of Designing Engineers), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2473, 2570.

20. 1934 Senate Hearings, *supra* note 18, at 302 (statement of Richard W. Hogue), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 332.

21. *Id.* at 300, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 330.

with the political right to representation: "A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."²² In the words of one congressman, "self-government through fairly chosen representatives" was an "inherent" American right. "This bill does no more than guarantee that right to American labor."²³

Again and again, themes of democracy, self government, and citizenship, rights of franchise, representation, and association were uttered in justification of the Wagner Act. The paeans to American political ideals and institutions rang forth as if Independence Day were being celebrated. As Wagner later averred, the right of labor representation was a fundamental right of "democratic self-government," marking the "difference between despotism and democracy."²⁴

Democratic ideals aside, there still remained the problem of establishing the legality of the legislation. Here, too, proponents of the Wagner Act cast their arguments in political terms. For example, the American Federation of Labor (AFL) defended the bill's constitutionality not on the basis of the federal government's power to regulate interstate commerce, the argument later accepted by the Supreme Court,²⁵ but rather on the basis of Article IV, section 4 of the United States Constitution, which guarantees that every state shall have "a republican form of government."²⁶ Eschewing an abstract, formal notion of the Constitution's political guarantee, the counsel for the AFL told Congress that "the preservation of industrial democracy [was] essential to the preservation of a republican form of

22. S. REP. NO. 1184, 73d Cong., 2d Sess. 4 (1934), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1099, 1103.

23. 79 CONG. REC. 9691 (1935) (statement of Rep. Withrow), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 3132. Senator Wagner later echoed this point, saying, "[T]here can be no more democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote." Senator Robert F. Wagner, Address Before the National Democratic Forum (May 8, 1937), *quoted in* Leon H. Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT: AFTER TEN YEARS 5, 13 (Louis G. Silverberg ed., 1945).

24. Keyserling, *supra* note 23, at 13. Protection of "the right to bargain collectively," Wagner elaborated, is "the difference between democracy in industry on the one hand, and tyranny, or at best, benevolent despotism on the other." 81 CONG. REC. 2940 (1937).

25. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

26. U.S. CONST. art. IV, § 4; 1934 Senate Hearings, *supra* note 18, at 109 (statement of William Green, President, AFL), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 139.

government."²⁷

The principle of representation was the axis of both the industrial system ordered by the Wagner Act and the political system ordered by the Constitution. Just as James Madison had written in *The Federalist Papers* that representation was the "pivot" of the American republic,²⁸ so too Wagner deemed it the "foundation" of collective bargaining.²⁹ Through representation and collective bargaining, Wagner envisioned workers participating in the creation of the laws of the shop. Accordingly, the Wagner Act gave the National Labor Relations Board express authority to investigate questions regarding the "representation of employees" and thereafter to "certify" the workers' chosen representative.³⁰ A representative "designated or selected" by the majority of employees would then become the "exclusive representative of all the employees."³¹

Much of the criticism aimed at the Wagner Act concerned its proscription of company unions³² and its stipulation that the union selected by the majority constituted the "exclusive representative" of all employees.³³ In deflecting such criticism, Wag-

27. 1934 Senate Hearings, *supra* note 18, at 109 (statement of William Green, President, AFL), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 139.

28. THE FEDERALIST NO. 63, at 386 (James Madison) (Clinton Rossiter ed., 1961).

29. 1935 Senate Hearings, *supra* note 3, at 46 (statement of Sen. Wagner), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1422. Even those who viewed the Wagner Act largely as a macroeconomic measure realized that representation was the key to its economic efficacy. The Director of the National Emergency Council, Donald Richberg, explained that if "workers in an enterprise have no voice in the determination of terms and conditions of employment, there will exist a lack of economic balance, which will continually menace the stability of the economic system." 79 CONG. REC. 267 (1935), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1284, 1291.

30. National Labor Relations (Wagner) Act, ch. 372, § 9(c), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 159 (1988)). The first precommittee draft of the bill did not grant the Board authority to resolve questions of representation. This power appeared in the second draft, however, and remained in the bill throughout the legislative process. Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relation Act*, 11 INDUS. REL. L.J. 73, 79, 102, 104 (1989).

31. § 9(c), 49 Stat. at 453 (current version at 29 U.S.C. § 159 (1988)).

32. The years immediately preceding the passage of the Wagner Act witnessed a boom in plans for employee representation created and controlled by employers. Their detractors denominated such systems of representation "company unions." BERNSTEIN, *supra* note 15, at 38-40.

33. 29 U.S.C. § 159. See BERNSTEIN, *supra* note 14, at 108-09 (summarizing criticism of prohibition of company unions and establishment of exclusive representation). The only criticism asserted as vigorously as these two was that

ner and other legislators returned to the model of representative democracy, in particular to the principles of popular sovereignty and majority rule. Company unions ran contrary to "genuine industrial democracy," argued Wagner.³⁴ Likening the guarantee of workers' rights to the creation of American government, he asked: "When the employer hands his workers a constitution, can there be real freedom or choice?"³⁵ By the same reasoning, the highly controversial clause regarding "exclusive representation" by an independent, employee-selected union found its rationale in the basic principle of majority rule. In his congressional testimony, Edwin E. Witte, an economics professor at the University of Wisconsin, used an especially evocative partisan political analogy to deride the idea that employers would voluntarily recognize whichever unions their employees selected: "Now, that may, at first blush, seem a fair position, but I submit, gentlemen, that exactly parallels the situation which would prevail, if, instead of you gentlemen here representing your respective States, all of the people who voted for your opponents were represented by them."³⁶ Both government and industry, Witte maintained, required a representative system premised on the will of the majority. The alternative was "pure anarchy."³⁷ The essence of "industrial government" lay in the "fundamental principle of democracy, majority rule."³⁸

Even though the Wagner Act revolved around the right to representation, the legislation did not specify precisely how the majority was to choose its representative. Section 9(c) of the Act empowered the NLRB to resolve questions of representation *either* through "a secret ballot of the employees" *or* through "any other suitable method to ascertain [sic] such repre-

the Act prohibited only employer and not union coercion. *See infra* Part III.D (discussing the argument for parity between employers and unions). Notably, both majority rule and elections are distinctive to United States labor law. *See* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1426-30 (1971).

34. 1934 Senate Hearings, *supra* note 18, at 309 (statement of John M. Carmody, Chief Engineer, Civil Works Administration), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 339.

35. 1935 Senate Hearings, *supra* note 3, at 42 (statement of Sen. Wagner), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1418.

36. 1934 Senate Hearings, *supra* note 18, at 243 (statement of Prof. Edwin E. Witte, University of Wisconsin), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 273.

37. *Id.*

38. *Id.* at 244, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 274.

sentatives.”³⁹ Apparently, the openness of this provision did not trouble trade unionists. But such an ambiguous deviation from the strict procedures used to elect political representatives was not lost on critics of the legislation. Partisans of management were especially alarmed, alleging a threat to the democratic process, testifying that only a secret ballot was “fair” and “free from [union] coercion.”⁴⁰ According to the Vice President of General Motors, “The rule of ‘and other suitable method’ is entirely too vague to be workable and is subject to grave abuse.”⁴¹ The chair of one employee representation plan asked, “What other method is more suitable than by secret ballot . . . ?”⁴²

In parrying these criticisms, Wagner ultimately sidestepped the problem of defining “any other suitable method” and sorting out exactly how it would fit into the scheme of choosing labor representation. He staunchly defended the democratic nature of the procedures laid out in the legislation, but so as seemingly to read the maligned provision out of the law. His defense put primacy on the sanctity of elections: “[A]s 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

39. § 9(c), 49 Stat. at 453 (footnote omitted) (current version at 29 U.S.C § 159(c) (1988)). The NLRB’s authority to certify union representatives in the absence of an election was consistent with the practice of labor boards established under the National Industrial Recovery Act of 1933. In a February 1934 Executive Order, President Roosevelt made explicit the labor boards’ authority to determine either “upon investigation, or as the result of an election, that the majority of the employees of an employer . . . have selected their representatives.” Exec. Order No. 6580, § 2 (Feb. 1, 1934), *reprinted in* 1 N.L.B. vii (1934). Although the entire section containing this provision was deleted less than a month later, Exec. Order No. 6612-A (Feb. 23, 1934), *reprinted in* 1 N.L.B. viii (1934), in March of 1934, the National Recovery Administration issued a release stipulating that in investigating representation, an election “is not the exclusive method . . . and need not be employed except in those cases where no other adequate method exists.” LEWIS L. LORWIN & ARTHUR WUBNIG, LABOR RELATIONS BOARDS 157 n.31 (1935) (quoting NRA Release No. 4118 (Mar. 29, 1934)).

40. 1934 Senate Hearings, *supra* note 18, at 532 (statement of Ralph F. Foster), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 566.

41. 1935 Senate Hearings, *supra* note 3, at 605 (statement of John T. Smith, Vice President, General Motors Corporation), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1991.

42. *Id.* at 659 (statement of Clifford U. Cartwright, Secretary-Chairman, Employees’ Representation Plan, Oklahoma Pipe Line), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2045. He urged that the words “‘any other suitable method’ should be stricken.” *Id.* at 658, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2044.

vote, as they do for their political representatives in a secret ballot, to select their choice."⁴³

"[This] is what I call the tenets of democracy," Wagner affirmed.⁴⁴ Yet the Wagner Act did not designate the government-supervised election the sole means by which workers could choose representatives within the new framework of industrial democracy. Thus the question of whether the method of exercising the right to labor representation should be made to square with political practice shifted to the Board and the courts, becoming a flashpoint of controversy as soon as the Act became law.

B. REPRESENTATION AND ELECTIONS

During the first five years after the NLRB began operating in 1935 it did not hesitate to certify unions as the "exclusive representative" of employees in the absence of an election. It issued 272 certifications, nearly a quarter of the total number, relying on evidence other than the tally of a vote.⁴⁵

The procedure in such cases was straightforward. Certification depended upon proof presented at a trial-like hearing rather than the outcome of an election. An employee or union filed a petition requesting certification, the Board investigated, and, if it discovered "a question" concerning representation, held a hearing.⁴⁶ At the hearing, if the union offered sufficient evidence that employees had "already chosen" to be represented, the Board would certify the union without an election.⁴⁷

43. *Id.* at 642 (statement of Harvey J. Kelly, American Newspaper Publishers Association), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2028.

44. *Id.* at 679 (statement of E.R. Lederer, Chairman, Labor Subcommittee, Planning and Coordinating Committee for the Petroleum Industry), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2065. Wagner began this remark, "[Y]ou have an election under government supervision . . . where a man walks into the booth and selects his own representative." *Id.*

45. The Board certified 897 unions after conducting elections. The Board conducted a total of 1060 elections. 1 NLRB ANN. REP. 40 (1936); 2 NLRB ANN. REP. 25 (1937); 3 NLRB ANN. REP. 40 (1938); 4 NLRB ANN. REP. 44 (1939); 5 NLRB ANN. REP. 26 (1940). These figures do not include cases settled by the parties' agreement to hold an election.

46. 29 U.S.C. § 159(c) (1988). A "question" concerning representation existed if a substantial number of employees had expressed a desire to be represented and their employer had refused to recognize their representative. 1 NLRB ANN. REP. 26-27 (1936).

47. 1 NLRB ANN. REP. 28 (1936). William M. Leiserson, Chairman of the National Industrial Recovery Act's Petroleum Labor Policy Board, explained that board's parallel policy during the hearings on the Wagner Act: "If there

The Board found admissible diverse forms of evidence of the majority's will. It relied on signed authorization cards, membership applications, petitions, affidavits of membership, signatures of employees receiving strike benefits from a union, participation in a strike called by a union, and employee testimony at the hearing.⁴⁸

The Board certified unions in the absence of elections despite employer resistance to that procedure and the refusal of many firms to accept their new legal obligation to bargain with workers' chosen representatives. Employers contended that they would abide by the Wagner Act if their employees chose their representatives in a voting booth. In 1937, one management lawyer argued before the Board that his "[c]ompany would be more willing to engage in collective bargaining with the petitioning unions in the event a formal election conducted by the Board should result in their favor."⁴⁹ The Board rejected the argument, however, certifying a union based on evidence of membership alone and thereby imposing a legal duty on the employer to bargain with the union.⁵⁰

By the summer of 1939, however, as the tide of New Deal reform ebbed, the Board came under intense political pressure, and its practice of certifying unions without conducting an election drew especially fierce opposition.⁵¹ The Board faced attacks from all sides—employers,⁵² an antagonistic press,⁵³ an

is a strike in a plant where a thousand people are working and 900 go out, you do not have to have an election to determine what the 900 want. They are telling you. It is silly to go through the election business then." 1934 *Senate Hearings*, *supra* note 18, at 236, reprinted in 1 *NLRA LEGISLATIVE HISTORY*, *supra* note 1, at 27, 266.

48. See, e.g., *Woodville Lime Prod. Co.*, 7 N.L.R.B. 396, 399 (1938) (affidavits); *Combustion Eng'g Co.*, 5 N.L.R.B. 344, 349 (1938) (participation in strike); *News Syndicate Co.*, 4 N.L.R.B. 1071, 1075-76 (1938) (applications); *Wilmington Transp. Co.*, 4 N.L.R.B. 750, 753-54 (1937) (employees' testimony); *Shell Chem. Co.*, 4 N.L.R.B. 259, 264 (1937) (petition); *Seas Shipping Co.*, 2 N.L.R.B. 398, 401 (1937) (signed cards); *Richards-Wilcox Mfg. Co.*, 2 N.L.R.B. 97, 100 (1936) (union membership rolls); see also JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* 20 (1981) (citing other NLRB decisions relying on indicia of majority will other than election results).

49. *Campbell Mach. Co.*, 3 N.L.R.B. 793, 799 (1937).

50. See *id.* at 798-800.

51. Louis Stark, *Labor Board Quits Card Certification*, N.Y. TIMES, July 14, 1939, at 5. See generally GROSS, *supra* note 48, at 1-225 (chronicling the growth of political opposition to NLRB enforcement of the Wagner Act).

52. Prior to 1937, when the Supreme Court affirmed the constitutionality of the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), employers contended that the Act exceeded Congress's power. The day after the first meeting of the Board, 58 prominent lawyers issued a 132-page

alliance of Republicans and southern Democrats,⁵⁴ the President,⁵⁵ and even the AFL.⁵⁶ It was alleged to be biased against employers, and to favor the Congress of Industrial Organizations (CIO),⁵⁷ and to be infiltrated by Communist sympathizers.⁵⁸ Board personnel were summoned before a battery of congressional investigators—the House and Senate Labor Committees and the Special House Committee to Investigate the NLRB (the Smith Committee).⁵⁹ In 1939, at the height of the

statement on behalf of the American Liberty League declaring the Act unconstitutional. GROSS, *supra* note 14, at 172; Walter Gellhorn & Seymour Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 339-40 (1939). The full text of the statement is in *Proposed Amendments to the National Labor Relations Act: Hearings Before the House Comm. on Labor*, 76th Cong., 1st Sess. 2241-87 (1939) [hereinafter *1939 House Hearings*]. Their statement was used as a model in many of the 95 actions employers filed to enjoin Board action between the summer of 1935 and the spring of 1937 when *Jones & Laughlin* was decided. Gellhorn & Linfield, *supra*, at 340 n.4. Employers then turned to an attack on Board procedures. The charges against the Board are set forth in Gellhorn & Linfield, *supra*, at 343-88.

53. For example, the *American Mercury* called the Board a “nightmare” and *Collier's* labeled the NLRA the “Strained-Relations Act.” Harold L. Varney, *The Case Against the Labor Board*, 43 AM. MERCURY 129, 129 (1938); Editorial, *Collier's*, Nov. 5, 1938, at 54. Board Chairman J. Warren Madden later recalled, “[W]e got very little support from any newspaper or magazine which would be regarded as influential.” GROSS, *supra* note 48, at 73.

54. The *New York Times* described a “clamor of legislators against the board” Luther A. Huston, *NLRB Under Fire in Congress*, N.Y. TIMES, Aug. 1, 1937, at 6E. A Republican senator castigated the Board as an “adjunct” of the Congress of Industrial Organizations (CIO), see *Nye Criticizes the NLRB as a “Partisan Body,”* N.Y. TIMES, July 23, 1937, at 1, and a Democratic congressman from Mississippi accused the Board of “conspiring with communistic influences to destroy Southern industries.” *Rankin Asks Labor Board Removal for “Red” Plot to Destroy Industry*, N.Y. TIMES, July 27, 1937, at 1.

55. Reports of Roosevelt’s dissatisfaction with the Wagner Act and its administration appeared as early as the summer of 1938. GROSS, *supra* note 48, at 39.

56. At the 1937 AFL Convention, the Board and its agents “were raked fore and aft in language seldom heard at American Federation of Labor conventions.” Louis Stark, *Speakers Score Labor Board*, N.Y. TIMES, Oct. 14, 1937, at 1. The Convention unanimously adopted a report instructing the Executive Council to assemble proof of the Board’s misfeasance and authorized President Green and the Council to petition President Roosevelt for “prompt and adequate relief.” GROSS, *supra* note 14, at 251. At its 1938 Convention, the AFL adopted a resolution calling for amendment of the Wagner Act to curtail the Board’s power. GROSS, *supra* note 48, at 65-66.

57. See, e.g., Varney, *supra* note 53, at 134-41, 146-50. Ten unions comprising the Committee for Industrial Organization were expelled from the AFL in November of 1936 and formed the CIO. See BERNSTEIN, *supra* note 15, at 429.

58. THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL* 133-34 (1991).

59. See GROSS, *supra* note 48, at 100-94 (describing the three committees’

political storm surrounding the Board, with numerous amendments to the Wagner Act pending in Congress,⁶⁰ the Board, abruptly and without congressional direction, abandoned its practice of certifying unions without an election. In the face of bitter antagonism to its incipient efforts to impose a system of representation on industry, the Board shifted course and resorted exclusively to the most unimpeachable democratic instrument—the election.

The Board signalled this change in *Cudahy Packing Co.*,⁶¹ a decision issued in July, 1939. In *Cudahy*, the United Packinghouse Workers of America, CIO, Local 21 (Packinghouse Workers) filed a petition seeking to be certified as the representative of all production and maintenance employees at the employer's Denver-based meat packing facility.⁶² The Independent Packinghouse Workers Union of Denver (Independent Union), an independent union that had been party to a collective bargaining agreement with the Company, intervened.⁶³ At the hearing, the Packinghouse Workers introduced membership cards signed by 147 of the 157 employees and petitions signed by 141 employees. The Independent Union presented a petition signed by forty-three employees in the unit.⁶⁴ After considering this evidence, the Board broke with precedent and refused to certify the Packinghouse Workers without an election. The Board stated that "[a]lthough in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which

investigative efforts). Both the House and Senate Labor Committees began hearings on amendments to the Act during the early summer of 1939. *Id.* at 101, 103. Congressman Howard Smith of Virginia introduced a resolution to create a special committee on June 22, 1939. The House adopted the resolution on July 20. *Id.* at 104-05, 156.

60. By March, 1939, 11 major bills to amend the Act were pending in Congress. *Id.* at 79. A Gallup poll reported in the *Washington Post* that same month found that 66% of those surveyed thought the Act should be amended or repealed while only 34% thought it should remain unchanged. *Id.* at 80.

61. 13 N.L.R.B. 526 (1939). *Cudahy* was the first decision in which William Leiserson participated as a Board member. GROSS, *supra* note 48, at 106. Roosevelt appointed Leiserson on April 25th in an effort to quiet criticism of the Board or, in Leiserson's words, to "do a house-cleaning job" at the Board. *Id.* at 90.

The very same day that the Board decided *Cudahy*, it issued a new set of Rules and Regulations to take effect two days later which, among other things, allowed employers to petition for elections. *Id.* at 105.

62. *Cudahy*, 13 N.L.R.B. at 526-27.

63. *Id.* at 527-28.

64. *Id.* at 531.

has arisen is resolved by secret ballot.”⁶⁵ Aside from the vague allusion to “experience,” the Board offered no explanation for this decisive shift in the law.

The *Cudahy* ruling might have been explained by the conflicting evidence of support for the two rival unions admitted in the case.⁶⁶ But on the same day it issued the *Cudahy* opinion, the Board also decided *Armour & Co.*⁶⁷ In *Armour*, only one union claimed to represent the employees. Nevertheless, the Board reiterated the rule announced in *Cudahy* and proceeded expressly to adopt the employer’s argument that an election would induce management to be more amenable to bargaining,⁶⁸ an argument the Board had rejected just two years earlier.⁶⁹ Without comment on its departure from precedent, the Board spurned evidence of majority support and directed that an election be held. It reasoned that “any negotiations . . . will be more satisfactory if all disagreement between the parties regarding the wishes of the employees has been, as far as possible, eliminated.”⁷⁰ In reporting the Board’s rejection of nonelectoral evidence of majority support, the *New York Times* noted that “employers have refused to abide by [the Board’s] certification of representatives designated by examination of membership cards.”⁷¹ Thus, at a time of adverse scrutiny of Board policy, employer resistance to certification by “any other suitable method” prompted the Board to rely exclusively on the device of the election.

Cudahy and *Armour & Co.* marked the end of the Board’s use of any method other than the election to determine workers’ choice of representatives.⁷² Between 1939 and 1947, the Board’s statutory power under section 9(c) of the Wagner Act to recognize other evidence of majority sentiment lay dormant as a matter of administrative policy. In 1947, with little debate, Congress codified that restriction in the Taft-Hartley Act.⁷³

65. *Id.* at 531-32.

66. The Board had earlier denied certification on these grounds. *See, e.g.,* Pier Mach. Works, Inc., 7 N.L.R.B. 401, 404 (1938); Pennsylvania Greyhound Lines, Inc., 3 N.L.R.B. 622, 630 (1937).

67. 13 N.L.R.B. 567 (1939).

68. *Id.* at 569.

69. *See* Campbell Mach. Co., 3 N.L.R.B. 793, 799 (1937).

70. *Armour*, 13 N.L.R.B. at 572.

71. Stark, *supra* note 51, at 5.

72. The Board continued to certify based on nonelectoral evidence only if the employer did not contest the evidence. 7 NLRB ANN. REP. 58 (1942).

73. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 9(c), 61 Stat. 136, 144 (1947) (current version at 29 U.S.C. § 159(c) (1988)).

Section 9(c) was amended to read, "if . . . a question of representation exists, [the Board] shall direct an election by secret ballot and shall certify the results thereof."⁷⁴ In one of the few comments on the amendment, Senator Carl Hatch approvingly observed that the secret ballot provision would bring labor law into conformity with political elections: "This is merely an extension of our general voting practices to the field of labor organizations."⁷⁵ Along with a host of other restrictions, Taft-Hartley formally deprived the Board of the power it had already yielded to certify a union without an election.⁷⁶

Paradoxically, even after the Board began in 1939 to grant the election privileged status in certification proceedings, it continued to rule that an employer could have a duty to bargain⁷⁷ with a union that had not won a Board-supervised election. If a union could prove that it represented a majority at the time it requested to bargain and was refused by the employer, the Board would find that the employer had committed an unfair labor practice and direct it to bargain.⁷⁸ Board practice in duty-

74. 29 U.S.C. § 159(c)(1) (1988). By contrast, the National Mediation Board continues to have power under the Railway Labor Act to "take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives . . ." 45 U.S.C. § 152 (Ninth) (1988).

75. 93 CONG. REC. 5137 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1479-80 (1948) [hereinafter LMRA LEGISLATIVE HISTORY].

76. For a general discussion of the Taft-Hartley amendments, see HARRY A. MILLIS & EMILY C. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 395-609 (1950); TOMLINS, *supra* note 2, at 252-316.

77. The question of whether an employer had a duty to bargain arose in unfair labor practice cases. The NLRB, then and now, adjudicates two types of cases: unfair labor practice cases and representation cases. In an unfair labor practice case, the Board determines whether an employer or union has violated the prohibitions set forth in § 8 of the amended NLRA—including refusing to bargain—and, if it so finds, orders the offender to cease and desist and to remedy the violation. 29 U.S.C. §§ 158, 160(a)-(c) (1988). In a representation case, however, the Board investigates whether employees wish to be represented. A representation case does not result in an order, but instead in the certification of election results. 29 U.S.C. § 159(c) (1988).

78. The contradictory rulings concerning the necessity of an election derived from two key provisions of the Wagner Act. Section 8(5) made it an unfair labor practice for an employer to refuse to bargain with "the representatives of his employees," subject to § 9(a). National Labor Relations (Wagner) Act, ch. 372, § 8(5), 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158(a)(5) (1988)). Section 9(a) identified such representatives as those "designated or selected" by a majority of employees. § 9(a), 49 Stat. at 453 (current version at 29 U.S.C. § 159(a) (1988)). Thus, § 9(a) of the Act, in speaking merely of "designated or selected" representatives, left unspecified how representatives had to be chosen. Like § 9(c), which the Taft-Hartley Act later

to-bargain cases, however, also came under legislative scrutiny. During the debate over the Taft-Hartley Act, Congress considered but rejected an amendment to the NLRA that would have required an employer to bargain only with a union certified after an election or already recognized by the employer.⁷⁹

Nevertheless, in the years after the Taft-Hartley Act was passed, the Board moved on its own to extinguish employers' obligation to bargain with unions that had not won Board-supervised elections.⁸⁰ Indeed, in 1966 the Board held that the ab-

amended, see § 9(c), 61 Stat. at 144 (codified as amended at 29 U.S.C. § 159(c)), § 9(a) did not prescribe the election as the sole method. In its first annual report, the Board explained that in unfair labor practice cases concerning an employer's refusal to bargain, an election was unnecessary if employees or the labor organization could "produce satisfactory evidence of a majority." 1 NLRB ANN. REP. 89 (1936). In other words, a union could win the right to become the employees' representative even though an election had not been held.

Between 1935 and 1939, the Board relied on similar forms of evidence of majority status in unfair labor practice cases under § 8(5) and representation cases under § 9(c). Compare cases cited *supra* note 48 (nonelection evidence of majority in representation cases) with *Piqua Munising Wood Prods.*, 7 N.L.R.B. 782, 787 (1938) (relying on authorization cards to find duty to bargain), *enforced*, 109 F.2d 552 (6th Cir. 1940) and *Globe Mail Serv.*, 2 N.L.R.B. 610, 620 (1937) (membership). After *Cudahy Packing Co.*, 13 N.L.R.B. 562 (1939), however, Board rulings under the two provisions diverged. In *Cudahy*, the Board rejected evidence such as membership cards and petitions as proof of majority support in representation cases. *Id.* at 531-32. In contrast, after *Cudahy*, the Board continued to rely on such evidence in refusal-to-bargain cases. See, e.g., *Coca-Cola Bottling Works*, 46 N.L.R.B. 180, 197-98 (1942) (applications); *Franks Bros. Co.*, 44 N.L.R.B. 898, 910-11 (1942) (membership cards).

79. See H.R. 3020, 80th Cong., 1st Sess. § 8(a)(5) (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 51, 51-52. The *House Conference Report* explicitly stated that § 8(a)(5) was intended to follow the provisions of "existing law." H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 505, 545, and in 1947 U.S.C.A.N. 1135, 1147. A similar proposal had also been rejected during the debate over the Wagner Act. See 1934 Senate Hearings, *supra* note 18, at 652-53 (statement of L.L. Balleisen, Secretary, Industrial Division, Brooklyn Chamber of Commerce), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 690-91. Again in 1977 and 1978, several proposals of this nature were unsuccessfully introduced in Congress. See Gerald E. Rosen, *Labor Law Reform: Dead or Alive?*, 57 U. DET. J. URB. L. 1, 33-34 (1979).

80. Initially, the Board shifted its focus from the question of whether the union was the chosen representative when the employer refused to bargain to the question of the employer's motive in refusing to recognize the union. In *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), the Board signalled the new direction of the law. The Board posed the question as "whether an employer is acting in good or bad faith at the time of the refusal," and it held that the employer could refuse to bargain based on a "good faith doubt of the Union's

sence of an election itself constituted valid grounds for an employer to refuse to bargain. An employer, the Board ruled, "will not be held to have violated his bargaining obligation . . . simply because he refuses to rely upon cards, rather than an election, as the method of determining the union's majority."⁸¹

Under the new, and still standing, Board policy, an employer may insist for any reason that a union seek an election—even to gain time to persuade employees to abandon the union—so long as the employer does not use unlawful means to influence employees. The employer need not offer an affirmative reason for rejecting a recognition request; rather, "he can demand an election with a simple 'no comment' to the union."⁸² The Board now refuses to find a violation of the employer's duty to bargain unless the employer has committed infractions that would "interfere with the election processes and tend to preclude a fair election."⁸³ Bringing duty-to-bargain cases in line with the primacy of the election in representation cases, the Board no longer aims to discover whether a majority of employees desired union representation when the employer refused recognition, but only whether the union had a fair chance to prove majority support in a Board-supervised election.⁸⁴

Under current law, neither in representation cases nor in unfair labor practice cases may workers ordinarily designate representatives by any method other than an election.⁸⁵ In

majority" but not in order to "gain time within which to undermine the Union's support." *Id.* at 1264-65.

For the next 20 years, it remained unclear under which circumstances an employer would be held to have violated § 8(a)(5) by refusing to bargain with a noncertified union. See generally Howard Lesnik, *Establishment of Bargaining Rights Without An NLRB Election*, 65 MICH. L. REV. 851 (1967) (tracing the development of Board law in this area). The rule was well established that an employer could lawfully refuse to bargain with a union that actually possessed majority support so long as the employer had a good faith doubt about the union's support. See, e.g., *Sunset Lumber Prods.*, 113 N.L.R.B. 1172, 1175 (1955). Less clear, however, was what evidence would suffice to demonstrate that the employer acted in bad faith. Some Board decisions at least suggested that an employer could not simply express doubt about a union's showing of majority support without valid grounds for that doubt. See, e.g., *Snow & Sons*, 134 N.L.R.B. 709, 710-11 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

81. *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1078 (1966).

82. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 594 (1969).

83. *Id.*

84. *Id.*

85. *Id.*; *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974). The Board generally requires an election unless the unwilling employer mistakenly acknowledges majority support for the union or indepen-

NLRB v. Gissel Packing Co., the Supreme Court bluntly stated the rule: "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."⁸⁶ The election now provides the only certain route to the labor representation protected by the Wagner Act.⁸⁷

That elections are indispensable to democratic government is an article of faith in American political thought.⁸⁸ Nonetheless, the NLRA originally deemed the election only one of several "suitable methods" for selecting labor representatives. The Board provided virtually no explanation of the theory behind the crucial change in the law regarding labor representation effected in *Cudahy* and later decisions. Congressional ratification of the Board's reversal of policy was equally perfunctory. The primacy of the union election appears to have stemmed less from deliberation by lawmakers than from employer resistance to "industrial democracy" and from the countervailing ideological authority of the election process.⁸⁹ In a democratic society it is all but indisputable that representatives should be chosen in elections; neither Congress nor the Board, however, ever

dently verifies such support. See, e.g., *Jerr-Dan Corp.*, 237 N.L.R.B. 302, 303 (1978), *enforced*, 601 F.2d 575 (3d Cir. 1979); *Sullivan Elec. Co.*, 199 N.L.R.B. 809, 810 (1972), *enforced*, 479 F.2d 1270 (6th Cir. 1973).

86. 395 U.S. at 602. The Board's reluctance to certify a union as the workers' representative absent an election victory is illustrated in *Texas Super Foods, Inc.*, 303 N.L.R.B. No. 30 (May 31, 1991), where the Board for the third time set aside the results of a representation election because of unlawful interference by the employer. As a part of its remedial order, the Board ordered a fourth election to be held. *Id.*, slip op. at 29.

87. An employer can voluntarily recognize a union as long as the union does indeed represent a majority. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 740 (1961) (holding that an employer who recognized a union based on a mistaken belief that the union represented a majority of employees violated the Act).

88. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (the "right to vote freely for the candidates of one's choice is of the essence of a democratic society"); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *THE FEDERALIST* No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (election of representatives one of the defining features of a republican form of government); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 168 (1969) (stating that the American Revolution set "the right to vote and the electoral process in general . . . on a path to becoming identified in American thought with the very essence of American democracy"); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1114 (1975) ("No institution is more central to the United States' system of representative democracy than the election.").

89. Ten years after *Cudahy*, the Board frankly explained that it abandoned nonelectoral measures to invest its certifications with more "certainty and prestige." *General Box Co.*, 82 N.L.R.B. 678, 683 (1949).

fully considered how the procedures of political democracy would fit into the workplace.

C. THE POLITICAL ANALOGY

In retrospect, it is ironic that the House Report on the Wagner Act endorsed the "common belief" that the election device "in a democratic society has, among other virtues, that of allaying strife, not provoking it."⁹⁰ For since the Act's passage, the rules governing the labor representation election⁹¹ have re-

90. H.R. REP. NO. 969, 74th Cong., 1st Sess. 20 (1935), *reprinted in* 2 NLRB LEGISLATIVE HISTORY, *supra* note 1, at 2910, 2930.

91. Under current law, employees, their representative, or an employer may initiate a representation case by filing a petition with the Board. 29 U.S.C. §§ 159(c)(1)(A)-(B) (1988). If filed by employees or a union, the petition must be supported by a showing that at least 30% of the employees desire representation. 29 C.F.R. § 101.18 (1992). If filed by an employer, the petition must demonstrate that at least one union has demanded recognition. 29 U.S.C. § 159(c)(1)(B) (1988). If the Board finds that the petition creates a "question of representation," it must hold a hearing, to which both the union and the employer are parties. 29 U.S.C. § 159(c)(1) (1988); NLRB, CASEHANDLING MANUAL, pt. 2, § 11008.1 (1989). At the hearing, the Board determines whether the unit—the group of employees the union seeks to represent—is appropriate. 29 U.S.C. § 159(b) (1988). The Board also resolves individual eligibility questions. Some employees are ineligible for the Act's protections because of the position they hold. These employees include supervisors, 29 U.S.C. §§ 152(3) (1988), managers, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), and confidential employees, *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). The Board is also barred from placing guards in a unit with any other types of employees. 29 U.S.C. § 159(b)(3) (1988). Professionals cannot be grouped together with nonprofessionals unless a majority of the professional employees votes for inclusion. *Id.* § 159(b)(1). If the unit is deemed appropriate, the Board issues a direction of election that describes the unit, resolves questions of voter eligibility, and sets an election date. 29 C.F.R. § 102.67(a) (1992).

Although the Board supervises elections, unions and employers also influence the procedures. At a preelection conference, the parties consider the location of the polls, the hours the polls will be open, and other election mechanics. KENNETH C. MCGUINNESS & JEFFREY A. NORRIS, HOW TO TAKE A CASE BEFORE THE NLRB 181 (1981). During the balloting, both employers and unions may station observers at the polls. *NLRB, supra*, § 11310. Along with Board agents, the observers can challenge the eligibility of any voter. *Id.* § 11338.

The conduct of the employer, the union, and third parties from the time a petition is filed until the polls close is governed by a set of Board rules developed through common law adjudication. *See generally* 1-2 JOHN D. FEERICK ET AL., NLRB REPRESENTATION ELECTIONS 465-651 (1991) (3d ed. 1988 & Supp. 1992) (reviewing Board objections law); ROBERT E. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT (1985) (same). The losing party may file objections alleging that the other side or a third party violated the rules and thereby influenced the outcome of the election. If the Board finds that the objections or challenges (if the latter are potentially outcome-determinative)

peatedly provoked legal and political strife. Three times in the past half-century Congress has debated substantial revision of union election law.⁹² Government officials, academics, and corporate and labor spokespersons have attacked this body of law

raise factual issues, it conducts a hearing. NLRB, *supra*, § 11396.2. If challenges are at issue and the Board sustains the challenges, it certifies the original results. *Id.* § 11472.3. If it rejects any of the challenges and the resulting valid ballots alter the outcome, it certifies the new results. *Id.* If the Board sustains objections, it overturns the results and directs a new election. *Id.* § 11436. When the election results are final, the Board "certifies" them to the parties. 29 U.S.C. § 159(c)(1) (1988).

92. In 1938 and 1939 an unusual coalition of employers and the AFL, which was locked in rivalry with the CIO, brought a number of proposed amendments to Congress. GROSS, *supra* note 48, at 75. Prominent among them were various restrictions on the Board's handling of representation cases. *See id.* Though one set of amendments passed the House, none was enacted. *Id.* at 210-11, 224. This owed in large part to *Cudahy* and other Board decisions, which altered several controversial rules in representation proceedings, forestalling congressional action. But many of the proposed reforms reappeared in 1947 when the Republican-dominated Congress adopted the Taft-Hartley Act. *See id.* at 252-53.

The Taft-Hartley Act, ch. 120, sec. 101, 61 Stat. 136 (1947), constituted a wholesale revision of the Wagner Act, including its election procedures. *See generally* MILLIS & BROWN, *supra* note 76, at 271-609 (discussing the changes imposed by the Taft-Hartley Act); TOMLINS, *supra* note 2, at 252-316 (discussing the social and political context of the Taft-Hartley Act). Enacted over presidential veto, the Taft-Hartley Act not only codified the *Cudahy* rule regarding elections, it also gave statutory sanction to the Board's new rule of allowing employers to petition for an election when faced with a request for union recognition. § 9(c), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(1) (1988)). The Act, however, also marked a departure from existing Board law in representation cases. First, it enabled employees to request an election to attempt to demonstrate that a union no longer enjoyed majority support. § 9(c)(1)(A)(ii), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(1)(A)(ii) (1988)). Second, it limited the Board's discretion to determine whether proposed units were appropriate. § 9(b), 61 Stat. at 143 (current version at 29 U.S.C. § 159(b) (1988)). Finally, in guaranteeing employers a broad right to free speech, the Taft-Hartley Act assured their right to campaign against unions in elections. § 8(c), 61 Stat. at 142 (current version at 29 U.S.C. § 158(c) (1988)).

In 1977 a set of union election law reforms narrowly missed enactment. *See* BARBARA TOWNLEY, LABOR LAW REFORM IN US INDUSTRIAL RELATIONS 168-93 (1986); Rosen, *supra* note 79, at 1-3. *See generally* Peter G. Nash, *The Labor Law Reform Act of 1977: A Detailed Analysis*, 4 EMPLOYEE REL. L.J. 59 (1978) (general discussion of proposed reforms). With a Democratic President and Democratic majorities in both houses of Congress, the labor movement proposed a set of reforms, including a return to the pre-*Cudahy* rule that allowed the Board to certify a union if a majority of employees signed authorization cards. DANIEL V. YAGER, HAS LABOR LAW FAILED? 42 (1990). The House backed the Labor Law Reform Act, although it did not contain the card check provision. Rosen, *supra* note 79, at 5; *see* H.R. 8410, 95th Cong., 1st Sess. (1977). But the measure died in the Senate after a 19-day filibuster and a record six failed cloture votes. Weiler, *supra* note 6, at 1770 n.1.

as unfair and incoherent.⁹³ Yet if the rules of union elections have defied consensus, the controversy has nonetheless been waged in a common democratic vernacular. Just as political analogies lent legitimacy to the right to labor representation, so too they have provided a conceptual framework for continuing struggles to define the practical meaning of that right. As a North Carolina statesman summed up the theory of the union election during the first major reform effort in 1939, "voting to select a bargaining agent should be something similar to our system of electing public officers in the Government."⁹⁴ At stake in the ongoing controversy over union election rules are questions of election timing, constituency, tactics, and review of results—questions critical to the representation process.

The question of election timing arose in the first blueprints for the Wagner Act. A January, 1934 outline of "Substantive Principles" featured the heading "Elections," and the query: "How frequently, and upon what occasion."⁹⁵ The Wagner Act did not answer the question, or even specify who could request an election.⁹⁶ Just after its passage, however, the Board established a procedure allowing employees or unions to petition for an election.⁹⁷ Pressure then mounted to give employers the same right.

In subsequent debates over the control of election timing, political parables were widely advanced. Testifying in congressional hearings in 1939, Board Chairman J. Warren Madden contended that allowing the employer to determine the timing of an election conflicted with political practice: "It would be a good deal as if a candidate for political office, who had timed his campaign in order to be at his best at election time, suddenly finds that his adversary had gotten the election set some months ahead of time and before he had made his campaign."⁹⁸

93. See *infra* text accompanying notes 98-120.

94. 1939 *House Hearings*, *supra* note 52, at 185-86 (statement of Rep. Barden summarizing an argument against the closed shop).

95. See Casebeer, *supra* note 30, at 74 (quoting Leon Keyserling, Proposals for National Labor Board—January 31, 1934—Substantive Principles (Jan. 31, 1934) (unpublished outline)). Keyserling prepared the "Principles" at or shortly after a meeting attended by AFL President William Green, John L. Lewis of the Mineworkers, the AFL's Counsel, Department of Labor Solicitor Charles Wyzanski, Wagner, and Keyserling. *Id.*

96. See § (9), 49 Stat. at 453.

97. See NLRB, RULES AND REGS., ser. 1, art. III. § 1 (1935), *cited in* Gellhorn & Linfield, *supra* note 52, at 394 n.118.

98. 1939 *House Hearings*, *supra* note 52, at 481 (statement of J. Warren Madden, Chairman, NLRB); see also GROSS, *supra* note 48, at 73 (discussing debate over the proposal to allow employers to petition for elections).

In the words of a union witness, "Well, Congressman, if this is a fair question, how would you like to have your political adversary . . . demand that you face the ballot next Tuesday morning at 10 o'clock."⁹⁹

Such arguments persuaded Congress in 1939. Yet, in the midst of the congressional hearings, on the same day as the *Cudahy* decision, the Board adopted a new rule allowing employers to file election petitions, but only when confronted by demands for recognition from more than one union.¹⁰⁰ This partial revision did not satisfy the Board's critics, however. In the Taft-Hartley Act, Congress altered the law to entitle employers to initiate the election process when they were confronted by any demand for union recognition.¹⁰¹ The new rule does not give employers the same rights as unions to petition for election. Nevertheless, because the Board cannot run an election without first holding a hearing unless the parties consent,¹⁰² and because the employer is a party to the hearing,¹⁰³ employers can use their party status to delay elections to the detriment of the union effort.¹⁰⁴

99. 1939 House Hearings, *supra* note 52, at 1547 (statement of Byrl A. Whitney, Director, Education and Research Bureau, Brotherhood of Railroad Trainmen).

100. GROSS, *supra* note 48, at 105 & n.82 (citing NLRB, PRESS RELEASE R-1859, NLRB ISSUES NEW RULES AND REGULATIONS (July 12, 1939)).

101. § 9(c)(1)(b), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(1)(B) (1988)).

102. Prior to the Taft-Hartley Act, the Board could postpone the hearing until after the election, eliminating the parties' ability to use it to delay elections. The Taft-Hartley Act stripped the Board of its discretion to conduct such "pre-hearing elections." See § 9(c)(1), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(1) (1988)). See generally 12 NLRB ANN. REP. 3-4 (1947) (discussing use of pre-hearing elections).

103. See NLRB, *supra* note 91, pt. 1, § 1100 8.1.

104. Between 1972 and 1978, the average time between the filing of a petition and election in uncontested cases was one and three-quarter months compared to three and one-half months in contested cases. Myron Roomkin & Richard Block, *Case Processing Time and the Outcome of Representation Elections*, 1981 ILL. L. REV. 75, 85. There is a correlation between such delay and a "no" vote. See MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 201-02 (1987). Employers therefore seek delay. The Senate Committee Report on the 1977 reform bill noted that the party seeking delay exploited its capacity to "force a pre-election hearing whether one is necessary or not." S. REP. NO. 628, 95th Cong., 2d Sess. 21 (1978). Employer manuals reveal managements' efforts to delay elections. As one author declares, "[T]he adroit employer, together with legal counsel, can usually raise a sufficient number of issues to provide the basis for a hearing. In exceptional cases, a hearing can be obtained . . . even where there are no issues." ALFRED T. DEMARIA, *HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS* 50 (1980). Other management consultants have also been forthright about advis-

In 1977 Congress considered legislation to eliminate election delay through fixed deadlines for Board processing of election petitions.¹⁰⁵ During this round of debate it was employer advocates who mustered political analogies against the reform. For example, a corporate executive asked Congress to imagine that "a candidate from a rival political party was . . . campaigning in your home district. Suppose under the election laws, that individual was able to file a petition and trigger an election within fifteen days thereafter. Would you think that this was a fair procedure?"¹⁰⁶ The bill was defeated.¹⁰⁷ In 1977, as in 1939, lessons from the political arena buttressed the prevailing argument against union election law reform.

In disputes over the standards for determining employee constituencies in union elections, the dominant theme has been "gerrymandering"—a term richly evocative of political corruption and rigged elections.¹⁰⁸ Not only is unit determination the chief issue in hearings that cause election delays; the character of the unit often influences the election's outcome, and if the union wins, the identity and number of represented employees shape the balance of power between union and management.

ing their clients that "[t]here are . . . means which may be employed to obtain a longer period of time" to campaign. William A. Krupman, *The Law and Strategy of Dealing with Union Organizing Campaigns*, in BASIC LABOR RELATIONS—1974, at 13, 29-30 (1974). Another consultant declares, "As a practical matter, the union controls the initiation of the organizing drive . . . , but the company control the end. This is done by delaying the election." JOHN G. KILGOUR, PREVENTIVE LABOR RELATIONS 260 (1981).

105. The House bill provided that the Board would conduct an election within 21 days after the petitioner filed if the petitioned-for unit was defined as appropriate in a rule or prior decision in the industry. In other cases, the election would occur within 45 days, unless the case presented issues of exceptional novelty or complexity, in which event the Board was given 75 days to conduct the election. H.R. REP. NO. 637, 95th Cong., 1st Sess. 54-55 (1977). The Senate bill was identical except that it provided for a period of 21 to 30 days in cases where a rule defined the requested unit as appropriate. S. REP. NO. 628, 95th Cong., 2d Sess. 50-51 (1978).

106. *Labor Reform Act of 1977: Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. pt. 1, at 219 (1977) [hereinafter *1977 House Hearings*] (statement of James W. Shields, Vice Chairman, Government Affairs Committee, Parking Industries of America).

107. Weiler, *supra* note 6, at 1770 n.1.

108. Governor Elbridge Gerry inspired the term in 1812 when, under Gerry, the Democrat-dominated Massachusetts legislature redrew the districts for the State Senate in order to increase Democrats' representation, creating an oddly shaped district in Essex County. An editor of *The Continent* hung a map of the districts in his office where a painter observed it, added a head, wings, and claws to the Essex district, and stated, "That will do for a salamander! Gerrymander!" 6 OXFORD ENGLISH DICTIONARY 472 (1989).

Prior to the passage of the Wagner Act, the chairman of the existing labor board warned Congress that to grant either party, but especially the employer, authority over unit determination would lead to "unlimited abuse and gerrymandering [and] would defeat the aims of the statute."¹⁰⁹ From 1935 to 1947, when the Board took the extent of existing union organization as its standard,¹¹⁰ employers and even some Board members alleged that the Board allowed union "gerrymandering."¹¹¹ Similar accusations surfaced in internecine labor disputes over unit determination, which intensified after the AFL expelled the CIO unions in 1936. Advocates for the AFL in Congress assailed the Board's "gerrymandering," charging the Board with showing bias in favor of the CIO by creating plant-wide and even multi-employer units that diluted AFL strength among particular crafts.¹¹² As one representative explained, "The Board evidently followed the course that they say Republicans in the olden days followed in some of the States, of putting Democrats in a few districts here and there so as to affect the result of the general election."¹¹³ In conceptualizing the problem of constituency, lawmakers along with labor leaders and employers found their metaphors in politics.

The Board's close regulation of campaign tactics,¹¹⁴ which often leads the Board to void election results,¹¹⁵ has prompted scholarly critics to draw particularly blunt analogies to politics. In *Union Representation Elections: Law and Reality*, Julius

109. 1935 Senate Hearings, *supra* note 3, at 82 (statement of Francis Biddle, Chairman, NLRB), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1458.

110. See NLRB v. Hearst Publications, Inc., 322 U.S. 111, 133-35 (1944); 12 NLRB ANN. REP. 20-21 (1947). The Taft-Hartley Act ended this practice by barring the Board from basing its union determination solely on the scope of existing organization. § 9(c)(5), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(5) (1988)).

111. Garden State Hosiery Co., 74 N.L.R.B. 318, 326 (1947) (Member Reynolds, dissenting).

112. 1939 House Hearings, *supra* note 52, at 204 (statement of Rep. Wood).

113. *Id.*

114. See generally 1-2 FEERICK ET AL., *supra* note 91, at 449-651 (discussing regulation of union election campaigns); WILLIAMS, *supra* note 91 (same).

115. Between 1964, when the Board began to report figures on objections, and 1989, the percentage of union- or employee-requested elections resulting in objections ranged from a low of 10% in 1983 to a high of 21% in 1984. See 29-54 NLRB ANN. REP. app. A (1964-1989) (compiling annual data regarding disposition of representation cases in a table, entitled "Objections Filed in Representation Cases Closed, by Party Filing"). The Board sustained a low of 15% of total objections filed in 1981, 46 NLRB ANN. REP. app. A, at 201 (1981), and a high of 29% in 1964, 29 NLRB ANN. REP. app. A, at 185 (1964).

Getman, Stephen Goldberg, and Jeanne Herman assail rules against misrepresentation, promise of benefits, eleventh-hour campaigning, and other campaign speech, arguing that the Board should leave speech in union elections as free "as in any political election."¹¹⁶ Goldberg elaborated this proposition in congressional testimony on the 1977 Labor Law bill,¹¹⁷ and other witnesses echoed the theory of making union elections "more analogous to the political model."¹¹⁸ According to such arguments, the Board's regulation of campaign conduct clashes with principles of free speech and popular sovereignty.

Finally, political practice serves as a point of comparison in critiques of the protracted legal process for reviewing union election results. Under current law, the process begins with the Board's ruling on challenged ballots and objections to campaign conduct. If the ruling is for union certification, the process may wind its way circuitously to the federal appeals courts, where employers can contest the Board's final order to bargain.¹¹⁹ Union members argue that this process not only

116. GETMAN ET AL., *supra* note 6, at 159-63. Notably, Getman and his colleagues drew heavily on studies of voters in political elections in mounting their critique. See, e.g., *id.* at 27-32.

117. 1977 *House Hearings*, *supra* note 106, pt. 2, at 367-69 (statement of Prof. Steven Goldberg, Northwestern University Law School). Getman and his colleagues' proposals were integrated into the Senate bill to the extent of extending the free speech proviso to representation cases. The Board, however, remained free to regulate speech during the 48 hours preceding an election. S. 2467, 93d Cong., 1st Sess. § 6 (1977).

118. 1977 *House Hearings*, *supra* note 106, pt. 1, at 274 (statement of Douglas A. Fraser, President, United Auto Workers).

119. Under current law, the Regional Director rules on objections to an election that raise questions of fact and challenges to ballots that are potentially outcome determinative following a hearing. An appeal can then be taken to the Board unless the parties have agreed that the Regional Director's decision will be final. NLRB, *supra* note 91, §§ 11368.3, 11400.3, 11434. Unlike the pre-election proceedings, however, the review procedure may not end with a decision of the Board—at least not if the union wins the election. A Board certification of a union is not a final order from which an employer can appeal to the court of appeals, *American Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). Nonetheless, an employer can effectively appeal the certification by refusing to bargain. At that point the union files an unfair labor practice charge with the Board. Ordinarily, the Board will cite the employer for refusing to bargain, finding its pre-election rulings to be *res judicata* in the unfair labor practice case. (In some instances, the Board has refused to give its own prior rulings binding effect and has allowed the employer to relitigate in the unfair labor practice case issues raised in the earlier representation case. See, e.g., *Sub-Zero Freezer Co.*, 271 N.L.R.B. 47, 47-48 (1984).) The employer may challenge this final order, holding that it has unlawfully refused to bargain, in an appellate court. 29 U.S.C. § 160(f) (1988). In the appeal, the employer may raise any issues that were decided in the earlier representation case. 29 U.S.C.

postpones collective bargaining, but that it militates against the finality that marks political elections. As a member of the Textile Workers Union told a congressional subcommittee in 1961, "It is ironic that the United States can nominate, elect, and inaugurate a President in 6 short months, but the NLRB cannot give real meaning to a labor election in 4 long years."¹²⁰

In constructing the system of labor representation on the bedrock of the union election, Congress and the Board aimed to tighten the symmetry between industrial and political democracy. And perhaps for insight, perhaps for more opportunistic reasons, advocates of both labor and management have looked to the political realm in contesting union election rules and in designing opposing schemes of law reform. Legislators, Board members, trade unionists, employers, academics—all have exploited democratic metaphors, all have argued that union election law goes astray precisely where it departs from political practice. Lawmakers' declarations notwithstanding, the election did not fit neatly into the workplace. Nowhere was this more evident than in the legal problem posed by the employer's role in the representation process, and nowhere did political analogies figure more prominently.

II. EMPLOYERS AND UNION ELECTIONS

The preamble to the Wagner Act set forth as the premise of labor's right to representation the "inequality of bargaining power" between individual employees and corporate employers.¹²¹ That inequality, the Act declared, followed from the fact that employees lacked full freedom to associate and therefore "actual liberty of contract."¹²² For decades, the courts had rejected this argument, no matter how vigorously it was prosecuted by labor reformers and influential legal scholars and

§ 159(d) (1988). The appeal effectively stays the Board's order to bargain because the Board cannot enforce its own orders. 29 U.S.C. § 160(e) (1988). The appeal is risk-free to the employer because the Board has held that an employer cannot be found liable to pay damages to its employees or the union for losses incurred during the appellate process as a result of the employer's unlawful refusal to bargain. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971).

120. *Administration of the Labor-Management Relations Act by the NLRB: Hearings Before the Subcomm. on National Labor Relations Board of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 155 (1961) (statement of William Pollock, President, Textile Workers Union).

121. National Labor Relations (Wager) Act, § 1, 49 Stat. 449, 449 (1935) (current version at 29 U.S.C. § 151 (1988)).

122. *Id.*

economists.¹²³ By 1935, however, a majority in Congress agreed that the employment relationship was less one of free contract than of sovereignty and subordination, a situation that labor's right to representation for the purposes of collective bargaining was designed to rectify. Such is the standard account of the impulse behind the Wagner Act. What has not been taken into account, however, is that the procedures for securing such representation did not redress but instead recreated inequality in the workplace. The primacy of the union election opened the way for employers to exercise influence over workers' choice of representatives. Moreover, the conflation of the union election and the political election cast employer and union as rival candidates vying for workers' votes. This conception both widened the employer's role in the union election and masked the disparity of power that had motivated the Act's passage.

A. ECONOMIC DEPENDENCE, THE FRANCHISE, AND LIBERAL POLITICAL THEORY

The problem of reconciling representative democracy with the hierarchies of the employment relationship was not unique to the NLRA. Rather, it was a variant of a problem that had long perplexed legal and political thinkers—namely, the tension between free exercise of the franchise and the economic dependence of employees. According to the liberal political theory of the Enlightenment, the rights of citizenship ended where the employer's sway in the workplace began. At the founding of the American republic the economic dependence of wage earners dictated their disenfranchisement, and after they gained suffrage diverse critics continued to maintain that the wage system threatened democratic government. The effort to democratize industry magnified the tension between economic dependence and political independence by transposing it into the workplace. Under the Wagner Act, politics and employment were no longer distinct and contrasting orders; rather, the Act installed democratic norms and procedures directly within the workplace, setting in sharp relief the problem of defining the employer's place in the system of representation.

In setting forth a new, liberal theory of governance, seventeenth-century political thinkers such as John Locke and James Harrington had emphatically argued that wage earners should be excluded from the suffrage on account of their de-

123. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 470-87 (1909).

pendence on employers for their livelihoods.¹²⁴ A century later William Blackstone reported in his *Commentaries* that the "true reason" for property qualifications was that the propertyless had "no will of their own" and, if they had votes, "would be tempted to dispose of them under some undue influence or other."¹²⁵ In 1787 at the Constitutional Convention, American lawmakers were troubled as well by the political implications of the employment relationship. Many opposed extending the franchise to hirelings who lacked personal autonomy and freedom of choice—to "mechanics & manufacturers who will receive their bread from their employers."¹²⁶ Even if they were granted a formal right to vote, as Gouverneur Morris argued, propertyless wage earners would not truly be represented because they would "sell" their votes to "the rich who will be able to buy them."¹²⁷ In James Madison's words, "they will become the tools of opulence and ambition."¹²⁸

With the advent of universal manhood suffrage and the growth of wage labor, the problem of preserving the political independence of employees took on new urgency. During debates over the use of secret ballots, employer abuses were often cited.¹²⁹ Introduction of the Australian ballot did not resolve the difficulties, however. By the early years of the twentieth century, many states had enacted laws, which remained on the books for decades, prohibiting employers from coercing or attempting to influence employees' exercise of the franchise.¹³⁰

124. C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 181, 221-32 (1962).

125. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *171 (1765), quoted in Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 *STAN. L. REV.* 335, 340 (1989).

126. JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 402 (Norton 1987) (1840).

127. *Id.* at 402-03.

128. *Id.* at 404.

129. In 1880, a congressional committee found that employers frequently marched or carried workers to the polls where they were furnished with ballots and compelled to hold them up in their hands so they could be watched as they deposited the ballots in the box. S. REP. NO. 497, 46th Cong., 2d Sess. 9-10 (1880); see also ELDON EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 12-13 (1917) (describing similar election conduct).

130. See, e.g., OKLA. REV. LAWS § 3139 (1910) (repealed) (providing that it was a misdemeanor for any corporation to influence or attempt to influence "by bribe, favor, promise, inducement, threat, intimidation, importuning or beseeching" the vote of any employee), reprinted in U.S. BUREAU OF LABOR STATISTICS, *BULLETIN* No. 148, pt. 2, at 1707 (1914). A compilation of these statutes appears in Note, *Pay While Voting*, 47 *COLUM. L. REV.* 135, 136 n.9 (1947). At least 37 states still have such statutes on their books. Mark T. Carroll, *Protect-*

Labor reformers contended that economic dependence endangered both the individual liberty of citizens and the system of representative democracy. "[T]here is an inevitable and irresistible conflict between the wage-system of labor and the republican system of government," a leading spokesman for the Knights of Labor declared in 1886.¹³¹ The solution was not to disenfranchise labor,¹³² but rather to "engraft republican principles on property and industry."¹³³ A half-century later, New Deal reformers and trade union leaders echoed the connection between economic and political dependence. Testifying on behalf of the Wagner Act, the President of the AFL's Metal Trades Department recalled as "a young man in Worcester, Mass., going by the polls . . . and seeing workers herded up to the polls with their foremen right outside. . . . So it was not the wage earners that were expressing their wish at the polls, but it was the employer."¹³⁴ Wagner made the point more tersely: "[P]olitical democracy will become a sham and a delusion unless there is economic democracy in industry itself."¹³⁵

ing Private Employees' Freedom of Political Speech, 18 HARV. J. ON LEGIS. 35, 58 (1981).

131. GEORGE E. MCNEILL, *THE LABOR MOVEMENT* 459 (1886), *quoted in* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 768-69. On the significance of such arguments in the nineteenth-century labor movement, see LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* 4-5 (1983); DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872*, at 238-260 (1967); SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850*, at 61-103 (1984); Forbath, *supra*, at 813-14.

132. Disenfranchisement remained the cure in the public sector, however, where from the 1880s onward Congress and state legislatures adopted a set of sharp restrictions on the political activities of public employees at least in part to shield them from manipulation by their employers. *See, e.g.*, *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564, 566 (1973); *Broaderick v. Oklahoma*, 413 U.S. 601, 603-10 (1973); *American Pub. Workers v. Mitchell*, 330 U.S. 75, 78-81 (1947).

133. MCNEILL, *supra* note 131, at 456, *quoted in* Forbath, *supra* note 131, at 813.

134. *1935 Senate Hearings*, *supra* note 3, at 202 (statement of John P. Frey), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1582.

135. 81 CONG. REC. 2940 (1937). Wagner later argued, "[T]he 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." Robert Wagner, *The Ideal Industrial State—As Wagner Sees It*, N.Y. TIMES MAG., May 9, 1937, at 23, *quoted in* Keyserling, *supra* note 23, at 14. In fact, Wagner suggested that industry might be the only possible forum for democracy in modern society. He stated that "politics is becoming impersonalized and when the average worker is remote from the processes of government, it is more imperative than ever before that industry should afford

As the franchise was introduced into industry under the Wagner Act, however, it did not remove but instead reinstated the contradiction between democracy and economic dependence. In the workplace, the problem of undue employer influence remains even more acute. In the political arena, employers may act as both voters and candidates;¹³⁶ the fear has been that through the wage relation they would exercise influence beyond the mere power of persuasion and disproportionate to their voting strength. In union elections, by contrast, the law permits employers neither to vote nor to seek to be representatives of their employees.¹³⁷ Yet, at the same time, employers' interest in union elections is even more direct than in political elections, and their ability to exert influence is far greater. A union victory alters the legal relationship between employers and employees, whereas the outcome of political elections does not necessarily alter employers' legal rights or immediately affect their interests. Furthermore, in political elections the electorate includes numerous employers, their employees, and those outside the labor market. In union elections, however, the voters are always employees of a single employer, which gives the employer incommensurably greater power to influence a union election than a political election.¹³⁸ Thus, the role of employers in union elections is crucial, but highly ambiguous. Indeed, the problem of employers' undue political influence that haunted the Founding Fathers constitutes the paramount problem in union election law.

B. AMBIGUITY IN THE WAGNER ACT

The Wagner Act left the role of employers in the labor representation process as ambiguous as the procedures for securing representation. Precommittee drafts of the Act had specified that a dispute over "who are the properly chosen representatives" of workers could arise either "between an employer and his employees" or "between two groups of employees."¹³⁹ As

him real opportunities to participate." Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, N.Y. TIMES, Mar. 11, 1934, § 9, at 1.

136. This is obviously not true of corporate employers, but it is true of those who own them.

137. Employers are expressly barred from creating organizations to represent their employees. 29 U.S.C. § 158(a)(2) (1988).

138. The Board cannot direct an election for union representation in a multi-employer unit. See ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 298 (11th ed. 1991).

139. Casebeer, *supra* note 30, at 109 (quoting the Labor Disputes Act, Title III, Draft 2(b), § 307 (Feb. 19, 1934)).

introduced and adopted, however, the bill gave the Board authority to resolve representation disputes without spelling out who exactly was party to such disputes. It neither expressly included nor excluded the employer. Section 9 of the Wagner Act authorized the Board to conduct "an appropriate hearing upon due notice," but failed to indicate to whom notice was due or who had a right to participate in the hearing.¹⁴⁰ Similarly, the Act made it an unfair labor practice for employers to "interfere with, restrain, or coerce" employees in the exercise of their right to representation, without specifying whether every form of employer influence fell within the prohibition.¹⁴¹

Prior to the Act's passage, diverse congressional witnesses proposed that the law should exclude employers from representation proceedings. In particular, their arguments were directed against the pre-Wagner Act labor boards' policy of securing employers' consent before holding a union election. Because those boards lacked enforcement authority, they engaged in mediation more than adjudication and introduced the representation election as an instrument of conciliation. Although the 1933 executive order creating the first federal labor board did not authorize elections,¹⁴² just six days after the order was issued, the National Labor Board (chaired by Wagner) settled a strike among hosiery workers in eastern Pennsylvania by gaining their employers' agreement to recognize union representatives who would be chosen in a Board-supervised election.¹⁴³ This procedure became known as the "Reading Formula" and was a central element of federal labor policy prior to the Wagner Act.¹⁴⁴ Notably, it was an employer representative on the labor board, Gerald Swope, the president of General Electric, who proposed that elections be part of the

140. National Labor Relations (Wagner) Act, § 9(c), 49 Stat. 449, 452-53 (1935) (current version at 29 U.S.C. § 159(c) (1988)).

141. § 8(1), 49 Stat. at 452 (current version at 29 U.S.C. § 158(a)(1) (1988)).

142. See Exec. Order No. 6511, *reprinted in* 1 N.L.B. vi (1934). The National Labor Board was the first non-wartime board. A National War Labor Board had existed during World War I. See NATIONAL WAR LABOR BOARD, U.S. DEPARTMENT OF LABOR, REPORT OF THE SECRETARY OF THE NATIONAL WAR LABOR BOARD TO THE SECRETARY OF LABOR 5 (1920).

143. See H.W. Anthony Mills, 1 N.L.B. 1 (1933); 1934 *Senate Hearings*, *supra* note 18, at 30 (statement of Milton Handler, General Counsel, NLRB), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 60; BERNSTEIN, *supra* note 14, at 59-60; LORWIN & WUBNIG, *supra* note 39, at 95-97.

144. LORWIN & WUBNIG, *supra* note 39, at 96; TOMLINS, *supra* note 2, at 113-14.

formula.¹⁴⁵ For not only did the formula recognize employers' right to demand proof of majority sentiment, it also allowed them to specify the procedure for measuring that sentiment: a Board-supervised election.¹⁴⁶ The "Reading Formula" carried the election device into the workplace, but it did so conditional upon employer consent, in a manner that rendered the employer "party" to the election.

During the congressional debate over the Wagner Act, labor relations experts, federal officials, and union representatives argued against treating the employer as a party to the representation proceeding. They maintained that the Reading precedent was inapplicable under the Wagner Act. The most forceful advocate of this position was William H. Davis of the Twentieth Century Fund Committee, whose influential study of labor relations appeared as Congress was considering the Act.¹⁴⁷ Davis advised Congress to deny employers any role in their employees' choice of representatives. He proposed adding language to section 9(c) of the Act stating that "the employer shall not be recognized as a party" to disputes concerning the representation of employees.¹⁴⁸

Such proposals drew a key distinction between labor mediation and enforcement of the new right to representation. Under earlier federal policy, when "mediation was in the foreground," as Davis said, "the employer was there as a party."¹⁴⁹ But because employees were to attain a right to designate representatives under the new law, employers should have no role in that process. For the Wagner Act to perpetuate the idea of the employer as a party, Davis argued, was a "confusion of the mediation functions and law-enforcement functions."¹⁵⁰ William Leiserson, Chairman of the Railway Labor Act's National

145. Frances Perkins, *Eight Years as Madame Secretary*, 24 FORTUNE 77, 79 (1941).

146. Secretary of Labor Frances Perkins later observed, "In a way the consent-election provision was antiunion. Never before had a trade union been asked to *prove* that it represented the majority of the workers." *Id.*

147. See 1935 *Senate Hearings*, *supra* note 3, at 704-05 (statement of William H. Davis, Chairman, Special Committee on the Government and Labor, Twentieth Century Fund, Inc.), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2090-91; TOMLINS, *supra* note 2, at 131; LABOR AND THE GOVERNMENT: AN INVESTIGATION OF THE ROLE OF THE GOVERNMENT IN LABOR RELATIONS (Alfred L. Bernheim & Dorothy Van Doren eds., 1935).

148. 1935 *Senate Hearings*, *supra* note 3, at 718 (statement of William H. Davis), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2104.

149. *Id.*

150. *Id.*

Mediation Board and later a member of the NLRB, made similar arguments in a letter to Wagner. According to Leiserson, there was "a mistake" in the wording of section 9, which "should be changed to make the representation dispute purely disputes among employees only, to which the employer is not a party."¹⁵¹ He urged this change to keep "the employer and his attorneys . . . out of the representation disputes" and to make "the problem of determining the representative . . . a much more simple one."¹⁵² In his congressional testimony, Leiserson cited his experience on the National Mediation Board, which handled representation cases with "nobody around except the employees that are interested."¹⁵³ Because the issue was "not clearly put" in the proposed legislation, Leiserson explained, he was "afraid the employers may come in."¹⁵⁴

The essential point was that the interest of employers in workers' choice of representatives in no way entitled them to participate in that choice—either as parties in litigation or through an election campaign. As Davis put it, the employer, "of course," was "interested" in the representation question, but it was "not his dispute. He is not a party to the controversy."¹⁵⁵ Using the example of international relations, Davis explicated the difference between having an "interest" and being a "party": "We may be interested in a controversy between Belgium and England on the value of the belga today, but we are not parties to that controversy."¹⁵⁶ Similarly, the AFL's counsel contended that whatever economic stake employers might have in the outcome of a union election, they had "no legal interest whatsoever."¹⁵⁷ Also enlisting a geopolitical ex-

151. TOMLINS, *supra* note 2, at 137 (quoting Letter from William M. Leiserson, Chairman, Railway Labor Act's National Mediation Board, to Sen. Robert F. Wagner (Mar. 9, 1935)). Leiserson was also Chairman of the NRA Petroleum Labor Board. 1935 Senate Hearings, *supra* note 3, at 869 (statement of William M. Leiserson), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2255.

152. TOMLINS, *supra* note 2, at 137 (quoting Letter from William M. Leiserson, Chairman, Railway Labor Act's National Mediation Board, to Sen. Robert F. Wagner (Mar. 9, 1935)).

153. 1935 Senate Hearings, *supra* note 3, at 878 (statement of William M. Leiserson, Chairman, National Mediation Board), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2264.

154. *Id.*

155. *Id.* at 718 (statement of William H. Davis, Chairman, Special Committee on the Government and Labor, Twentieth Century Fund, Inc.), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2104.

156. *Id.*

157. 1935 Senate Hearings, *supra* note 3, at 750 (statement of Charlton

ample, he asked Congress to "suppose the United States and Mexico were seeking to adjust a boundary matter by negotiation through commissioners. How would it be regarded if the United States sought to influence the selection of certain commissioners to represent Mexico?"¹⁵⁸ Other congressional witnesses maintained that it was as illegitimate for employers to participate in union elections as it was for employees to interfere in the selection of company directors. In Leiserson's words, "[I]t would be just the same as if the employees, because they are employees, should walk into a stockholders' meeting and try to elect the managers."¹⁵⁹

Ogburn, Counsel, AFL), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1530.

158. *Id.* After the Act's adoption, union lawyer Louis B. Boudin drew an analogy to international law as he urged the Board to keep employers out of union elections. An employer has an interest in the outcome of such elections, Boudin acknowledged, just like one country has an interest in another's representatives. But, he continued,

that does not mean that a country about to negotiate a treaty with another country, the failure of which may result in war, has a *legitimate* interest in the internal affairs of the other country, and that it should be heard either in the election of its government or in any matter which may *affect* the election of that government. Such interference would be acknowledged by all as unwarranted *aggression* upon a neighbor's right to self-determination.

Louis B. Boudin, *Representatives of Their Own Choosing*, 37 ILL. L. REV. 385, 400 (1943). Forty years later, Paul Weiler also adopted this analogy to explain the position of employers in union elections. *See* Weiler, *supra* note 6, at 1814. The international analogy is not perfect, however, as one country can freely leave the bargaining table while an employer has a legal duty to bargain with a certified union.

159. 1935 *Senate Hearings*, *supra* note 3, at 878 (statement of William M. Leiserson, Chairman, National Mediation Board), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2264. The AFL's counsel reasoned similarly: "Employers have no more say-so in the selection of representatives for collective bargaining by employees than employees have in the selection of the companies' representatives." *Id.* at 150 (statement of Charlton Ogburn), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1530; *see also* 78 CONG. REC. 12,044 (1934) (remarks of Sen. Shipstead) (making same argument), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1241. This same refrain appeared in 1939, when the Board reported to Congress that the "right of employees to choose their representatives when and as they wish is normally no more the affair of the employer than the right of stockholders to choose directors is the affair of the employees." 1939 *House Hearings*, *supra* note 52, *supp.* at 36 (report of the NLRB). Again, in 1943, the Seventh Circuit used a "reverse statement of the case" to dismiss an employer's objections to a union election as "ephemeral and unsubstantial." *NLRB v. National Mineral Co.*, 134 F.2d 424, 427 (7th Cir.), *cert. denied*, 320 U.S. 753 (1943). "In what forum in this land of ample legal machinery," the court asked, "could the employees be heard to challenge the election of the stockholders' representative for collective bargaining?" *Id.*

Standing counter to such arguments, however, was the theory that excluding employers from representation proceedings would encourage them to evade the duty to engage in collective bargaining. The Legal Division of the existing labor board underscored the pragmatic point that the right to representation necessarily rested on employer compliance. It argued that under the Wagner Act the new board would be more likely to prevail in the courts in forcing employers to recognize unions if the employers were parties to representation proceedings, and thus were able to present evidence and cross-examine witnesses.¹⁶⁰ The Wagner Act failed to speak either way on the question, however. It was left to the Board to construe the statute's silence as either excluding employers from or tacitly recognizing them as parties to representation proceedings.

C. EMPLOYERS AS PARTIES

When the Board opened its doors in the summer of 1935, it confronted two questions concerning employers' role in the representation process: Should employers be party to the trial-like administrative process in representation cases, and should they be allowed to influence employee sentiment on the subject of representation? Initially, the Board gave contrasting answers: It granted employers the status of parties in representation cases, but it barred them from seeking to influence employees' representation decision. Yet once the election became the cornerstone of the representation process, the dualism in the rules became untenable. Employers effectively exploited their party status to influence the outcome of elections, and the electoral process inevitably exposed union organizing to employer influence.

Since its inception, the Board has considered employers to be parties to representation cases. It has given employers notice of the filing of a representation petition and has also allowed them to participate in any hearings on the petition.¹⁶¹ The current Board *Casehandling Manual* clearly defines "interested parties" to include employers.¹⁶²

The idea that there are parties to representation proceedings and that the employer should be one is consistent with a conception of such proceedings as a form of fact finding, with

160. See TOMLINS, *supra* note 2, at 137 (quoting Philip Levy, Memorandum on the Davis Amendment (April 6, 1935)).

161. Gellhorn & Linfield, *supra* note 52, at 351.

162. NLRB, *supra* note 91, pt. 1, § 11008.1.

the fact at issue being employees' sentiments about a union. Wagner asserted in 1935 that such a proceeding was "nothing but an investigation, a factual determination of who are the representatives of employees."¹⁶³ The Board agreed, explaining to Congress in 1939 that a representation case "is in the nature of an investigation of fact by the Board."¹⁶⁴ This aptly characterized the proceedings prior to the 1939 *Cudahy* decision that involved review of non-electoral evidence of majority sentiment. Employers' party status in such cases merely gave them the right to contest the evidence of support already garnered by unions.

After *Cudahy* established the primacy of the election, however, representation cases were no longer simply a process of adjudication. Rather, they consisted of the election itself (as the sole admissible proof of majority sentiment), and two phases of litigation concerning the election—first, resolving whether an election should be held and who should vote, and second, determining whether its results actually reflected the majority's will.¹⁶⁵ Thus, once the election became the exclusive focus of adjudication in representation disputes, employers' established status as party to representation cases gave them leverage over the electoral procedures through which employees were required to express their will. Even though the Board still barred employers from directly interfering with employees' choice of representatives, it opened an avenue for more subtle, litigious forms of influence.

Employers have exercised their rights in the process of litigation in a manner calculated to affect the outcome of elections. Here, their ability to delay elections has been central.¹⁶⁶

163. 1935 *Senate Hearings*, *supra* note 3, at 50 (statement of Sen. Wagner), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1426.

164. *Hearings Before the Senate Comm. on Education and Labor*, 76th Cong., 1st Sess. 580 (1939) [hereinafter 1939 *Senate Hearings*] (report of the NLRB). The Board continued, "Such a hearing is not in the nature of a trial but an investigation." *Id.*

165. See *supra* note 91 (discussing procedure in representation cases).

166. See *supra* note 104 (discussing employers' efforts to affect election results through delay).

Despite the fact that both employer and union have always been parties to representation cases, the Board has always insisted that representation proceedings are nonadversarial. The Board explained to Congress in 1939 that representation cases "unlike unfair labor practice cases, do not involve a proceeding directed against an employer . . ." 1939 *Senate Hearings*, *supra* note 164, at 580 (report of the NLRB). The year after Congress passed the Taft-Hartley Act, the Board reported that such cases "are not adversary in character." 13 NLRB ANN. REP. 19 (1949). The Board's *Casehandling Manual* con-

Yet employers have recently pointed to the high percentage of elections conducted without litigation as evidence that they are not obstructing the representation process.¹⁶⁷ Indeed, in more than eighty percent of the representation cases following union petitions in each year since 1975, the parties have reached agreement on all preliminary issues, eliminating the need for a preelection hearing.¹⁶⁸ In seeming contrast to reports of increased employer resistance to unionization in the past twenty years,¹⁶⁹ the percentage of representation proceedings in which the parties could not resolve all preliminary issues has steadily declined during the same period, to just over fifteen percent in 1989, the lowest level since 1948.¹⁷⁰ But the apparent consensus actually reveals that unions have been forced to accept elections on employers' terms because otherwise employers may delay the conduct of elections and, potentially, the advent of collective bargaining.¹⁷¹ As a practical matter, because of em-

tinues to describe a representation case hearing as "investigatory and not adversary." NLRB, *supra* note 91, pt. 1, § 11180. Paradoxically, employers have taken advantage of this characterization of representation proceedings to delay elections. By refusing to take a position on the appropriateness of a proposed unit or the eligibility of particular employees with which the union could agree and instead insisting that the Board resolve the questions, an employer insures that the Board will take evidence and prepare a decision in the "inquisitorial" proceeding. See, e.g., Yale College, No. 39-RC-408, slip op. at 4, 57-67 (NLRB Apr. 22, 1983). This guarantees a delayed election regardless of how much the union is willing to concede.

167. The Chamber of Commerce cited such percentages during the 1977 reform act debates as evidence that "there is a cooperative air in the investigative process." *Labor Reform Act of 1977: Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 989 (1977) [hereinafter *1977 Senate Hearings*] (statement of Robert T. Thompson, Chairman, National Chamber of Commerce). The minority views in the House Report also cited the high percentage of consent elections as a reason to leave well-enough alone. H.R. REP. NO. 637, *supra* note 105, at 64-65.

168. See generally 40-54 NLRB ANN. REP. app. A (1975-1989) (compiling annual data regarding disposition of representation cases in a table entitled "Disposition by Stage of Representation and Union Deauthorization Cases Closed"). Data is not yet published for 1990 and 1991.

169. See, e.g., Weiler, *supra* note 6, at 1776-86.

170. See generally 13-54 NLRB ANN. REP. app. A (1948-1989) (compiling annual data regarding disposition of representation cases in a table entitled "Disposition by Stage of Representation and Union Deauthorization Cases Closed").

171. See Christine M. Mrak, *Expediting Representation Cases and Alternatives to Board Procedure*, Address at the AFL-CIO Lawyers Coordinating Committee Conference 9 (April, 1985) (transcript on file at the *Minnesota Law Review*). Mrak, a union lawyer, described a "stipulate to almost anything" approach as a means of expediting representation cases. *Id.* As a management attorney confirms, "The employer, at this stage, has great leverage with both the union and the Board, and it is usually possible to obtain the time needed to

employers' status as parties to representation proceedings, unions today must seek their consent to elections just as they had to before the Wagner Act.

D. EMPLOYERS AS CANDIDATES

Until the mid-1940s, the Board granted employers the status of party to representation litigation but denied them that of candidate in the representation election. The first entailed the right to probe and test the union's claim to majority support; the second would have entailed the right to urge workers to withhold support from the union—to vote "no." Although party status enabled employers indirectly to influence election results, the Board prohibited direct influence. Even before the Taft-Hartley Act codified employers' right to campaign, however, the Board's use of elections as the exclusive means of testing majority support implicated employers directly in the electoral process, making it impossible for the Board either practically to prevent employer influence or legally to justify prohibiting employer campaigns. Here, again, the early dualism in Board rules governing the employer's role in the election gave way, as the employer gained a status tantamount to a candidate in union elections.

Prior to *Cudahy*, the Board permitted workers to demonstrate support for a union and to gain certification by nonelectoral means that shielded their self-organization from their employer. Membership cards could be solicited without employers knowing that their employees were organizing. Dues could be collected or a strike planned outside the employers' oversight. Evidence of all these forms of support for a union could then be presented at a hearing.¹⁷² An election was

campaign. . . . The employer ordinarily can also have its choice as to the exact day of the week for the election." DEMARIA, *supra* note 104, at 48. That the ability to delay allows management to pressure unions to consent to elections on management's terms is evidenced by the NLRB General Counsel's prediction during the 1977-1978 reform debates that strict time limits for the conduct of elections would reduce the number of consent elections by 45%. See 124 CONG. REC. 17,050 (1978) (remarks of Sen. Griffin).

172. See, e.g., Combustion Eng'g Co., 5 N.L.R.B. 344, 349 (1938) (holding participation in strike to be sufficient evidence of majority support for union); Seas Shipping Co., 2 N.L.R.B. 398, 401 (1937) (signed cards); Richards-Wilcox Mfg. Co. 2 N.L.R.B. 97, 100 (1936) (union membership rolls).

The old National Labor Board recognized that employees' ability to choose the method for designating their representatives was a crucial aspect of their right freely to select representatives. "[T]he method of designation," the Board held in 1933, is "within the exclusive control of the workers. The law

more than an alternative form of proof of employee sentiment, however. It was an open contest to create or alter that sentiment, requiring notice to the employer, a period of time between the notice and balloting, and the casting of ballots in a government-supervised process. To be sure, representation litigation was also an adversarial encounter; but it was a contest over the *evidence* of majority sentiment, rather than one to shape the sentiment itself. In narrowing the method of selecting representatives to the government supervised election, the Board inevitably subjected the process of self-organization to employer influence.

Initially, the Board attempted to bar employers from campaigning among their employees.¹⁷³ The Board reasoned

does not tolerate any impairment of the freedom of self-organization." Edward G. Budd Mfg. Co., 1 N.L.B. 58, 60 (1933). A statement of NLB policy confirmed, "The manner of conducting an election is entirely within the discretion of the employees." 78 CONG. REC. 12,030 (1934) (summarizing NLB principles), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1210. Leiserson explained the NLB's policy in respect to the method of selection:

Section 7 of the Recovery Act gives the employees the right to organize and choose representatives. [In] answer [to] question[s] as to what steps are necessary, we can only say that that is a matter for the employees to decide for themselves. They may call a meeting and elect the representatives in any way they desire.

TOMLINS, *supra* note 2, at 113 (quoting Letter from William M. Leiserson, Chairman of the National Recovery Act Petroleum Labor Board (In Record Group 25, Box 81, "NLB General Correspondence File K", National Archives and Records Service, Washington, D.C.)).

173. See, e.g., *American Tube Bending Co.*, 44 N.L.R.B. 121, 133-34 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943). There is evidence in the legislative history that Congress did not intend to prohibit all employer influence. The Chairman of the Senate Committee on Education and Labor, Senator David Walsh, stated during hearings on the bill that there was nothing in the bill "to prevent an employer from discussing with his employees the merits and demerits of the various kinds of organizations." 1935 *Senate Hearings*, *supra* note 3, at 557 (statement of John D. House), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1943. Walsh explained that the word "influence" was struck from what became § 8(1) of the Act "because we felt that an employer should not be prevented from exercising his influence for or against any particular organization." *Id.* at 557-58, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, 1617, 1943-44. Notably, the word was contained in the Railway Labor Act that in other respects served as a model for the Wagner Act. See 45 U.S.C. § 152 (Ninth) (1988).

Indeed, during the 1939 hearings, the Board denied that it barred employer campaigning in the absence of "a background of open manifestations of hostility to self-organization." 1939 *Senate Hearings*, *supra* note 164, at 497 (report of the NLRB). It is difficult to find cases that do not involve independent unfair labor practices. See, e.g., *Ford Motor Co.*, 14 N.L.R.B. 346, 378-79 (1939) (examining company publications in light of prior discriminatory discharges), *enforced in part*, 114 F.2d 905 (6th Cir. 1940), *cert. denied*, 312 U.S. 689 (1941).

that employers could not vote and did not appear on the ballot as candidates in representation elections and therefore had no legitimate interest in the outcome. Moreover, because of employers' economic authority over the employee electorate, the Board held that employer participation would prevent voters from casting their ballots freely.

The Board stated this conclusion most forcefully in the 1942 case of *American Tube Bending Co.*¹⁷⁴ In that case, Local 420 of the International Association of Machinists filed a petition seeking certification as the representative of the almost 500 employees of the New Haven-based metal tube manufacturer.¹⁷⁵ An independent union intervened.¹⁷⁶ Four days before the election, American Tube's President, Henry W. Jones, Jr., sent a letter on company stationery to all the employees regarding the issues at stake in the election.¹⁷⁷ A day before the election, the foremen directed all employees to assemble in groups, and Jones addressed each group, touting the company's achievements and informing the employees that they would be voting on who to "have for your leader."¹⁷⁸ The choices on the ballot, Jones advised, were the two competing unions or "the present management of your company."¹⁷⁹ Jones urged all of the employees to vote, intoning the theme of political democracy: "Americans, ever since the Declaration of Independence, and even before that, have settled questions like this by going to the polls, and voting secretly exactly as they wished."¹⁸⁰

The Board, however, did not view the employer's campaign rhetoric as the exercise of a political birthright. Instead the Board undertook to enfranchise American Tube's employees, holding that the Wagner Act entitled employees to choose "their bargaining representative free from employer interference."¹⁸¹ Furthermore, such freedom imposed a "correlative" duty on the employer to "maintain complete neutrality with re-

But the Board's language in *American Tube* and other cases was considerably broader. See *infra* text accompanying notes 174-92.

174. 44 N.L.R.B. 121 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

175. *Id.* at 121.

176. *Id.* at 122.

177. *Id.* at 124-26.

178. *Id.* at 126-28.

179. *Id.* at 128.

180. *Id.* at 129.

181. *Id.*

spect to an election.”¹⁸²

In *American Tube*, the Board categorically rejected the notion that the employer was a candidate in the election. It reiterated the rule set forth in an earlier case: “An election is not a contest between a labor organization and the employer of the employees being polled, and participation by an employer in a preelection campaign as if he were a contestant is an interference with the employees’ rights to bargain collectively through representatives ‘of their own choosing.’”¹⁸³ The Board dismissed the employer’s construction of the choices appearing on the ballot as a “false interpretation of the issues.”¹⁸⁴ By equating the choice of “[n]either” union with “*the present management of [the] company*,” the Board declared, the employer “became a candidate in the election and forced himself upon the ballot.”¹⁸⁵ The letter and speeches to the employees conveyed the idea that “their employer considered himself to be a party to the election . . . and that a vote for the unions was a vote against the company.”¹⁸⁶ That was a “deception,” the Board held.¹⁸⁷

Nevertheless, American Tube’s campaign speech was not unlawful simply because it propagated a “false interpretation.”¹⁸⁸ According to the Board, the speech was unlawful because its message was inextricably tied to the employer’s economic power over its employees. Emphasizing that the foremen assembled the employees on company time and that the letter was on company stationery, the Board stated that such tactics “brought heavily into play the economic dependence” of the employees upon American Tube.¹⁸⁹ Given these conditions of inequality, the Board concluded, “[i]t was impossible for the employees to distinguish between the [employer] *qua* candidate

182. *Id.*

183. *Id.* at 132 (quoting *Sunbeam Elec. & Mfg. Co.*, 41 N.L.R.B. 469, 487-88 (1942), *enforced as modified*, 133 F.2d 856 (7th Cir. 1943)).

184. *Id.* at 131.

185. *Id.* at 131 & n.8.

186. *Id.* at 130-31.

187. *Id.* at 132. In a number of other cases, the Board was careful to characterize employer communication as “not isolated or unconnected occurrences,” but rather as an “intelligent *campaign* against the union.” *Sunbeam Elec.*, 41 N.L.R.B. at 485 n.18; *see also* *Nebel Knitting Co.*, 6 N.L.R.B. 284, 293 (1938) (describing the employer’s pattern of anti-union conduct as a “campaign to combat and defeat” the union’s attempt to organize workers), *enforced as modified*, 103 F.2d 594 (4th Cir. 1939).

188. *American Tube Bending Co.*, 44 N.L.R.B. 121, 131 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

189. *Id.* at 133.

and the [employer] *qua* employer[].”¹⁹⁰ Based on the “relationship existing between the author of the utterances and the employees [sic] as well as the circumstances under which the communications were delivered,” the Board ruled that the employer’s campaign communications “attained a force stronger than their intrinsic connotation, and beyond that of persuasion” amounting to illegal coercion.¹⁹¹

For nearly a decade after its founding, the Board took the position that employer persuasion could not be separated from coercion. In its *First Annual Report*, the Board deemed employer campaign statements an effort to “poison the minds of workers.”¹⁹² In 1939 the Board reported to Congress its opposition to proposed amendments to the Wagner Act that would have guaranteed employers’ right to express their views on the union question.¹⁹³ The Board objected that such a reform would trench on the right to representation and “abandon the fundamental principle of the Act that the employer shall keep his hands off the self-organization of employees.”¹⁹⁴ Here, too, the Board stressed the realities of economic inequality and employer authority in the workplace. An employer could not “express his opinion in a vacuum,” the Board reasoned.¹⁹⁵ “Behind what he says lies the full weight of his economic position, based upon his control over the livelihood of his employees.”¹⁹⁶ The Supreme Court ratified this reasoning when it upheld the Board’s requirement that employers remain neutral toward competing unions.¹⁹⁷ “Slight suggestions” of employer preference have a “telling effect among men who know the consequences of incurring that employer’s strong displeasure,” the Court declared.¹⁹⁸

190. *Id.*

191. *Id.*

192. 1 NLRB ANN. REP. 73 (1936). The Board’s policy led two experts to advise employers in 1940 that they should “refrain from advising Employees in any matters concerning labor organizations. . . . Do not express opinions of any labor organization” They encouraged employers to “stay *completely neutral* regarding elections.” W.A. RINCKHOFF & HARVEY B. RECTOR, *PROCEDURE AND PRACTICES UNDER THE NATIONAL LABOR RELATIONS ACT* 8, 14 (1940).

193. See GROSS, *supra* note 48, at 198.

194. *Id.* (quoting NLRB, REPORT OF THE NATIONAL LABOR RELATIONS BOARD TO THE SENATE COMMITTEE ON EDUCATION AND LABOR UNDER H.R. 9195 19-20 (1940)).

195. *Id.*

196. *Id.*

197. *International Ass’n of Machinists v. NLRB*, 311 U.S. 72 (1940).

198. *Id.* at 72.

Yet there was a tension in the Board law governing employer influence. The Board's proscription, under *American Tube*, of employers' *direct* influence through a campaign conflicted with employers' right to influence *indirectly* the outcome of an election by delaying it, reshaping the unit, or challenging voter eligibility. Moreover, employers' rights as parties to the adjudicative phases of representation proceedings were difficult to separate from participation in the election itself.

The question of employer observers at the polling place exposed the tension in Board law with particular clarity. In 1938 the Board ruled that employers could not be present at elections, finding that their party status did not entitle them to observe the balloting.¹⁹⁹ According to the Board, the mere "presence of an employer's representative" might inhibit employee free choice "although no interference or coercion is intended by the employer."²⁰⁰ The Board reaffirmed the exclusion in 1940, holding that employers "may not, as a matter of right, exercise any prerogative in the Board's administration of Section 9 of the Act."²⁰¹ In its 1942 decision in *Southern Steamship Co. v. NLRB*, the Supreme Court upheld the exclusionary rule, finding it "wholly reasonable to remove any possibility of intimidation by conducting the election in the absence of the employer's representatives."²⁰²

Yet prior to the Court's decision, the Board announced that since the election in dispute in *Southern Steamship Co.* it had reversed the rule, permitting employers to place observers at the polls to challenge ineligible voters and to verify the tally.²⁰³ The Board immediately imposed limits on employer observers, barring supervisors and others too "closely identified with an employer."²⁰⁴ Nevertheless, the right to station observers at the polls clashed with the rule excluding employers from the campaign. The inconsistency was plain in the Board's language. In 1942, in its *Seventh Annual Report*, the Board explained that "each party to the election has an equal number of observers to represent it at the scene of the balloting. . . . Company observ-

199. *American France Line*, 4 N.L.R.B. 1140, 1141 (1938).

200. *Id.*

201. *Southern S.S. Co.*, 23 N.L.R.B. 26, 31 (1940), *enforced*, 120 F.2d 505 (3d Cir. 1941), *enforcement denied on other grounds*, 316 U.S. 31 (1942).

202. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942).

203. *Southern S.S. Co.*, 23 N.L.R.B. at 31 n.3a.

204. *Watkins Brick Co.*, 107 N.L.R.B. 500, 500 (1953).

ers are usually nonsupervisory personnel.”²⁰⁵ Yet that same year, in *American Tube*, the Board characterized the employer’s insistence that it was “a party to the election” as a “deception.”²⁰⁶

The demise of the rule set forth in *American Tube* followed not simply from the tension between its exclusion of employers from campaigns and their status as parties to the adjudicatory phases of representation proceedings. In addition, the creation of an electoral contest in which one party could campaign while the other had to remain silent contradicted traditional notions of political freedom.²⁰⁷ Even in the debates over the Wagner Act, employers argued that an election with only one candidate was incongruous. It was a simple proposition, asserted the counsel for one employers’ association: “[G]uidance from two different sources, each of which tends to disclose and correct the frailties of the other, stimulates wholesome discussion and thinking.”²⁰⁸ A representative of the National Publishers Association used more colorful language to make the same point: If an employer were “hog tied,” employees would be subject to “bulldozing,” and an election would “not register the real choice of a body of employees.”²⁰⁹

205. 7 NLRB ANN. REP. 35 (1943) (emphasis added).

206. *American Tube Bending Co.*, 44 N.L.R.B. 121, 130, 132 (1942) (emphasis added), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

207. The discussion that follows, in addition to the foregoing, is premised on the fact that most union elections involve only one union. GOLDFIELD, *supra* note 104, at 207 (noting that between 1972 and 1984, 94% of union elections involved only one union). The perception that employers are candidates may be diluted when more than one union is competing, at least in the eyes of voters. Empirical research suggests that employees are more likely to vote for representation in elections involving competing unions. *See id.* at 204, 207 (finding a 76.4% union victory rate in multi-union elections, compared to a 49.1% union victory rate in all elections between 1972 and 1984); Gary N. Chaison, *The Outcomes of Multi-Union Representation Elections Involving Incumbents*, 13 PUB. PERSONNEL MGT. 435, 436-37 (1973) (reporting similar finding); Ronald L. Seeber, *Union Organizing in Manufacturing: 1973-1976*, in 1 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 1, 23, 26 (David B. Lipsky & Joel M. Douglas eds., 1983) (same).

208. 1934 Senate Hearings, *supra* note 18, at 1019 (brief of Walter G. Merritt), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 1057. Merritt was counsel to the American Anti-Boycott Association, which sponsored several important pieces of pre-Wagner Act litigation, for example, *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the Danbury Hatters Case). *See* Daniel R. Ernst, *The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association, 1902-1919*, at 143 (1989) (unpublished Ph.D. dissertation, Princeton University).

209. 1935 Senate Hearings, *supra* note 3, at 280 (statement of Guy L. Har-

In a dissent from a 1946 Board opinion barring employers from forcing employees to listen to anti-union campaign speeches, Member Gerald D. Reilly contended that the Board should recognize employers as candidates. Later that year Reilly helped to draft the Taft-Hartley Act, and in his dissent he aired the theory he would soon incorporate into the new legislation.²¹⁰ Acknowledging that the parallel between employers and aspirants to political office was not precise, he suggested that "the candidates are the choices on the ballot"—self-representation and union representation²¹¹—and he therefore maintained that the notion of the employer as a candidate was "no more far-fetched than viewing the employees themselves as candidates."²¹² The problem was that the forces supporting one choice—self-representation—could not match the resources "available to national industrial unions."²¹³ The employer, Reilly concluded, should be considered a proxy for the choice of self-representation, a necessary rival to the union.²¹⁴

According to this theory, employer campaigning was not only necessary to insure true freedom of choice in representation elections; it was also protected speech, just like that of a candidate for political office. At a time when the ordinary haggling between buyer and seller was unprotected,²¹⁵ employers

ington, National Publishers Association), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1666.

210. MILLIS & BROWN, *supra* note 76, at 377.

211. Clark Bros. Co., 70 N.L.R.B. 802, 813 (1946) (Member Reilly, dissenting), *enforced as modified*, 167 F.2d 373 (2d Cir. 1947).

212. *Id.*

213. *Id.*

214. See *id.* at 812-13. The Chamber of Commerce echoed this logic during the debates over the 1977 reform bill. It was "essential," the Chamber reasoned, that "voters in union elections, as well as political elections, have the opportunity to become fully informed," and "this require[d] that both the union and employer have an adequate opportunity to communicate . . . with employees regarding the issue of union membership." 1977 *House Hearings*, *supra* note 106, pt. 2, at 542 (statement of Robert T. Thompson, Chairman, Labor Relations Committee, National Chamber of Commerce).

215. See *Breard v. Alexandria*, 341 U.S. 622, 642, 645 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Even Roger Baldwin, the founder of the American Civil Liberties Union, rejected the contention that "the act unreasonably restricts employers' rights of free speech." Roger Baldwin, *Organized Labor and Democracy*, in CIVIL LIBERTIES AND INDUSTRIAL CONFLICT 3, 27 (1938). "An employer may advertise his anti-union sentiments in the press or in public speeches," Baldwin reasoned, but he "may not address them directly to his employees in an effort to prevent their joining a union." *Id.* The ACLU itself, however, criticized the Board's decision in *Ford Motor Co.*, 4 N.L.R.B. 621 (1937), in which the Board found that Ford had conducted a violent anti-union campaign and ordered the company, among other things, to cease dis-

sought in both the courts and Congress to elevate to the status of free speech their campaigns to persuade employees to continue to bargain as individuals.²¹⁶ The Board's placement of the contest over union representation in an exclusively electoral framework lent new power to employers' arguments that their campaign rhetoric belonged at the core of the liberties protected by the Constitution.²¹⁷

In 1945, reversing a decade of Board precedent,²¹⁸ the Supreme Court declared that the First Amendment protected

tributing anti-union literature. The ACLU found this aspect of the order to be an overbroad restriction of the employer's speech. American Civil Liberties Union, Memorandum on the Ford Case (March 1938), Robert F. Wagner Papers, box 5, file 58 (Georgetown University).

216. Employers' right to free speech was a central issue during the 1939 hearings. GROSS, *supra* note 48, at 180-81, 198, 207-08, 253. In fact, the House version of the Wagner Act contained a provision that "nothing in this act shall abridge the freedom of speech, or of the press, as guaranteed in the first amendment to the Constitution," but it was deleted in conference. 79 CONG. REC. 10,259 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 3260.

217. Cf. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."). The same argument surfaced in 1977 and 1978 against reforms that would have limited employers' opportunity to campaign. Senator Robert T. Stafford asserted, "It is only elemental democracy that the employee have equal access to the arguments of each side before he casts his secret ballot. Surely, a citizen should have the same right in his employment decisions that he does in choosing among candidates to represent him in Government." 124 CONG. REC. 14,324 (1978).

218. In the 1941 case of *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the Court suggested, but stopped short of holding, that employers had a First Amendment right to resist unions. The case involved not an election but the creation of a company union. In finding that the employer dominated the union, the Board relied on a bulletin posted throughout the operations and a series of speeches by high company officials urging employees to form and join an independent organization. *Id.* at 479. The Court did not reject the Board's conclusion, but it expressed concern that the agency had found that the speech alone constituted an unfair labor practice without reference to "surrounding circumstances." *Id.* The Court therefore remanded the case to the Board for redetermination of the issues. *Id.* at 480. On remand, the Board again held that the employer had violated the Act. 44 N.L.R.B. 404, 440, enforced, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533 (1943). Although *Virginia Electric* is often cited as marking the end of the Board's requirement of employer neutrality, see, e.g., GROSS, *supra* note 48, at 248-49, it is important to note that *American Tube* was decided the year after *Virginia Electric*. Yet it is also important to note that *Virginia Electric* did convince one eminent jurist, Learned Hand, to depart from his earlier ruling that the Board could bar employer campaigns, see *NLRB v. Federbush Co.*, 121 F.2d 954 (2d Cir. 1941), in reversing the NLRB's decision in *American Tube*, 134 F.2d 993, 995 (2d Cir.), cert. denied, 320 U.S. 768 (1943).

employers' campaign speech just as it did that of candidates in political elections. The case, *Thomas v. Collins*, concerned state suppression of union speech during a labor election campaign.²¹⁹ The Court affirmed the union's First Amendment rights, and then went beyond the facts of the case to establish that unions and employers must have parallel rights to speak freely in electoral contests. Presupposing that unions and employers are rival candidates in representation elections, the Court bestowed on employers a right to campaign against unions.²²⁰

Thomas involved a Texas statute that required labor organizers to register and obtain organizers' cards before soliciting members.²²¹ R. J. Thomas, the President of the United Automobile Workers, traveled to Pelly, Texas to address a rally sponsored by the Oil Workers Industrial Union (CIO) which had petitioned for an election among a group of petroleum workers. Prior to Thomas' speech, the State Attorney General obtained an *ex parte* temporary restraining order under the registration law. Thomas gave the speech, and he was arrested and charged with violation of the law and criminal contempt.²²² The Supreme Court overturned Thomas's contempt conviction.²²³

The *Thomas* Court put particular emphasis on the electoral setting of the speech in question. The State of Texas argued that the law was "directed at business practices" and could be sustained if it had a "rational basis."²²⁴ The Court ruled, however, that the electoral context elevated the speech above ordinary commercial interchange.²²⁵ It noted that the speech and rally were "incidents of an impending election for collective bargaining agent" and, finding that the labor election was an "occasion . . . clearly protected" by the First Amendment, it ruled that the speech was protected as well.²²⁶

In a concurring opinion, Justice Jackson affirmed that free expression was no less important for industrial democracy than for political democracy. He highlighted the parallels between the union election and the political election, reiterating the ar-

219. 323 U.S. 516 (1945).

220. *Id.* at 537-38.

221. *Id.* at 519-20 n.1.

222. *Id.* at 520-23.

223. *Id.* at 543.

224. *Id.* at 526, 527.

225. *Id.* at 528-29.

226. *Id.* at 533, 534.

guments that had secured statutory protection of workers' rights in order to elevate those rights to constitutional stature. Justice Jackson began with the proposition that speech is protected because the founders "knew of no other way by which free men could conduct representative democracy."²²⁷ He then unfolded the connections among speech, labor representation, and political democracy:

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. Their smaller society, too, must choose between rival leaders and competing policies. This should not be an underground process. . . . If free speech anywhere serves a useful social purpose, to be jealously guarded, I should think it would be in such a relationship.²²⁸

For Jackson as well as for other members of the Court, it was imperative to establish that employers had equal rights to speak freely in union campaigns. The majority stated emphatically that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."²²⁹ Jackson spun out the point in greater detail: "Labor is free to turn its publicity on any labor oppression The employer, too, should be free to answer."²³⁰ Jackson expressly criticized earlier rulings by both the Board and the Supreme Court that denied employers the right "in all its breadth and vigor" to speak freely in union election campaigns.²³¹ "Free speech on both sides . . . of the labor relation is to me a constitutional and useful right," he concluded.²³² Justice Douglas also concurred separately, simply to rebut the "intimation that the principle announced in this case serves labor alone and not an employer."²³³

Congress codified employers' right to free speech in the 1947 Taft-Hartley Act. The Act's proponents cited the Supreme

227. *Id.* at 545-46 (Jackson, J., concurring).

228. *Id.* at 546. Derek Bok later echoed this argument: "The Supreme Court has already made clear that speeches in representation campaigns are generally subject to the first amendment. . . . And this seems only logical, for representation elections are closely akin to political contests." Bok, *supra* note 6, at 68.

229. 323 U.S. at 537.

230. *Id.* at 547 (Jackson, J., concurring).

231. *Id.* at 548.

232. *Id.* at 547.

233. *Id.* at 543 (Douglas, J., concurring). After *Thomas*, the Board began consistently to allow employer anti-union speech. See, e.g., *Fisher Governor Co.*, 71 N.L.R.B. 1291, 1295-96 (1946), *enforced*, 163 F.2d 913 (8th Cir. 1947); *Oval Wood Dish Corp.*, 62 N.L.R.B. 1129, 1139 (1945).

Court's opinion in *Thomas* to convince lawmakers that to include such a guarantee would simply confirm a constitutional liberty.²³⁴ With little debate, Congress adopted a free speech proviso. Stated in neutral terms, but intended specifically to overrule decisions such as *American Tube*,²³⁵ the proviso made clear that employers' expression of "views, argument, or opinion" was not an unfair labor practice unless it contained a "threat of reprisal or force or promise of benefit."²³⁶

By the late 1970s employer advocates argued that management not only was free to express anti-union views, but that it had an affirmative "right" to campaign against unions. In opposition to proposed reforms of federal labor law that would have restricted employers' opportunity to campaign by shortening the time between filing of petitions and elections, the National Association of Manufacturers asserted that "an employer should not be denied of the right to persuade his employees . . . that they do not need a union."²³⁷ According to the Chamber of Commerce, a "careful balancing" of unions' and employers' "campaign rights" was essential in representation elections.²³⁸ Such notions of the equities of the labor election were central to the defeat of the 1977 labor reform bill and found authority in the Supreme Court's ruling in *Thomas* and the Taft-Hartley free speech proviso.²³⁹

By entitling employers to campaign like candidates, the Board, Congress, and the Supreme Court brought to the fore

234. S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 407, 429.

235. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 84 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 292, 375; S. REP. NO. 105, *supra* note 234, at 23, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 407, 429.

236. 29 U.S.C. § 158(c) (1988).

237. 1977 *House Hearings*, *supra* note 106, pt. 1, at 145 (statement of National Association of Manufacturers).

238. See *id.*, pt. 2, at 540-42 (statement of United States Chamber of Commerce).

239. Previous scholars have accepted this conception of employer and union as contending candidates. Julius Getman and his colleagues argued that the very fact that elections give employers an opportunity to campaign is a "powerful nonempirical argument supporting the preference for elections." GETMAN ET AL., *supra* note 6, at 136. This is because the "concept that each party should have a roughly equal opportunity to persuade the voters is fundamental to the democratic process." *Id.* Derek Bok, too, while acknowledging that "this principle is not expressly set forth in the statute," nevertheless found a requirement of fairness to both union and employer "central to the very idea of an election." Bok, *supra* note 6, at 53. But see Weiler, *supra* note 6, at 1813-16 (arguing that employers should have no right to campaign).

the tension between political freedom and economic inequality. The campaign rule also distilled the significance of speech to the balance of power in the workplace. Not only did the law governing the employer's role depart from early constructions of the Wagner Act, it also derived from a different reading of the power at stake in the employment relationship. The Wagner Act explicitly recognized the economic inequality of employers and the employed—as the Board held in *American Tube*, the law zealously guarded employees' rights on account of their "economic dependence."²⁴⁰ In the aftermath of the *Thomas* decision and the Taft-Hartley Act, however, solicitude for employers' equal right to speak freely displaced the notion that employer speech amounts to an exercise of economic authority. As the representation election assumed a cardinal position in labor law, political liberties overrode legal efforts to redress economic disenfranchisement. Industrial democracy had provided the legitimating metaphor for labor's new rights to representation, but that metaphor came full circle to justify employers' right to induce workers to refuse representation.

III. FREE SPEECH AND EMPLOYER AUTHORITY

Just ten months after the Taft-Hartley Act took effect, the Board confronted the task of guaranteeing employees' freedom to choose representatives while respecting employers' freedom of speech. In the 1948 case of *General Shoe Corp.*,²⁴¹ the Board invalidated a labor election on the grounds that the employer's campaign precluded employee free choice. A pivotal case, *General Shoe* generated a complex jurisprudence of objectionable campaign conduct, and its standards for measuring electoral misconduct still guide Board law today. In *General Shoe* the Board held that speech could be grounds for invalidating elections in representation cases even though, under the Taft-Hartley Act's free speech proviso, it could no longer be wholly barred as an unfair labor practice.²⁴²

General Shoe also stands as a landmark case in setting forth a new model of the labor election. In balancing employee rights to vote freely with employer rights to speak freely, the Board found the political model inapposite. The ruling relied

240. *American Tube Bending Co.*, 44 N.L.R.B. 121, 133 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

241. 77 N.L.R.B. 124 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

242. *Id.* at 126.

not on political metaphors but instead on scientific metaphors. It termed the labor election an "experiment" that should be conducted under "laboratory conditions" so as to gauge accurately employee desire.²⁴³ Imposing a standard of pristine fairness, the laboratory model dictated stringent regulation of campaigns, which was a procedure at odds with the rhetorical license permissible in political elections.²⁴⁴ In later decisions, however, the Board did not apply this model uniformly. Veering back and forth between metaphors of science and politics, the Board restricted employer speech in some cases while countenancing employer coercion in others. Nor was this the only inconsistency rooted in the Board's mixing of metaphors. In *General Shoe* the Board responded to the Taft-Hartley guarantee of free speech by erecting an alternative barrier against employer coercion. Yet the potent political image of employer and union as rival candidates thereafter led the Board to hold both parties to the strict scientific standard of the "laboratory."

A. A LABORATORY FOR DEMOCRACY

The election at issue in *General Shoe* occurred before the passage of the Taft-Hartley Act.²⁴⁵ The employer conducted a campaign through letters, pamphlets, and speeches that, in the Board's opinion, "undeniably were calculated to influence the rank-and-file employees in their choice of a bargaining representative."²⁴⁶ Supervisors visited workers at their homes "for the purpose of dissuading them from selecting the Union."²⁴⁷ On the eve of the election, the company's president had the employees brought to his office in small groups and read them an "intemperate anti-union address."²⁴⁸ In the spring of 1947 the trial examiner held that this "intensive anti-union campaign" was an unfair labor practice.²⁴⁹ After the Taft-Hartley Act

243. *Id.* at 127.

244. While campaign finance is regulated in political elections, the content and location of campaign speech remains unregulated. *See, e.g.,* Stephen D. Sencer, *Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises*, 90 MICH. L. REV. 428, 440-42 (1991) (discussing judicial reluctance to punish false campaign promises). For a discussion of regulation of campaign finance, see generally David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991).

245. 77 N.L.R.B. at 124.

246. *Id.* at 125.

247. *Id.*

248. *Id.* at 126-27.

249. *Id.* at 125.

took effect, however, the Board found itself "constrained" to disagree with the examiner.²⁵⁰

The Board held that Taft-Hartley's free speech proviso protected General Shoe's campaign but also found that the campaign provided grounds for setting aside the election. In so doing, the Board uncoupled the question of whether conduct was an unfair labor practice from the question of whether such conduct required the Board to overturn election results. The Taft-Hartley Act stipulated that speech was not, and could not be used as evidence of, an unfair labor practice.²⁵¹ In *General Shoe*, however, the Board held that the employer's conduct warranted overturning the election.²⁵² The Board noted that this remedy was extraordinary, and it acknowledged that it could not "police the details surrounding every election" and had, in the past, only "sparingly" exercised its power to order a new election.²⁵³ Yet the Board ruled that in the case of "excessive acts"—when the "record reveals conduct so glaring"—the election should be invalidated.²⁵⁴ Such glaring conduct, according to the Board, must imperil "employees' freedom of choice,"²⁵⁵ and in *General Shoe* it found this point had been reached. Although lawful under the Taft-Hartley free speech proviso, the employer's campaign "created an atmosphere calculated to prevent a free and untrammelled choice by the employees."²⁵⁶

In *General Shoe* the Board not only created a new category of offense in order to escape the literal reach of Taft-Hartley's free speech proviso, it also broached a new theory of the union election. In *American Tube* and many other early Board cases, the Board had simply barred employer campaigns as unfair labor practices—illegal intrusions into elections in which employers had no protected interest. This approach was no longer available after the Taft-Hartley Act, which codified the political model of employer and union as rival candidates. The Board therefore formulated an alternative model, founded on the premise that "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and

250. *Id.*

251. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(c), 61 Stat. 136, 142 (1947) (current version at 29 U.S.C. § 158(c) (1988)).

252. 77 N.L.R.B. at 126.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

untrammelled choice for or against a bargaining representative."²⁵⁷ From this premise, which focused on the conditions requisite to employee freedom, the Board went on to deduce a scientific theory of the election:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.²⁵⁸

The laboratory metaphor drew on the notion of the union election as a form of fact-finding that had figured as a minor theme in congressional debates in 1935 and 1939.²⁵⁹ The theory of the election as an experiment conformed with its function as evidence within a trial-type proceeding. An appeal can be taken from a trial judgment and, if the judgment resulted from inadmissible evidence or was otherwise tainted, the case can be remanded for retrial. Likewise, a contaminated experiment can be rerun.

The sterile, scientific model of the union election put forward in *General Shoe*, however, was strikingly inconsistent with the vital, contentious world of democratic politics. In fact, in a later ruling the Board explicitly acknowledged that in order to insure employees' free exercise of the franchise, it had adopted "safeguards more rigorous than those applied in the arena of democratic procedures which lie at the very heart of our form of government."²⁶⁰ The model of a laboratory where the "atmosphere" can be regulated, "surrounding conditions" controlled, questions of "degree" examined, variables isolated,

257. *Id.*

258. *Id.* at 127 (footnote omitted). The Board asserted that the uncoupling of the standard of objectionable conduct from the definition of unfair labor practices was not an innovation, citing cases in which it had held union conduct objectionable despite the absence of union unfair labor practices in the law prior to the Taft-Hartley Act. *Id.* at 127 n.10. The standard applied in these earlier cases, however, was markedly different from laboratory conditions. Just three years before *General Shoe*, the Board had declared, "[a]bsent violence, we have never undertaken to police union organizations or union campaigns." *Maywood Hosiery Mills, Inc.*, 64 N.L.R.B. 146, 150 (1945); cf. *National Tea Co.*, 41 N.L.R.B. 774, 779 (1942) (overturning election because of violence).

259. See *supra* notes 163-64 and accompanying text.

260. *Modine Mfg. Co.*, 203 N.L.R.B. 527, 530 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974).

and improper influences removed²⁶¹ hardly describes the format of a political campaign. Nor are the "uninhibited desires" of voters a fixed substance that can be distilled through repeated trials. The laboratory metaphor and its remedial correlate, the rerun election, challenge the ideal of popular sovereignty intrinsic to representative democracy.

In *General Shoe*, moreover, the Board did not specify exactly what influences would contaminate union elections. It neither held that all employer campaign speech warranted upsetting election results nor stated that only employers could pollute the election experiment. Rather, in finding evidence of inordinate employer influence, the Board spoke of "the rare extreme case."²⁶² It dismissed *American Tube* as a precedent, distinguishing the speech at issue in the two cases. The Board stated that the conduct in *General Shoe* was more offensive, involving "no mere campaign speech" of the type at stake in *American Tube*.²⁶³ According to the Board, the speech went "so far beyond the presently accepted custom of campaigns directed at employees' reasoning facilities . . . that the election results could not be taken to represent the employees' own true wishes."²⁶⁴

What distinguished the speech in *General Shoe* was neither its content nor that it was uttered by the company president. Rather, the Board differentiated between lawful employer campaigning and unlawful interference with employee freedom of choice by focusing on the site of the employer's expressive activity. The question "of degree" concerning the "requisite laboratory conditions" ultimately reduced to a question of place.²⁶⁵ The Board drew a line around those places where employer speech constituted an inherent exercise of authority over employees, ruling that speech in those sites invalidated elections. In *General Shoe* the Board identified as the "extreme" conduct requiring a new election both the dispatch of foremen to "propagandize employees in their homes" and the giving of speeches to small groups of employees in the office of the company president.²⁶⁶ The Board justified the line around the president's office by reasoning that it was "the very room which each employee must have regarded as the locus of final

261. *General Shoe*, 77 N.L.R.B. at 126-27.

262. *Id.* at 127.

263. *Id.* at 126.

264. *Id.* at 127.

265. *See id.* at 126-27.

266. *Id.*

authority in the plant.”²⁶⁷ Thus, in striking a balance between employers’ liberty to speak and employees’ free exercise of the franchise, the Board adopted a spatial rule. Yet the Board did not explain why the line should encompass employee homes.

B. THE LOCUS OF AUTHORITY

The Board’s decision in *General Shoe* generated a complex and contradictory body of doctrine. The decision itself drew immediate criticism from the Special Joint Congressional Committee on Labor-Management Relations, which proposed an amendment that would have overturned *General Shoe* by stipulating that the Taft-Hartley free speech proviso extended not only to unfair labor practice cases but also to representation cases.²⁶⁸ The amendment was not adopted. Nonetheless, in *General Shoe* and subsequent rulings in representation cases, the Board gave scrupulous consideration to employers’ freedom of speech.²⁶⁹ In fact, apart from prohibiting threats and promises, which were specifically exempt from the free speech proviso, the Board turned away from the task of regulating the content of employers’ campaign speech and increasingly focused on its location.²⁷⁰ As one member observed, the Board had shifted by the late 1940s from “an exclusive concern with *what* was said by employers to employees, to the issues involved in *how* and *where* such speeches were given.”²⁷¹ After

267. *Id.*

268. *Joint Comm. on Labor-Management Relations*, S. REP. NO. 986, 80th Cong., 2d Sess., pt. 3, 6-7, 54-55 (1948). The Joint Committee was established by the Taft-Hartley Act, ch. 120, sec. 401, 61 Stat. 136, 160 (1947). The Senate’s 1978 reform bill contained a similar provision. *See* S. 2467, 95th Cong., 2d Sess. § 6 (1978).

269. For example, in *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962), the Board reaffirmed its holding that the free speech proviso did not apply in representation cases, but noted, “[t]he strictures of the first amendment, to be sure, must be considered in all cases.” *Id.* at 1787 n.11.

270. The Board continued to prohibit threats and promises as allowed by the free speech proviso. *See, e.g.*, *Playskool Mfg. Co.*, 140 N.L.R.B. 1417, 1419 (1963) (threats); *Wagner Elec. Corp.*, 167 N.L.R.B. 532, 533 (1967) (promises); *see also WILLIAMS, supra* note 91, at 151-90 (discussing cases involving employer threats), 130-46 (discussing cases involving employer promises). It also began to restrict both employer and union misrepresentation, *see, e.g.*, *Hollywood Ceramics Co., Inc.*, 140 N.L.R.B. 221, 226 (1962), and racially inflammatory speech, *see, e.g.*, *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 72 (1962); *see also WILLIAMS, supra* note 91, at 25-66 (discussing cases involving misrepresentation), 97-108 (discussing cases involving appeals to racial prejudice).

271. *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 412 (1953) (Member Murdock, dissenting in part). Murdock actually stated that this shift began the year before Congress passed the Taft-Hartley Act in *Clark Bros.*, 70 N.L.R.B.

the Taft-Hartley Act was passed, the Board sought to delimit the places and circumstances conducive to equality between employer and employee, and to distinguish them from those in which the employer's authority precluded free discussion of the representation question. But that scheme of categorization has produced blatantly contradictory and incoherent rulings. Unable to define clearly the locus of authority, the Board sharply and arbitrarily restricted employer campaigning while simultaneously allowing coercive forms of employer speech outside of the proscribed sites.

The tensions in the Board's approach were conspicuous even in *General Shoe*. In finding that the office of the company president constituted the "locus of final authority" and that speech uttered there constituted objectional conduct,²⁷² the Board did not state whether employer authority could pervade other company sites. Nor did it state how the rule applied if the layout of a workplace did not so neatly match its chain of command. Moreover, while presupposing that speech in the "locus of final authority" starkly emphasized employer economic authority, the Board also found objectionable the dispatch of foremen to "propagandize" against the union at employee homes.²⁷³ In a single case, then, the Board held that employer speech is coercive both in the site most closely identified with and tightly controlled by the employer—the locus of final authority—and in the site seemingly most remote from the locus of final authority and most closely identified with and tightly controlled by employees—their homes.

After *General Shoe*, the Board could not stably fix the "locus of final authority." Seeking to equate employer authority with a particular location, the Board wandered throughout the workplace. In the 1957 case of *People's Drug Stores, Inc.*, the Board found objectionable the employer's interviews of employees in the backrooms and basements of its stores.²⁷⁴ The Board acknowledged that there was nothing physically distinctive or socially symbolic about these places. Still, it reasoned, "[t]he very fact that employees were summoned by management representatives to a place, removed from their work stations, which has been selected for that purpose by management rep-

802 (1946) (discussed *supra* at text accompanying notes 211-14). 107 N.L.R.B. at 412.

272. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

273. *Id.* at 127.

274. 119 N.L.R.B. 634, 636 (1957).

representatives imparts to the place selected its character as 'the locus of final authority in the plant.'"²⁷⁵ Dissenting, one Board Member accused his colleagues of detaching the restriction from its original physical moorings, creating "a roving situs" for 'the locus of final authority.'"²⁷⁶ That was exactly what the Board had done.

In *People's Drug* the Board tacitly recognized that employer authority is not confined to any particular space in many plants and offices. Thus, the Board tried to define the locus of final authority in more abstract terms by deciphering the social meaning of various sites in the workplace. Territory familiar to employees or where they were gathered as a group, the Board reasoned, should not be cordoned off against employer speech.²⁷⁷ If the employer addresses employees "in open areas of the plant, where they are not unaccustomed to find themselves," the Board held in a case decided the year after *People's Drug*, the speech is likely to result in "free and open discussion with both management and employees enjoying the confidences and assurances which are normal aspects of collective and group activities."²⁷⁸ The Board explained that "a critical element underlying" the locus doctrine was the "isolation" of small groups of employees from their workmates.²⁷⁹ In part, this rationale served to reconcile the seemingly conflicting prohibitions of employer speech both in the locus of final authority and in employee homes. According to the Board, employer speech is coercive if addressed to isolated employees, even in their own homes, while speech to large groups, even in sites closely identified with management, is not.²⁸⁰ Yet the element of unfamiliarity in the locus doctrine remained discordant with the ban on home visits.

The Board's emphasis on employee unfamiliarity with the

275. *Id.*; see also *National Caterers of Virginia, Inc.*, 125 N.L.R.B. 110, 112 (1959) ("The unusual act of setting up two chairs in a corner of the storeroom which also contained the manager's desks . . . reasonably led employees to believe that the location was a locus of managerial authority.").

276. 119 N.L.R.B. at 642 (Member Jenkins, dissenting). For a case involving a truly "roving" locus, see *Phelps Dodge Corp.*, 177 N.L.R.B. 531, 533 (1969) (finding supervisor's truck to be locus of final authority).

277. 119 N.L.R.B. at 636.

278. *Mead-Atlanta Paper Co.*, 120 N.L.R.B. 832, 834 (1958), *enforced*, 268 F.2d 938 (10th Cir. 1959).

279. *Id.*

280. *Tuttle & Kift, Div. of Ferro Corp.*, 122 N.L.R.B. 848, 849 (1959). The Board has cited isolation as a rationale for the ban on home visits. See *Peoria Plastic Co.*, 117 N.L.R.B. 545, 547 (1957).

site finally severed the locus doctrine from the original concern with employer authority. In the 1974 case of *NVF Co.*,²⁸¹ the Board elaborated that strand of the doctrine that had first been articulated in *People's Drug*. In *NVF*, the employer's general manager called nearly every eligible voter into his office in groups of five to six to solicit their "no union" vote.²⁸² The Board's Regional Director overturned the election on this ground, but the Board reversed.²⁸³ Although the speech took place in the general manager's office, the Board reasoned that "the employees were *familiar* with this office since they had occasion to visit it to obtain loans from, or discuss grievance matters with, the general manager."²⁸⁴ The site "thus had no special impact of awe upon the employees," the Board flatly concluded.²⁸⁵ In other words, precisely because the employer exercised its economic prerogatives in the office, ruling on workplace disputes and dispensing financial favors there, employees were accustomed to the site, and it therefore was not the locus of final authority. By the Board's reasoning, familiarity might not breed outright contempt, but at least it counteracted employee "awe" of authority.

NVF not only extended the rule of unfamiliarity so as to undermine the original rationale for the locus doctrine; it also drastically narrowed the concept of isolation. *NVF* thereby contradicted the Board's holding in *General Shoe* that speeches delivered to groups of twenty to twenty-five employees were objectionable.²⁸⁶ In *NVF* the Board held that employees "were not singled out" because they were addressed in "groups of five or six."²⁸⁷ In view of the "size of the groups," the Board concluded, "there is no reason to believe that the individual employee considered that he was singled out by the Employer for special attention and thus for special pressure."²⁸⁸ Apparently, the Board barred only utter isolation of individual employees in

281. 210 N.L.R.B. 663 (1974).

282. *Id.* at 663.

283. *Id.*

284. *Id.* at 664 (emphasis added).

285. *Id.*; see also *Crane Carrier Co.*, 122 N.L.R.B. 206, 207 (1958) (holding that a conference room was not a locus of authority because employees met there with the company president to discuss "production and personnel problems").

286. *General Shoe Corp.*, 77 N.L.R.B. 124, 126-27 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

287. 210 N.L.R.B. at 664.

288. *Id.*

the locus of final authority.²⁸⁹

Two decades before *NVF*, however, the Board had developed a separate line of precedent founded on exactly the converse of the proposition that employer authority is most palpable when employees are isolated from one another, and that it is diluted among large groups of employees. In the 1953 case of *Peerless Plywood Co.*, the employer assembled all of its employees the afternoon before an election to hear an anti-union speech by the secretary-treasurer of the company.²⁹⁰ The Board invalidated the election. Based on "experience with conducting representation elections," the Board held that such "last-minute speeches" delivered to "massed assemblies of employees" had an "unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect."²⁹¹

In *Peerless Plywood* the Board announced a prohibition of "election speeches on company time to *massed assemblies* of employees" within the twenty-four hours preceding an election.²⁹² The rule still stands today. Under this rule, employers do not engage in objectionable conduct simply by campaigning within the last twenty-four hours before an election. Company officials may even systematically address every employee individually within the twenty-four hour period.²⁹³ Rather, to run afoul of the rule, employers must address a "massed assembly[y]." ²⁹⁴ In *Peerless Plywood*, the Board found the employer's speech coercive because of the "mass psychology" of the group, in contrast to the danger of isolation underlying the locus of final authority and home visit decisions.²⁹⁵ In *General Shoe* and its progeny, the Board has created a jumble of inconsistent and nonsensical rules, relying on rationales running

289. Even utter isolation was not enough in *Flex Prods., Inc.*, 280 N.L.R.B. 1117 (1986). In that case, the company president individually called 120 of the 164 employees into the plant manager's office. The Board nonetheless found that there was no evidence "that the employees were being singled out for special pressure" because they knew that the president was meeting "with virtually every employee." *Id.* at 1118.

290. 107 N.L.R.B. 427, 428 (1953).

291. *Id.* at 429.

292. *Id.* (emphasis added). It is notable that in the political context, the Supreme Court has struck down restrictions on campaigning on election day. See *Mills v. Alabama*, 384 U.S. 214, 220 (1966) (striking down ban on election-day editorial endorsements).

293. *Associated Milk Prods., Inc.*, 237 N.L.R.B. 879, 879 (1978).

294. *Peerless Plywood Co.*, 107 N.L.R.B. at 429.

295. *Id.*

from the symbolic meaning of place, through group dynamics, to mass psychology.

The unintelligibility of Board jurisprudence on employer influence is most striking in its rulings on the question of "captive audience" speeches. Since *General Shoe*, the Board has continued to overturn elections based solely on employer speech if the speech is uttered under conditions that highlight the employer's economic authority.²⁹⁶ Meanwhile, however, the Board has also held that the free speech proviso protects employers' flagrant use of economic power to insure an audience for their speech and to prevent the audience from responding.²⁹⁷ Although the Board in *Peerless Plywood* forbade employers from delivering speeches to massed assemblies of employees on company time during the twenty-four hours preceding an election, it left employers free to make such "captive audience" speeches before the twenty-four hour period and even during the insulated period so long as the speeches are not given to large groups of employees.

Prior to the Taft-Hartley Act, the Board ruled that captive audience speeches were unlawful. In the 1946 case of *Clark Bros. Co.*, the Board found that an hour before the polls opened, the employer shut down the power and engines in its plant, all operations were suspended, and the foremen directed the employees to listen to "anti-CIO campaign speeches . . . broadcast throughout the entire plant."²⁹⁸ In effect, the Board held, employees were compelled to listen to the speeches because their employer "controlled the manner in which the employees occupy their time."²⁹⁹ Only by leaving the plant could employees have escaped the speeches, which they were "not at liberty to do during working hours."³⁰⁰ Therefore, employees were not "free to determine whether or not to receive" the employer's "aid, advice, and information."³⁰¹ By wielding its "economic power" to hold an employee audience captive, the Board ruled, the employer committed an unfair labor practice.³⁰²

In *Clark Bros.*, the Board was careful to spell out that it was not restricting the "expressions of opinions," but only the

296. See *supra* notes 274-92 and accompanying text.

297. See *infra* notes 308-25 and accompanying text.

298. 70 N.L.R.B. 802, 804 (1946), *enforced as modified*, 163 F.2d 373 (2d Cir. 1947).

299. *Id.*

300. *Id.*

301. *Id.* at 805.

302. *Id.*

compulsion to listen involved in captive audience speeches.³⁰³ The compulsion was not "an inseparable part of the speech," the Board held.³⁰⁴ For an employer to hold captive an audience of employees was as much an illegal use of force as "the act of a speaker in holding physically the person whom he addresses in order to assure his attention."³⁰⁵ The Board concluded that the "law may and does prevent such a use of force without denying the right to speak."³⁰⁶ Distinguishing between exercise of "superior economic power" and liberty of speech, the Board found that the employer was "coercing its employees to listen."³⁰⁷

Since the Taft-Hartley Act, however, the Board has refused to separate the compulsion to listen from the freedom to speak.³⁰⁸ Only two years after *Clark Bros.*, the Board approved employers' use of captive audience speeches.³⁰⁹ Construing the free speech proviso, the Board stated explicitly that its "language . . . and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists."³¹⁰ In *General Shoe* the Board recognized that the free speech proviso was on its face limited to unfair labor practice cases. Nevertheless, since the Taft-Hartley Act was passed, the Board has not granted the alternative remedy of overturning elections solely on the basis of employer captive audience speeches.³¹¹ By 1975,

303. *Id.* at 806.

304. *Id.* at 805.

305. *Id.*

306. *Id.*

307. *Id.*

308. The Senate Report on the Taft-Hartley Act specifically disapproved of *Clark Bros.*, but it stated that the case stood for the proposition that employer speech was unlawful merely because it took place "in the plant on working time." S. REP. NO. 105, *supra* note 234, at 23, reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 407, 429. At least one witness called for "[e]xpress repudiation" of the captive audience doctrine. *Labor Relations Program: Hearings on S. 55 Before the Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 4, 2139 (1947) [hereinafter 1947 Senate Hearings] (statement of Earl Carroll Theater-Restaurant).

309. *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

310. *Id.*

311. See, e.g., *S & S Corrugated Papers Mach. Co.*, 89 N.L.R.B. 1363, 1364 (1950). In *S & S Corrugated*, the Board concluded that, under *Babcock*, employer captive audience speeches alone could not form the basis for a finding that the employer had interfered with its employees' free choice of representation. *Id.* The Board later limited the holding of *S & S Corrugated* when it overturned an election prior to which a retail employer had promulgated a broad, privileged no-solicitation rule and then delivered a captive audience speech within a few days of the election. See *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 611-13, 614 n.12 (1951) ("To the extent that our decision herein may be deemed inconsistent with the Board's decision in *S & S Corrugated* . . . , that

even a liberal Board member declared that he had "no quarrel with the view that the Act does not preclude an employer from calling his employees together as a 'captive audience' to hear his anti-union views."³¹²

Although the Board ratified captive audience speeches on account of the free speech proviso, such conduct involves an element of coercion easily distinguishable from expression. The captive audience speech is diametrically opposed to the "free and open discussion"³¹³ the Board professes to promote. For unlike voters at a political rally, employees can neither freely decide whether to attend such meetings nor exit if they dislike what is being said. As a union witness explained to Congress in 1947, "addressing captive workers over plant loud-speaker systems during compensable working hours is a form of free speech, not enjoyed by a Senator seeking to influence a majority of his constituents in a pending election. A Senator can only hope that his auditors will not turn the dial."³¹⁴ The Board even upheld the discharge of an employee who discretely left a captive audience meeting, affirming a trial examiner's holding that workers have "no statutorily protected right to leave a meeting which the employees were *required* by management to attend on company time and property to listen to management's *noncoercive* antiunion speech designed to influence the outcome of a union election."³¹⁵ By focusing exclusively on the speech, the Board blinked at the fact that the discharge was an exercise of economic power punishing the employee who dared not to listen to anti-union speech.

Furthermore, while the Board has barred employers from campaigning in the "locus of final authority," holding that the very site inhibits free discussion, it has nonetheless affirmed employers' power to stifle such discussion in captive audience

decision is overruled, but *Babcock & Wilcox* is adhered to."'). The decision in *Bonwit* was consistent with *S & S Corrugated* to the extent that each case recognized the employer's right to give captive audience speeches. As the Board stressed in *Bonwit*, it did not proscribe such speeches, but rather the employer's discriminatory application of a no-solicitation rule against the union. *Id.* at 614-15.

312. J.P. Stevens & Co., 219 N.L.R.B. 850, 854 (1975) (Member Fanning, concurring in part and dissenting in part), *enforced*, 547 F.2d 792 (4th Cir. 1976).

313. Mead-Atlanta Paper Co., 120 N.L.R.B. 832, 834 (1958) (explaining the locus of authority doctrine).

314. 1947 Senate Hearings, *supra* note 308, pt. 3, at 1270 (statement of George Q. Lynch, Pattern Makers League of North America).

315. Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968) (emphasis added).

meetings. According to the Board, it is lawful for employers deliberately to exclude union supporters from captive audience meetings. In the 1970 case of *Luxuray of New York*, a women's apparel manufacturer directed its supervisors to send all employees to a series of campaign meetings, but to keep at work the union's organizing committee and a few other employees suspected of being pronoun.³¹⁶ The trial examiner conceded that through this tactic the employer "did its best to inhibit the free play of discussion."³¹⁷ Yet the examiner found the exclusion lawful, and the Board upheld his finding.³¹⁸

If employers allow union supporters to attend compulsory campaign meetings, they can still silence them by prohibiting all employee discussion. The Board has ruled that an employer may "attempt to further its antiunion campaign by conducting a captive audience meeting and by declaring that no questions would be answered in the course thereof."³¹⁹ Similarly, once a meeting is in progress, an employer may remove an employee who persists in trying to ask a question despite instructions that no questions would be fielded. In a 1967 captive audience case, the Board unequivocally declared that an employer has "no statutory obligation to accord the employees the opportunity to speak."³²⁰ In fact, although employers cannot lawfully fire employees who speak out spontaneously during a captive audience meeting,³²¹ they may lawfully fire employees who evince a concerted plan to voice union support.³²² As the Eighth Circuit Court of Appeals declared in reversing the Board's decision to reinstate an employee who had the "temerity to ask questions"³²³ at a captive audience meeting, it is not a forum in which "'employees must be placed in the status of equals in dealing with management.'"³²⁴ The Board has spun an intricate web of rules in its attempt to delineate the places and cir-

316. 185 N.L.R.B. 100, 101 (1970), *enforced in part*, 447 F.2d 112 (2d Cir. 1971).

317. *Id.* at 103.

318. *Id.* at 100 n.1.

319. F.W. Woolworth Co., 251 N.L.R.B. 1111, 1113 (1980), *enforced*, 655 F.2d 151 (8th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

320. Hicks-Ponder Co., 168 N.L.R.B. 806, 814 (1967).

321. Prescott Indus. Prod. Co., 205 N.L.R.B. 51, 51 (1973), *enforced in part*, 500 F.2d 6 (8th Cir. 1974).

322. J.P. Stevens & Co., Inc., 219 N.L.R.B. 850, 850 (1975).

323. *Id.* at 851 (Member Fanning, concurring in part and dissenting in part).

324. NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 11 (8th Cir. 1974) (quoting NLRB v. Red Top, Inc., 455 F.2d 721, 728 (8th Cir. 1972)).

cumstances in the workplace that inhibit "free and open discussion" of the union question. Since the Taft-Hartley Act, however, the Board has disregarded employers' use of their material power to force employees to listen to anti-union speech, a discussion scarcely free or open.³²⁵

C. THE WORKPLACE AS POLITICAL SPACE

Not only in captive audience meetings, but throughout the workplace, the Board has affirmed the power of employers to suppress speech and discussion. The realities of employer authority and employee dependence, so obvious in the captive audience meeting, exist during the entire work day and in every site at the workplace. As the Board observed about the employment relation, employers have the "ability to control [employee] actions during working hours."³²⁶ Any time, then, that employers campaign during work time, they necessarily use their "control" to influence the outcome of union elections. Dependent on their jobs, employees are no more free to leave the work site to avoid employer speech than they are to depart from a captive audience meeting. In either case they are subject to discharge or at least a loss of pay. As Chief Justice Earl Warren declared, "Employees during working hours are the classic captive audience."³²⁷ Although the Board has recognized the workplace as a "privileged and effective forum,"³²⁸ it has failed to define the entire workplace a locus of authority. Nor has the Board given employers and unions equal rights to campaign in the workplace: It allows employers not just to campaign but to prevent unions from doing so.

In *Republic Aviation v. NLRB*,³²⁹ the Supreme Court affirmed the significance of the workplace as political space. The Court upheld Board rulings that barred most employers from prohibiting both employee discussion of union representation during breaks and distribution of union literature during non-work time in nonwork areas of plants and offices.³³⁰ The Board

325. One study of over 200 elections found that employers used captive audience speeches in 67% of the elections. JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES* 145 (1990).

326. *Clark Bros. Co.*, 70 N.L.R.B. 802, 805 (1946), *enforced as modified*, 163 F.2d 373 (2d Cir. 1947).

327. *NLRB v. United Steelworkers of America*, 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part).

328. *Metropolitan Auto Parts, Inc.*, 102 N.L.R.B. 1634, 1635 (1953).

329. 324 U.S. 793 (1945).

330. *Id.* at 805.

has held, however, that employers may lawfully prohibit employees both from campaigning for unions during work time and from distributing union literature in work sites.³³¹ It is even lawful for some employers, such as retail stores and hospitals, to prevent employees from campaigning during their own time if they are in areas open to the public.³³² Conversely, employers are free to interrupt production and address employees on the union question anywhere in the workplace.³³³

The disparity between rights to speak for and against union representation extends still further. The Supreme Court has allowed almost all employers to bar union organizers from the workplace,³³⁴ a rule Justice Clarence Thomas recently reaffirmed in his first opinion for the Court.³³⁵ In all but the most remote sites, such as logging camps, mines, and mountain resort hotels, Justice Thomas held, "an employer may validly post his property against nonemployee distribution of union literature."³³⁶ According to the Board, in controlling workplace access, employers may not discriminate against unions among other outside solicitors. If they permit charitable solicitation, for example, they also must also permit union solicitation.³³⁷ Similarly, they may not permit employees to distribute anti-union literature but not pro-union literature.³³⁸ Employers, however, are fully at liberty to conduct their own campaign in

331. *E.g.*, Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 621 (1962) (upholding ban on employee distribution of literature in work areas); Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943) (upholding ban on employee campaigning during work time), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944). This line of cases is discussed in William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964).

332. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 495 (1978) (agreeing with Board that solicitation may be banned in "immediate patient care areas," but disagreeing on the definition of such areas); Goldblatt Bros., 77 N.L.R.B. 1262, 1263 (1948) (holding that solicitations may be banned on a retail store's sales floor).

333. *See supra* notes 308-15 and accompanying text (discussing NLRB approval of employer captive audience meetings).

334. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (holding that an employer may prohibit nonemployees from distributing literature on company property when there exist reasonably available alternate channels of communication).

335. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992).

336. *Id.* at 848.

337. *See, e.g.*, Friendly Ice Cream Corp., 254 N.L.R.B. 1206, 1207 (1981), *enforcement denied*, 677 F.2d 170 (1st Cir. 1982).

338. *See, e.g.*, Columbus Mills, Inc., 303 N.L.R.B. No. 31, slip op. at 1 (May 31, 1991).

the workplace, while excluding all others—unions not excepted.

If employers use the workplace to campaign, however, they falsify any claim that a neutral purpose underlies the exclusion of union campaigns. The Court of Appeals for the District of Columbia recognized this in a ruling that the Supreme Court would later strike down. The court of appeals reasoned that the employer, having distributed "certain amounts of literature at certain places at certain times," could not simultaneously claim that union distribution "of the same quantity of literature at the same places and at the same times would be disruptive of order or cleanliness . . . [or otherwise] a detriment to his operation."³³⁹ For a fleeting moment in 1953, the Board did outlaw this discriminatory conduct. In *Metropolitan Auto Parts, Inc.*, the Board recognized the employer's right to seal the workplace against all campaigning, but it held that if an employer "chooses to enter the representation campaign and utilizes company time and property to present his views, he uses a 'privileged and effective forum' which he may not in fairness refuse to the opposition."³⁴⁰ Only nine months later, however, in *Livingston Shirt Corp.*, the Board reversed course.³⁴¹

In *Livingston* the Board conceived of the employer's use of the workplace to campaign, together with its exclusion of unions, as an exercise of the right to free speech.³⁴² Thus, the Board held that a rule requiring union access to company property attached a penalty on the exercise of a right. The requirement of access was tantamount to a fine, an "obligation" imposed on the employer to "donate his premises and working time to the union for the purpose of propagandizing the em-

339. *United Steelworkers v. NLRB*, 243 F.2d 593, 599 (D.C. Cir. 1956), *aff'd in part, rev'd in part*, 357 U.S. 357 (1958).

340. 102 N.L.R.B. 1634, 1635 (1953). This rule was suggested by the Second Circuit's opinion in *NLRB v. Clark Bros. Co.*, 163 F.2d 373 (2d Cir. 1947). The Board earlier had required union access only when an employer promulgated a broad, privileged no-solicitation rule (for example, in a department store) and delivered captive audience speeches. *See, e.g., Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 611-13 (1951).

341. *See* 107 N.L.R.B. 400 (1953).

342. *Id.* at 404-06. In this context, as in the regulation of captive audience meetings under *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953), the Board has undermined its own absolutist free speech position by continuing to require union access when an employer both promulgates a broad, privileged no-solicitation rule—of the type allowed in retail stores and hospitals—and uses company time to campaign against the union. *See May Dept Stores Co.*, 136 N.L.R.B. 797, 800-02 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963). The Board first approved of this exception in *Livingston*, 107 N.L.R.B. at 409.

ployees.”³⁴³ The Board found no evidence of unlawful discrimination in the fact that the employer exercised its right to speak while barring the union from speaking. Instead, the Board concluded just the opposite. It found that the workplace was the employer’s “natural forum,” just as the union hall was the “inviolable forum for the union to assemble and address employees,”³⁴⁴ and it denied any “distinction in principle” between granting union access to the workplace and “admitting an employer to the union hall for the purpose of making an antiunion speech.”³⁴⁵ Two years later, the Board reasoned that “management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself.”³⁴⁶ Under Board doctrine, then, it is unlawful for an employer to discriminate between a party and a nonparty to a union election. Yet the employer may lawfully discriminate in a much more invidious manner—between parties—by freely using the workplace to campaign while barring the union.

In *NLRB v. United Steelworkers of America*, the Supreme Court affirmed this doctrine.³⁴⁷ In that case, company supervisors distributed literature that was “anti-union in tenor” while “all employees—whether they [were] for or against the union” were forbidden from distributing literature.³⁴⁸ The Court rejected the notion that in entering a campaign the employer incurs an obligation not to exploit its authority over the workplace. Rather, the Court held that the Board could mandate equal access to the workplace only upon evidence that exclusion “truly diminished” the union’s ability to get its “messages to the employees.”³⁴⁹ Since this decision, the Board has not accepted the invitation to prove in particular unfair labor practice cases that without equal access to the workplace

343. *Livingston*, 107 N.L.R.B. at 406.

344. *Id.*

345. *Id.* at 407. During the 1977 House debates over the labor law reform bill that included a guarantee of equal access to the workplace, an amendment was introduced to “balance” the guarantee by also granting employers access to union property. See Nash, *supra* note 92, at 74, 80 n.27. The Senate reform bill actually contained such a “balanced” access provision. S. REP. NO. 628, *supra* note 105, at 23, 47.

346. *Nutone, Inc.*, 112 N.L.R.B. 1153, 1154 (1955), *enforced as modified sub nom. United Steelworkers of America v. NLRB*, 243 F.2d 593 (D.C. Cir. 1956), *aff’d in part, rev’d in part*, 357 U.S. 357 (1958).

347. 357 U.S. 357, 363 (1958).

348. *Id.* at 359.

349. *Id.* at 363. The Court also rejected the claim for equal access because the pro-union employees had not requested an exception to the solicitation rule. *Id.*

unions cannot compete equally with employers in election campaigns.³⁵⁰ In deciding representation cases in which the free speech proviso by its express terms does not apply, the Board has not departed from the rule established by *Livingston* and *Steelworkers*. To the contrary, the Board continues to allow employers to exempt themselves from restrictions on campaigning in the workplace.

On the Board itself, however, dissenting opinions have been voiced. As one Board member pointed out in *Livingston*, the central issue that employer workplace campaigning raises is not one of speech or discrimination, but rather one of authority.³⁵¹ In other words, the wrong at issue is interference with employees' right not to listen to employer campaign rhetoric. Finding that the employer's campaign in the factory deployed the "economic power inherent in his control of his employees at the situs of their employment," the *Livingston* dissent construed the requirement of equal access to be "in the nature of requital."³⁵² The dissent viewed the entire workplace as a locus of authority and would have subjected employer speech at the "situs of employment" to the same restrictions that employers apply to union speech.³⁵³ Such a rule would have neutralized one facet of employer influence owing to their superior economic power.

The weight of employer authority in the workplace is augmented by the Board's practice of holding union elections

350. In *General Electric Co.*, 156 N.L.R.B. 1247, 1251 (1966), the Board indicated that it would "defer any reconsideration" of the question until it had evaluated the effects of its new rule, set forth in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239 (1966), that required employers to provide unions with a list of employees' home addresses within seven days after the Board directed an election. The Board, however, has never reconsidered the issue. This is true even though empirical evidence suggests that denying access truly diminishes unions' ability to communicate with workers. In their study of 31 elections, Getman and his colleagues found that 83% of the employees attended at least one company meeting while only 36% attended at least one union meeting. GETMAN ET AL., *supra* note 6, at 92. More importantly, very few employees who did not already intend to vote for a union attended its meetings while nearly the same percentage of union supporters and opponents appeared at company meetings. *Id.* Finally, undecided voters who eventually voted for the union, and those initially opposed to it who switched their sentiments, were more likely to have attended union meetings and to be more familiar with the union's campaign than undecided voters and company supporters who eventually voted against the union. *Id.* at 103-04.

351. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 421 (1953) (Member Murdoch, dissenting).

352. *Id.*

353. *Id.* at 420-21.

there. Currently, the Board instructs its agents that the "best place to hold an election" is the worksite and, further, that absent "good cause to the contrary" the election must be held there.³⁵⁴ The Board's Chairman reported to Congress in 1977 that elections conducted elsewhere are "a rarity."³⁵⁵

Substantial advantages accrue to the employer when the workplace is the election site. Unions and employers do not have equal access to the area proximate to the polling place. Even though the workplace is generally the only place where all employees gather and even though working conditions are ultimately at stake in the election, if the polling takes place at work, the employer may lawfully keep the union at a distance from the balloting. In fact, refusal by union organizers to leave the workplace during an election is grounds for overturning the results.³⁵⁶ The practical effect is that employers can campaign among employees on election day, and even during the polling, but unions cannot.

The advantage to employers surpasses having the last word. Because voting usually occurs on company time and company property, employees cast their votes when they are being paid by and are under the control of the employer, who may lawfully monitor their movements as they enter and exit the polls.³⁵⁷ Just recently, the Board upheld an election where one company supervisor checked off the names of employees on a list as they entered the employer's van to ride to the polls,

354. NLRB, *supra* note 91, § 11302.2.

355. 1977 *House Hearings*, *supra* note 106, pt. 1, at 411 (responses of John H. Fanning, Chairman, NLRB, to inquiries). The Treasurer of the Chamber of Commerce testified during the 1977 hearings that he was aware of only one election which had been held away from employers' property. 1977 *Senate Hearings*, *supra* note 167, pt. 1, at 990 (statement of Robert T. Thompson, Chairman, National Chamber of Commerce).

356. Phillips Chrysler Plymouth, Inc., 304 N.L.R.B. No. 7, slip op. at 3 (Aug. 12, 1991). The Board reasoned that such a challenge to "the Employer's assertion of its property rights" would not be lost on employees as they vote. *Id.* at 3.

357. Even if employees are on leave or on their day off on the day of the election, employers are permitted to pay them for the time they spend coming to work to cast their ballot. *See, e.g.,* Red Lion, 301 N.L.R.B. No. 7, slip op. at 2 (Jan. 9, 1991); *see also* Young Men's Christian Ass'n, 286 N.L.R.B. 1052, 1052 (1987) (holding that employer could provide expenses incurred in voting). Such payments were cited as evidence of employer domination in testimony concerning company unions given during the hearings on the Wagner Act. 1934 *Senate Hearings*, *supra* note 18, at 253 (statement of William J. Long, President, Weir Cove Lodge No. 30, Amalgamated Association of Iron, Steel, and Tin Workers), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 283.

and another checked off their names as the employees entered the employer's facility housing the polls.³⁵⁸ Board procedures attempt to limit employer control of the actual release of employees to vote by providing that one observer for each party, after informing "the applicable supervisor," should notify employees that they are free to vote. The procedures specify that "the actual releasing should not be done by a supervisor."³⁵⁹ Yet the Board's own language of "releasing" suggests that employer authority prevails except for the moment when the employee steps inside the private sanctuary of the voting booth.

Employer advocates frankly acknowledge that holding elections at the workplace may tilt the vote in the employer's direction. The manual, *Preventive Labor Relations*, explains: "Union supporters are, almost by definition, more determined or dedicated than company supporters and those who remain uncommitted. An election conducted on 'neutral' ground would probably reduce the size of the vote in the wrong quarters."³⁶⁰ Among employers, it is an article of faith that their "best interest lies in maximum turnout for the election."³⁶¹ Empirical research corroborates that high turnout favors no representation, presumably because the "uncommitted" will, if brought to the polls, vote to preserve the status quo,³⁶² and turnout for union elections is extraordinarily high. In political elections, turnout is just over fifty percent in presidential election years and less than forty percent in off-year elections,³⁶³ and it is even lower among the working class.³⁶⁴ In contrast, turnout in union elections has not dropped below eighty-three percent since figures became available in 1948.³⁶⁵ The difference derives partly from

358. American Nuclear Resources, Inc., 300 N.L.R.B. No. 62, slip op. at 2-3 (Oct. 29, 1990).

359. NLRB, *supra* note 91, § 11330.4.

360. KILGOUR, *supra* note 104, at 291.

361. CORNELIUS QUINN ET AL., MAINTAINING NONUNION STATUS 205 (1982).

362. John T. Delaney, *Union Success in Hospital Representation Elections*, 20 INDUS. REL. 149, 155 (1981); Herbert G. Heneman III & Marcus H. Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 INDUS. & LAB. REL. REV. 537, 544 (1983); Seeber, *supra* note 207, at 20.

363. MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1992, at xxxvii (1991).

364. See Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 53 (finding 47% turnout among working class voters, compared to 77% among higher income voters).

365. Turnout has remained virtually constant varying from a low of 86% in 1982 to a high of 91% in 1964. See 13-54 NLRB ANN. REP. app. A (1949-1990)

the convenience of voting at work and partly from the salience of the economic issues involved in union representation,³⁶⁶ but it also reflects employers' ability to use their authority on the non-neutral ground of the workplace to muster a high turnout.³⁶⁷

That employers stand to gain when the workplace is the locus of the election is perhaps best evidenced by their willingness to open their property to the balloting. The Board has no authority to order employers to put the voting booths on their premises, but employers almost always assent. As the Board Chairman testified before Congress in 1977, most employers "prefer" to situate union elections on their property.³⁶⁸ It is a

(compiling annual data regarding voter turnout in a table entitled "Types of Elections Conducted").

366. See, e.g., GETMAN ET AL., *supra* note 6, at 28.

367. The cases are replete with descriptions of employer efforts to insure that all employees vote. See, e.g., Harvard College, No. 1-RC-19054, slip op. at 24-25 (NLRB Oct. 21, 1988). During the debates over the Wagner Act supporters of company unions also heralded high voter turnout in elections of company union representatives. See, e.g., 1935 Senate Hearings, *supra* note 3, at 367, 370, 383, 388, 415, 421, 493, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1753, 1756, 1769, 1774, 1801, 1807, 1879. But detractors cited evidence of workers "actually [being] driven to the polls on the end of a riot stick," 1934 Senate Hearings, *supra* note 18, at 252, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 282, as well as more subtle pressures to vote, see *id.* at 233, 255, 487, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 263, 285, 521.

Myron Roomkin and Richard Block present an alternative explanation in *A Preliminary Analysis of the Participation Rate and the Margin of Victory in NLRB Elections*, in 34TH ANNUAL PROCEEDINGS OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 220 (1981). They find that participation is inversely related to the closeness of elections, but that this relationship is stronger in union victories. *Id.* at 224. They speculate that the difference is caused by employees balancing the probability that their vote will affect the outcome against their fear of retaliation from the loser, a fear that is stronger if they expect the employer to be the loser. *Id.*

368. 1977 House Hearings, *supra* note 106, pt. 1, at 412 (response of John H. Fanning, Chairman, NLRB, to inquiries). During these same debates, several employer representatives threatened that if the reforms were adopted, employers would begin refusing to so accommodate the Board. 1977 Senate Hearings, *supra* note 167, pt. 1, at 990 (statement of Robert T. Thompson, Chairman, National Chamber of Commerce); H.R. REP. NO. 637, *supra* note 105, at 77-78.

Unions ordinarily do not object to elections taking place on employers' property. This is primarily because, under the Board's regulations, employer ownership of the property clearly is not grounds for objection—otherwise "good cause" would exist in every case and the employer's premises could not be characterized as the "best place" to hold an election. NLRB, *supra* note 91, § 11302.2. Moreover, unions may fear that employers will use the union's objection as a campaign issue, informing employees that it was the union that wanted to make voting more inconvenient.

preference that follows directly from employers' right to campaign and is the logical conclusion of what the Board early on termed the employer's "superior economic power" in the workplace.³⁶⁹

In *General Shoe* the Board embarked on the project of regulating campaign conduct in order to guarantee employees' liberty of the franchise in the aftermath of the Taft-Hartley Act's guarantee of free speech to employers. The body of contradictory doctrine the Board formulated expressed both its refusal to exclude employers from the union election and its inconsistent construction of their place in that contest. The Board partly abandoned the political model, while failing to devise a coherent "scientific" alternative. On the one hand, the Board perceived that the economic authority intrinsic to the employment relationship distinguished employers from candidates in political elections. On the other hand, in deferring to employers' statutory right to campaign, the Board upheld their coercive use of authority in the workplace. In *General Shoe* the Board read the Taft-Hartley Act's terms strictly, holding that the free speech proviso did not apply in representation cases.³⁷⁰ Subsequently, while respecting this precedent, the Board nonetheless paid deference to employers' freedom of speech in ruling on objections to employer campaign conduct. Thus, employers were endowed with political liberties in the very locus of their economic dominion. Accordingly, the Board could not separate employers' freedom to speak from their ability to command, nor could it confine employers' authority to particular sites, leaving the rest of the workplace safe for democracy.

D. THE "MUTUALITY ARGUMENT"

Unlike the employer, a union stands in relation to unrepresented employees no differently than do candidates to voters in a political election. The union holds no lawful power, economic or otherwise, over the constituency it seeks to represent—it does not hire, fire, or control the working day of employees.³⁷¹

369. *Clark Bros. Co.*, 70 N.L.R.B. 802, 805 (1946), *enforced as modified*, 167 F.2d 373 (2d Cir. 1947).

370. 77 N.L.R.B. 124, 126 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

371. Some craft unions and unions that are active in the maritime trades do exercise power over unrepresented workers through the operation of hiring halls. See, e.g., *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 672-74 (1961). These unions are, however, unlikely to seek representative status through an election.

Even the most coercive campaign tactics, such as uttering threats, therefore carry different meaning when unions execute them than when employers do. When employees cast their ballots, they know that, if the union loses, it will have no economic authority over them and probably will leave the workplace. Conversely, win or lose, the employer retains control over their livelihoods. Despite the secret ballot, the employer can make highly effective threats—for example, by raising the specter of plant relocation. A losing union has no equivalent authority over its prospective constituency. The different status of the two parties in the workplace suggests that different sets of rules are needed to assure that neither employee nor union interferes with employee free choice. *General Shoe* pointed in that direction. Yet the laboratory model provided no basis for distinguishing between employer and union, and the political model continued to present a powerful case for treating the two parties equally. Since *General Shoe* the Board has imposed virtually parallel restrictions on unions and employers despite the utter lack of union authority in the unorganized workplace.

The question of whether federal law should restrain unions as well as employers was perhaps the chief point of contention in the debates over the Wagner Act. Opponents of the Act insisted on parity between the contending parties. As one industry economist put it, "In all fairness, the same elements of coercion, intimidation, interference, and restraint should be declared unlawful if indulged in by either labor or employer."³⁷² Yet proponents of the Act rebutted the "erroneously conceived mutuality argument."³⁷³ They pointed out that state law already barred union coercion and that enacting federal prohibitions would raise "the ghosts of many much-criticized injunctions" issued by federal courts in an earlier era.³⁷⁴ Ac-

372. 1934 Senate Hearings, *supra* note 18, at 682-83 (statement of Leslie Vickers, Economist, American Transit Association), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 720-21. The National Association of Manufacturers proposed an amendment to the Wagner Act prohibiting both employers and unions from coercing employees, largely in an effort to prevent the bill's passage. GROSS, *supra* note 14, at 140-42.

373. S. REP. NO. 573, 74th Cong., 1st Sess. 16 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2300, 2316. Wagner's chief aid, Leon Keyserling, formulated the Senator's counterarguments in Leon Keyserling, Memorandum on Coercion From Any Source: The Bill Preserves Mutuality, Robert F. Wagner Papers, box 2, file 2 (Georgetown University).

374. S. REP. NO. 573, *supra* note 373, at 16, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2300, 2316. For a discussion of the injunction era see FORBATH, *supra* note 2, at 59-97.

cording to the Senate Committee Report, the argument that "labor organizations should be no more active than employers in the organization of workers . . . would defeat the very objects of the bill."³⁷⁵ The Wagner Act did not proscribe any union practices as unfair.³⁷⁶ Nevertheless, the Board went on to hold that egregious union campaign conduct could warrant invalidating an election,³⁷⁷ and the Taft-Hartley Act codified the "mutuality argument." Taft-Hartley's proponents vociferously contended that "management should be afforded equal rights with unions under the Wagner Act."³⁷⁸ The 1947 Act not only protected employer campaigns, it also established a set of union unfair labor practices.³⁷⁹

Paradoxically, the Board cited pre-Taft-Hartley cases that overturned elections due to union campaign conduct as precedent in *General Shoe*.³⁸⁰ In that case, the Board voided the election based on employer speech that did not amount to an unfair labor practice. It erected a new, heightened standard for judging campaign conduct, adopting the metaphor of "laboratory conditions," but it did not specify that the standard applied only to employers.³⁸¹ Since *General Shoe*, adhering to the conception of union and employer as vying candidates, the Board has judged both by the strict standard of the laboratory.³⁸²

375. S. REP. NO. 573, *supra* note 373, at 16, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2300, 2316.

376. See National Labor Relations (Wagner) Act, ch. 372, § 8, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158 (1988)).

377. See, e.g., Continental Oil Co., 58 N.L.R.B. 169, 171-72 (1944) (finding that a union's posting of a wage increase notice the day before a runoff election was ground for overturning the union's victory over a competitor union).

378. 1947 Senate Hearings, *supra* note 308, pt. 2, at 911 (statement of Hugh H.C. Weed, Vice President, Carter Carburetor Co.).

379. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(b), 61 Stat. 136, 141 (1947) (current version at 29 U.S.C. § 158(b) (1988)).

380. 77 N.L.R.B. 124, 127 n.10 (1948), enforced, 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952).

381. See *id.* at 127.

382. See *infra* notes 391-96, 401, 403-05 and accompanying text. Between 1964 and 1989, employers made at least a quarter of the objections filed each year. Employer objections account for a high of 50% of total objections in 1982 to a low of 26% in 1964. 28-54 NLRB ANN. REP. app. A (1964-1990) (compiling annual data regarding objections in a table entitled "Objections Filed in Representation Cases Closed, by Party Filing.")

Derek Bok suggests that in the absence of an empirical basis for conclusions about the effects of campaign tactics, the argument "that comparable restrictions have been placed on the other side" became an "attractive basis for justifying intervention." Bok, *supra* note 6, at 74 n.92. There is also a procedural explanation for the application of strict standards to unions. Because the only way that rulings in representation cases can reach the courts is

To be sure, neither the Board nor the courts have entirely dismissed differences in the positions of employers and unions in the workplace. Some restrictions apply only to employers. Rejecting the claim that the Board used a "double standard" to overturn elections based on employer promises of increased benefits while allowing union pledges to secure higher wages, the Fifth Circuit Court of Appeals graphically stated the distinction: "An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant."³⁸³ On occasion, the Board too has spurned the notion of parity. In rejecting an employer's objections to a union's lowering of a membership assessment in the midst of a campaign, the Board denied that the union's tactic was "analogous in principle to that of an employer who, with a purpose to defeat a union, grants to employees a benefit he would not normally have granted."³⁸⁴ The union's action, unlike the employer's, could "scarcely be viewed by the employees as a warning that, if the union is not obliged, the employees may be made to suffer later," the Board declared.³⁸⁵ "[I]f the union is not obliged—that is, if it loses the election—it can have no effect on the employees in the future whatsoever."³⁸⁶

The Board also has recognized "a substantial difference" between employers and unions in assessing the impact of visits to employee homes.³⁸⁷ "Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers," the Board has stated.³⁸⁸ Unions not only have "more need" for home visits, "but, more important, lack the relationship with the employees to interfere with their choice of

through employers' refusals to bargain, the courts cannot review Board rulings on union objections or Board rulings sustaining employer objections. The only Board rulings which reach the courts are those rejecting employer objections to unions' conduct. *See supra* note 119 (explaining the process by which rulings in representation cases reach the courts). A one-way, upward ratchet thus operates on the standards governing union conduct.

383. *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969).

384. *Primco Casting Corp.*, 174 N.L.R.B. 244, 245 (1969).

385. *Id.*

386. *Id.*

387. *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131, 133 (1957).

388. *Id.*

representatives thereby."³⁸⁹ In cases concerning interrogation, surveillance, and speech in the locus of final authority, the Board has also distinguished between the contending parties.³⁹⁰

In evaluating campaign conduct, however, the Board has never systematically examined the different standing of unions and employers in the unorganized workplace. Not only has the Board applied the same "laboratory" standard to the conduct of each party, it has uniformly imposed rules that are senseless when applied to unions.³⁹¹ In *Peerless Plywood Co.*, for example, the Board set forth the twenty-four hour rule in neutral terms: "[E]mployers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election."³⁹² Yet how can a union, often forbidden access to the workplace, make a speech on company time to a massed assembly of employees?

The Fourth Circuit Court of Appeals recently held, in *Industrial Acoustics Co. v. NLRB*, that a union had violated the twenty-four hour rule.³⁹³ In that case, a union, turning acoustics to its own industrial ends, parked a car with a loudspeaker outside a plant gate and broadcast music and campaign rheto-

389. *Id.* at 134.

390. Unions are free to ask employees about their sentiments while employers are not. *See, e.g.*, *Springfield Hosp.*, 281 N.L.R.B. 643, 643 (1986), *enforced*, 899 F.2d 1305 (2d Cir. 1990); *Kusan Mfg. Co.*, 267 N.L.R.B. 740, 746 (1983), *enforced*, 749 F.2d 362 (6th Cir. 1984). Union interrogation is found to be objectionable only when it concerns support for a rival union or decertification effort and is coupled with threats. *See, e.g.*, *Graham Eng'g Co.*, 164 N.L.R.B. 679, 695 (1967); *Retail Clerks Int'l Assoc., Locals 698 & 298*, 160 N.L.R.B. 709, 710, 720-21 (1966). Employer polling is restricted, although the Board has recently loosened the restriction. *See Rossmore House*, 269 N.L.R.B. 1176, 1177 (1984), *enforced*, 760 F.2d 1006 (6th Cir. 1985) (rejecting a per se rule against employer interrogation in favor of test based on the circumstances of each case). Notably, the Board has flatly barred all employer polling once a petition is filed, holding that such polling "does not . . . serve any legitimate interest of the employer" even though political candidates routinely poll before elections. *Struksnes Constr. Co., Inc.*, 165 N.L.R.B. 1062, 1063 (1967). Employers are barred from engaging in surveillance of union activities, but the restriction does not apply to unions. *ATR Wire & Cable Co.*, 267 N.L.R.B. 204, 210 (1983), *enforced*, 752 F.2d 201 (6th Cir. 1985). Finally, by its terms, the locus of final authority doctrine cannot be applied to unions. *See supra* notes 268-89 and accompanying text.

391. In fact, the Board has insisted on its even-handed treatment of employers and unions. *See, e.g.*, *Oak Mfg. Co.*, 141 N.L.R.B. 1323, 1324 n.4 (1963) (explaining that union and employer preelection conduct is subject to similar standards).

392. 107 N.L.R.B. 427, 429 (1953).

393. 912 F.2d 717, 721 (4th Cir. 1990).

ric.³⁹⁴ The court noted that "some employees wear ear plugs during work" and that "the speeches were inaudible . . . while the machinery was in use" and could mainly be heard during the lunch break.³⁹⁵ Still, the court had "no difficulty" finding that the employees were a captive audience that could not avoid hearing the broadcasts, and therefore ruled that the union's speech violated the per se rule and "tainted" the election.³⁹⁶ Because in *Peerless Plywood* the Board had phrased the twenty-four hour rule in neutral terms, union organizers who are locked outside the plant gate speaking through megaphones are now equated at law with company presidents who hold the keys to the gates and speak to the employees assembled silently inside at their direction.

The neutral application of campaign rules has led the Board to prohibit innocuous union conduct of the sort in which candidates for political office routinely engage. For example, the Board stated in neutral terms a seemingly arbitrary rule against keeping lists of voters, barring "anyone from keeping any list of persons who have voted, aside from the official eligibility list."³⁹⁷ Like political candidates, however, unions often keep lists of those who have cast their ballots in order to "get out the vote."³⁹⁸

The prohibition of list-keeping makes sense only as applied to employers. Because elections almost always take place on employers' property, employees may perceive them as employer-staged.³⁹⁹ During the debate over the Wagner Act, its proponents observed that the franchise in company-union elections was not free precisely because employers ran them in their plants and kept lists of voters. "[I]f you refused to vote, they took down your check number and name and marked you

394. *Id.* at 718.

395. *Id.* at 719 n.2, 721.

396. *Id.* at 720-22. In *Industrial Acoustics*, the Court followed *United States Gypsum Co.*, 115 N.L.R.B. 734, 734-35 (1956) (holding that union sound-car broadcasts were objectionable "in substance, albeit not in form" even though employees "were not summoned to hear the speeches[,] . . . were not under the control of the maker[,] . . . were not compelled to listen[,] . . . and the attention given to the speaker by the employees was incidental while performing their duties").

397. *International Stamping Co.*, 97 N.L.R.B. 921, 922 (1951).

398. *See, e.g.*, *Harvard College*, No. 1-RC-19054, slip op. at 4-6 (NLRB Oct. 21, 1988).

399. In *International Stamping*, the son of the company president roamed through the plant during the election with a list of employees, checking off their names as they left to vote. 97 N.L.R.B. at 922.

as declining to vote," testified one steel worker.⁴⁰⁰ Like candidates in political elections, however, unions have no legal authority over either voters or the election site. Nevertheless, a union that stations organizers outside a set of grocery stores to keep a list of off-duty employees going in to vote is sanctioned equally with the employer inside who gathers the employees together and checks off their names as they are sent to the polls.⁴⁰¹

The legal construction of employers and unions as posing commensurate threats to electoral freedom extends even to finding an analogy in union conduct to the quintessential act of management authority—the grant of economic benefits. The danger to hirelings' political liberty that the framers of the Constitution had seen in employer vote-buying is now seen to emanate from unions as well. The Board bars employers from granting wage increases and other benefits shortly before an election. Affirming the restriction in the 1964 case of *NLRB v. Exchange Parts Co.*, the Supreme Court vividly described the "danger" in a grant of benefits as "the suggestion of a fist inside the velvet glove," that the source of benefits "may dry up if it is not obliged."⁴⁰² A decade later in *NLRB v. Savair Manufacturing Co.*, the Court applied the *Exchange Parts* theory to unions, overturning an election on account of a union's promise to waive a ten dollar initiation fee for signers of authorization cards if it won the election.⁴⁰³ The Court was even-handed in drawing prejudicial presumptions about the threat of reprisal signalled by the economic inducements that both unions and employers might offer. "[W]e cannot assume that unions exercising powers are wholly benign towards their antagonists," the Court declared.⁴⁰⁴ Like the employer grant of benefits, the promised union waiver of the fee, according to the Court, "may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime."⁴⁰⁵

400. 1934 Senate Hearings, *supra* note 18, at 487, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 27, 521 (statement of George H. Powers).

401. See Piggly-Wiggly No. 011, 168 N.L.R.B. 792, 792-93 (1967) (setting aside election in which union kept a list of employees entering stores to vote).

402. 375 U.S. 405, 409 (1964).

403. 414 U.S. 270, 280-81 (1973). Getman notes the connection between this case and the "over-regulation of employer speech" in Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45, 69 (1986).

404. 414 U.S. at 280.

405. *Id.* at 281. Neither the Board nor the courts, however, have extended

The problem with this theory, however, is that the union possesses no authority over employees if it loses a representation election. It is not that unions are any more benign toward their opponents than are employers, but rather, as Justice White pointed out in his dissent in *Savair*, that "important differences" exist between the threats employers and unions pose.⁴⁰⁶ Justice White attacked the "supposed analogy" between the union's "contingent" waiver in *Savair* and the employer's "actual" increase in benefits in *Exchange Parts*.⁴⁰⁷ Because the union "was not the representative of the employees, and would not be if it were unsuccessful in the election, [it] could not make the same threat by offering a benefit which it would take away if it lost the election."⁴⁰⁸ Playing on the language of the earlier holding, White declared, "the union glove is not very velvet," and "in the union context, the fist is missing."⁴⁰⁹

What Justice White put so curtly has largely eluded the Board and the courts since the enactment of the Taft-Hartley Act: the disparity of power between unions and employers in a workplace where employees are unrepresented. The framers of the Wagner Act had been emphatic about that disparity of power, repudiating the idea of "mutuality" in creating a code of protections and prohibitions to govern unions and employers. Yet in regulating the system of labor representation, the Board has constructed a set of rules that in critical respects treats the two parties equally. The Taft-Hartley Act did not dictate this result, for even after its enactment the Board sought to circumscribe employer power with rules such as the prohibition of speech in the "locus of final authority" in order to preserve "laboratory conditions." Rather, the image of contending parties, equally bound by a common set of rules, derived from the ideal of political democracy itself.

Since its creation the Board has adopted two approaches to the problem of employee dependence so powerfully illuminated by employer campaign speech. Before the Taft-Hartley Act, the Board aimed to bar employer speech, thereafter literally to

this theory to reach all union promises of benefits. See, e.g., *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969) (holding that a union's promise to gain benefits if it were selected did not materially affect employees' free choice).

406. 414 U.S. at 285 (White, J., dissenting).

407. *Id.* at 284-85.

408. *Id.* at 285.

409. *Id.*

confine it so as to preserve laboratory conditions. Both approaches were confounded by the sway of the political analogy: The notion of employer and union as rival candidates undergirded not only the free speech proviso, but conversely, too, the strict regulation of *both* union and employer campaign conduct. The insertion of the democratic device of the election into a workplace permeated by employer authority lies at the root of a jurisprudence that countenances employer coercion and bars harmless union conduct.

IV. RETHINKING INDUSTRIAL DEMOCRACY AND UNION ELECTION LAW

Since the New Deal, the guiding assumption of Congress, the Board, and the courts has been that the system of labor representation is the analog of political democracy. However rhetorically compelling, this analogy is nonetheless too simple. Rethinking the law requires probing beneath the layer of metaphor to take account of complexities in the analogy between labor representation and political representation—complexities that reveal ways in which the political election is inappropriate as a model for the union election. Not only does the election fit differently into the schemes of representation in the workplace and in the polity, the nature of representation itself is different in the two realms.

Such differences highlight the anomalous presence of employers in union elections and their peculiar capacity to thwart industrial democracy. The tension between democracy and dependence recognized by the framers of the American political system lies buried under a thicket of union election rules. In current labor law, the idea of industrial democracy is a fiction, masking inequalities that subvert labor's right to representation. Law reform should point in the direction of recognizing and redressing those inequalities, starting with the insight that employers should neither be parties to nor accorded the rights of candidates in union elections.

A. COMPLICATING THE POLITICAL ANALOGY

The Wagner Act inscribed the distinctions between the political election and the union election. In creating a system of political representation, the United States Constitution defines the units of representation and mandates election of rep-

representatives at predetermined intervals.⁴¹⁰ The Wagner Act was not a constitution, however. It did not mandate representation. Rather, it simply protected workers' right to organize themselves and to designate their own representatives. The first right named in the Act's pivotal section seven is the right of "self-organization."⁴¹¹ The Wagner Act and its amendments neither define constituencies for purposes of representation nor specify when they should elect representatives. Instead, the law entitles workers themselves to choose how, when, and, indeed, whether they wish to be represented.

The differences between the union election and the political election have engendered many of the most disputed questions in union election law. The question of election timing, for example, would not even arise if union elections were exactly akin to political elections, for political elections occur periodically on fixed dates.⁴¹² Union elections, on the other hand, follow no schedule, occurring only sporadically when employees or unions request an election or demand employer recognition.⁴¹³ Similarly, continual litigation would not arise over unit determination if union elections were like political elections. Political elections take place within predetermined districts,⁴¹⁴ but in union elections, as the Supreme Court has affirmed, the rule has always been that the unit's composition must be newly determined "in each case."⁴¹⁵

An even more crucial difference between the union election and the political election is that workers can choose not to be represented.⁴¹⁶ Citizens do not have that

410. See U.S. CONST. art. I, §§ 2, 3.

411. National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 449-52 (1935) (current version at 29 U.S.C. § 157 (1988)).

412. This is not true in parliamentary systems. See MARY A. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 297-99 (1985).

413. As a 1977 House committee report pointed out, "[t]he Act does not provide for a continuing referendum or regularly scheduled periodic polls on unionization." H.R. REP. NO. 637, *supra* note 105, at 33.

414. Some political units, such as congressional districts, are not fixed permanently, but rather are subject to periodic redefinition. But even these units are not redefined before every election. See ANDREW HACKER, *CONGRESSIONAL DISTRICTING* 40-46 (1963).

415. *American Hosp. v. NLRB*, 111 S. Ct. 1539, 1543 (1991). This language derives from the text of the Act. See 29 U.S.C. § 159(b) (1988). Although the Court in *American Hospital* upheld the Board's power to make rules defining appropriate units, it emphasized that the rules must still be applied in each case. 111 S. Ct. at 1543.

416. The original bill Wagner introduced in the Senate in February of 1934 vested the Board with authority to investigate a "dispute as to who are the representatives of employees." S. 2926, 73rd Cong., 2d Sess. § 207(a) (1934), re-

choice.⁴¹⁷ As AFL General Counsel Joseph Padway testified before a House Committee in 1939, offering a rare observation on the *sui generis* right to labor representation: "The peculiar part about this law as distinguished from ordinary legislative procedure in Government, which requires the President of the United States to be elected . . . [and] the Congressmen from a district to be elected, is that it does not require employees in a plant to select a bargaining agent, if they do not want to."⁴¹⁸ In other words, employees may either simply refrain from petitioning for an election or, if an election occurs, vote against representation. As Padway explained further,

In your district, that you represent . . . they have an election for a Congress, but they have got to vote for a Congressman. They cannot vote 'No.' . . . They have got to elect you or someone else. Under the National Labor Relations Act they can vote 'No.' They can vote 'We do not want a Congressman, we do not want a Representative.'⁴¹⁹

The Board's Chairman stated in a 1940 opinion that "the Board provides a place upon the ballot . . . where the employees may vote 'against' the labor organization involved," or if there are competing unions "for 'neither' or 'none.'"⁴²⁰ Unlike citizens,

printed in 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1, 11. This language suggested that all employees had representatives and the disputes which needed to be resolved concerned merely their identity. The language was subsequently altered to give the Board authority over "a question . . . concerning the representation of employees." S. 1958, 74th Cong., 1st Sess. § 9(c) (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 3270, 3274.

417. At least that choice does not appear on political ballots. The question of what the outcome would be if no one cast a ballot in a political election has never arisen.

418. 1939 House Hearings, *supra* note 52, at 838 (statement of Joseph A. Padway, General Counsel, AFL).

419. *Id.* at 836-37. Louis B. Boudin argued in 1943 that providing a choice of no representation was inconsistent with the Wagner Act and political practice. "Historically, voters have always voted, at least in elections in which there were candidates, for a certain candidate." Boudin, *supra* note 158, at 400.

Under the Railway Labor Act, voters are not given an express no-representation choice, but if less than 50% of eligible employees vote, certification will not issue. 45 U.S.C. § 152 (1988); see Herbert R. Northrup, *The Railway Labor Act—Time for Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441, 496 (1990).

420. R.K. LeBlond Mach. Tool Co., 22 N.L.R.B. 465, 470 (1940) (Chairman Madden, concurring in part and dissenting in part). Otherwise, the Chairman continued, "a collective representative might be forced upon the employees despite the wishes of a majority." *Id.* In the years prior to the Taft-Hartley Act, Member Edwin Smith insisted that if a majority of employees voted to be represented by a union, even if their votes were split between multiple unions, the runoff ballot should not contain the choice of no union. *Id.* at 468-69 (Member Smith, concurring); Interlake Iron Corp., 4 N.L.R.B. 55, 62-64 (1937) (Member Smith, dissenting). Member Smith's position has always been the

employees can entirely forego representation.

Indisputably, the union election and the political election are alike in that both employees and citizens are entitled to vote for representatives of their own choosing. Despite this basic likeness, the election's function within the system of representation is dissimilar in the worlds of politics and of labor. The union election inaugurates—it is constitutive of—the system of labor representation. In contrast, the political election is embedded within an already institutionalized system of representative government. Prior to an election, labor lacks all formal representation in the workplace, and a union must win representative status in the absence of any preexisting standing in the workplace. The union, then, is unlike a minority party seeking to regain or acquire an established place within the political system. Before an election, the employer can deny a union any authority; in fact, most employers shun even casual contact with union leaders to prevent employees from mistakenly believing that the union shares authority in the shop.⁴²¹ In displacing unilateral employer authority, a union election victory thus reorders, rather than simply renewing, the system of workplace governance. Unlike the political election, the union election enacts a peaceful transition from autarchy to

rule under the Railway Labor Act. See Northrup, *supra* note 419, at 496-97. The other members, *see, e.g.*, Interlake Iron Corp., 4 N.L.R.B. at 60-61, and eventually the Congress in the Taft-Hartley Act, *see* Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 9(c)(3), 61 Stat. 136, 144 (1947) (current version at 29 U.S.C. § 159(c)(3) (1988)), disagreed. Witnesses before Congress drew an analogy between the choice of no union and that of a third-party candidate. One management attorney compared union elections to an election among a Republican, a Democrat, and an Independent and asserted that if the two major party candidates together received a majority, and "If we followed the method the Board now has adopted we would say that the Republican and the Democrat together having received the majority of the votes, the voters had showed they wished a party man, not an Independent, and therefore we would leave the Independent off the ballot." 1947 *Senate Hearings*, *supra* note 308, pt. 1, at 154 (submission of Theodore R. Iserman). The law now provides that if the choice of no union places first or second, it should appear on the runoff ballot even if a majority of votes were cast for representation in the first election. 29 U.S.C. § 159(c)(3) (1988).

421. Clyde Summers recently argued that employers have a duty to recognize nonmajority unions as representatives of their members only, but he acknowledges dicta to the contrary. Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI-KENT L. REV. 531, 538 n.34 (1990). Contemporary trade unionists, such as the President of the AFL Office Employees International Union, believed that the Wagner Act barred their prior practice of bargaining solely for their members and that this prohibition made organizing more difficult. *See* Paul R. Hutchings, *Effect on the Trade Union, in THE WAGNER ACT: AFTER TEN YEARS*, *supra* note 23, at 72, 74.

democracy.⁴²²

Not only do union elections and political elections bear different relationships to representation, the nature of representation also is different in the two realms. The union election vests labor's representative with no sovereignty in the workplace. It is on this point—the legal authority of the union to govern—that the analogy between industrial and political democracy is most tenuous. Although the authority of elected officials within the American political system is constrained by a structure of checks and balances, citizens' representatives have plenary authority within their prescribed domains. By contrast, in the workplace the system of governance is mixed: the regime of employer authority persists alongside the new regime of labor representation. In fact, the labor election confers *no* unilateral authority on unions; they must seek employers' consent in collective bargaining to any alteration of the law of the shop. Even before its passage, proponents of the Wagner Act dispelled the notion that it would “turn over industry to the employees.”⁴²³ As one lawmaker emphasized, labor would not “control anything except the selection of its representatives.”⁴²⁴

Nonetheless, critics of the Wagner Act have often asserted the contrary. In urging amendment of the Act in 1947, Representative Fred A. Hartley claimed that it “surrendered to the labor barons sovereign powers over the working man and woman of the United States.”⁴²⁵ Similarly, the House Report that recommended adoption of the Taft-Hartley Act declared that American workers “have been subject to a tyranny more des-

422. Paul Weiler vividly illuminates this aspect of union elections when he “borrow[s] an analogy from the political arena” other than the selection of representatives in an already democratic polity to describe such elections. Weiler, *supra* note 9, at 1025. Weiler asks his readers to

[i]magine a group of countries in Central America with traditional authoritarian regimes. Under pressures from a variety of sources, these countries periodically conduct referenda about whether their citizens will be given a guaranteed voice in national affairs and, if so, who is to be their representative in dealing with the authorities. Naturally unhappy about this threat to their own prerogatives, the rulers are wont to campaign vigorously against such a major step by the polity.

Id.

423. 79 CONG. REC. 9682 (1935) (remarks of Rep. Griswold), *reprinted in* 2 NLRB LEGISLATIVE HISTORY, *supra* note 1, at 3109.

424. *Id.*

425. 93 CONG. REC. 3535 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 615. Congressman Richard M. Nixon used almost exactly the same words to assail the Wagner Act. *See id.* at 3603, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 727.

potic than one could think possible in a free country."⁴²⁶ Yet none of the coercive practices routinely ascribed to unions—enforcing a closed shop, extracting compulsory dues, forcing employees to strike—have ever been lawful absent employer consent and most are now unlawful even with employer consent.⁴²⁷ Only by gaining a share of employers' economic authority can unions gain any coercive power in the workplace. A majority vote for representation affords the union no authority to set the terms of employment, yielding it only a right to negotiate about wages, hours, and working conditions, and placing the employer under no obligation to reach agreement with the union.⁴²⁸ Unlike the political election, the union election establishes a system of representation but not of representative government.

In *NLRB v. Gissel Packing Co.*, the Supreme Court explicitly rejected the analogy between the union election and the political election.⁴²⁹ "[W]hat is basically at stake" in labor's right to representation, the Court declared, is "not the election of legislators or the enactment of legislation."⁴³⁰ To the contrary, the union election creates merely "a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent."⁴³¹ Rather than fundamentally transforming the employment relationship, the

426. H.R. REP. NO. 245, *supra* note 235, at 3, reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 292, 295.

427. The Taft-Hartley Act prohibited the closed shop. See Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 158(a)(3) (1988)). A union and employer can agree that employees must pay a fee to the union as a condition of employment, but the union can only charge a fee equivalent to the cost of representing the employees. *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988). Unions have no authority to force employees to strike unless they have voluntarily become members, and the Supreme Court has held that members are free to resign at any time, even during a strike, and even if they have agreed not to resign during a strike. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 100 (1985).

428. 29 U.S.C. § 158(d) (1988). The only other right that hinges on certification is the right to be present at investigatory interviews of employees. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-64 (1975). But the union has no right to bargain over the discipline or turn the interview into an adversary proceeding; it merely has the right to be present and be heard. *Southwestern Bell Tel. Co.*, 251 N.L.R.B. 612, 613 (1980), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982). The employer can insist that it is only interested in "hearing the employee's own account." *Weingarten*, 420 U.S. at 260.

429. 395 U.S. 575 (1969).

430. *Id.* at 617-18.

431. *Id.* at 617.

Court reasoned, the election simply interposes the union as the agent of the employees for the limited purpose of bargaining with the employer.⁴³²

What prompted this rare judicial statement of the disjunction between union and political elections⁴³³ was the Court's holding that in exceptional circumstances labor could obtain representation without an election.⁴³⁴ The Court acknowledged the "superiority of the election process."⁴³⁵ Still, it challenged the absolute sanctity of the election, upholding the validity of other indicia of employee sentiment in cases where employer coercion was so extreme as to preclude a free election.⁴³⁶ In interrogation of employees, surveillance, promise of benefits, and threats of reprisal, including plant closing, the Court found evidence of employer authority so coercive that the only remedy was to jettison the election as a way to resolve the representation question.⁴³⁷ By so ruling, the Court recognized that what lends such force to employers' anti-union campaigns is the persistence of their plenary power even after representation elections. Accordingly, the Court distinguished between the "economically dependent employee" and the "independent voter"—between the union election and the political election.⁴³⁸ In justifying its approval of nonelectoral means of obtaining representation, the Court laid bare the limited authority of union representatives.

Arguably, the direction of labor law reform should lie in transforming the *Gissel* exception into the general rule.⁴³⁹ Rather than making labor representation more like political representation, the means of choosing the two types of repre-

432. *Id.*

433. *Gissel's* is not the only such statement. In *Bausch & Lomb Inc. v. NLRB*, 451 F.2d 873 (2d Cir. 1971), the court rejected a First Amendment challenge to the Board's holding that misrepresentations could be grounds for overturning an election. *Id.* at 879. The court stated that "[t]he analogy of public elections to labor representation elections falls short of compelling similarity." *Id.*

434. *Gissel*, 395 U.S. at 596-97.

435. *Id.* at 602.

436. *Id.* at 614-15.

437. *Id.* at 580-90.

438. *Id.* at 617-18.

439. *Gissel* expressly held open this possibility. *Id.* at 595. The Board rejected it in *Linden Lumber Division, Summer & Co.*, 190 N.L.R.B. 718, 723 (1971), and the Supreme Court affirmed at 419 U.S. 301 (1974). The Court simply decided in *Linden*, however, that the Board did not abuse its discretion when it held that a union must petition for an election unless the employer has violated the law and disrupted the electoral process. *Id.* at 309-10.

sentatives could be differentiated. The nub of the *Gissel* ruling was that precisely because labor representatives do not govern, it is proper, at least in exceptional circumstances, for them to be chosen by nonelectoral means. Such a return to the Board's pre-*Cudahy* doctrine was a key union goal during the unsuccessful 1977 reform effort.⁴⁴⁰

Alternatively, it could be argued that industrial democracy should be made more like political democracy by altering the nature of the choice presented to workers in union elections. Such a reform would mandate employee representation, and the question posed on the ballot would simply be which representative.⁴⁴¹

The reforms of mandating labor representation and of abandoning the union election both address the distinction between political and labor representation. Each would circumscribe employer influence: one by withdrawing the choice of whether to be represented from employees and thereby also from employers, the other by insulating the choice from employer influence. Yet each would require fundamental statutory revision unlikely in the foreseeable future. Employees have always had the choice of no representation, and the Taft-Hartley Act enshrined the right "to refrain" from representation alongside workers' right to "representatives of their own choosing."⁴⁴² The Act also codified the *Cudahy* doctrine. Indeed, the election has been central to the defense of labor representation since the debates over the Wagner Act. A proposal to return to the pre-*Cudahy* rule did not even make it out of committee during the 1977 law reform effort.⁴⁴³

Moreover, abandoning the union election is not merely politically infeasible. It would also cut against the principle of majority rule that is central to the union's effective representa-

440. See YAGER, *supra* note 92, at 42. More recently, Paul Weiler endorsed such a rule, citing Canadian practice as precedent. Weiler, *supra* note 6, at 1806-08.

441. Paul Weiler has recently backed such reform, reaching the "pessimistic" judgment that in order to insure workers representation, it is "necessary to take away from these employees (and also the employer) the choice about whether such a participatory mechanism will be present." PAUL C. WEILER, *GOVERNING THE WORKPLACE* 282 (1990). Modeled on the West German Works Councils, Weiler's proposal is that the law create a representative body in each workplace. *Id.* at 284. Elections would then be an appropriate means of filling the seats in the body.

442. Ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 157 (1988)).

443. TOWNLEY, *supra* note 92, at 129; YAGER, *supra* note 92, at 42.

tion of employees. The relationship between workers and unions is not a simple principal and agent relationship. Because the majority rules, even though as a legal matter its rule merely precludes direct dealing between individual workers and the employer, the majority will should be expressed through the conventional institution of the election.

The alternative proposed here is to eliminate the formal role of employers in union elections. What complicates the analogy between industrial and political democracy—what disrupts the symmetry between the union election and the political election—is the economic authority of employers. Because the union election is constitutive of labor representation, employers have plenary authority beforehand; and because the union election does not fully transform the system of governance, employer authority persists even after the choice of representatives. The material authority of employers is presumed by the existing structure of labor law, and it would not be displaced by the reform proposed here. Rather, the proposal is to rewrite the law to deny employers any unique avenue for using their authority to influence union elections.

The Board should return to the principle that a union election is not a contest between the employer and the union. This idea was set forth in *American Tube*,⁴⁴⁴ and it can be implemented without abridging employers' freedom of speech. Such a reform would accomplish directly what the other proposals would accomplish indirectly—it would limit employers' influence on their employees' choice of whether to be represented. Unlike the other proposals, however, it could be achieved with almost no alteration of the statutory framework.⁴⁴⁵

B. REGULATORY IMPLICATIONS

The union election should not be thought of as a contest between employer and union. This theory, as the foregoing suggests, has obscured and ratified the disparity of power between the employer and union in the election process. Instead, the union election should be conceptualized in terms of the category of "self-organization," the central right the Wagner Act

444. 44 N.L.R.B. 121, 132 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

445. Congress "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

guaranteed to labor. Elections are simply the final step in the process of self-organization, expressing the extent of employee organization and, if majority support exists, vesting the organization—the union—with the authority to represent the individual employees. Such a reconception entails the corollary that employers should neither have legal standing as parties to the representation proceeding nor have rights tantamount to those of candidates in union elections.

The law leaves the Board discretion to determine the appropriate parties to hearings in representation cases.⁴⁴⁶ It should exercise this discretion by specifying that the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them. If employers are denied party status, it also follows that the Board should revert to its earlier rule, already approved by the Supreme Court, of barring employers from placing observers at the polls to challenge ballots, as such challenges are resolved at post-election hearings.⁴⁴⁷

Furthermore, employers should not be allowed to refuse to bargain after a union election victory as a tactic to provoke an unfair labor practice charge and thus the relitigation of issues resolved in the earlier representation proceedings.⁴⁴⁸ Such a "technical refusal to bargain" should be permitted in only one instance: where the law excludes certain employees from a bargaining unit in order to protect employer interests. For example, the Taft-Hartley Act excluded supervisors from the coverage of the law in order to insure that they remained loyal to employers.⁴⁴⁹ It would be lawful, then, for employers to refuse to bargain concerning supervisors, managers, or confidential employees, but not on the grounds that the unit was otherwise inappropriate, that ineligible employees voted, or that the

446. 29 U.S.C. § 159(c) (1988).

447. See *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942).

448. See *supra* note 119 (discussing employers' refusal to bargain as a litigation tactic). This reform would require Congress to revise 29 U.S.C. § 159(d) (1988). That section provides that when an order in an unfair labor practice case is "based in whole or in part upon facts certified following" a representation proceeding, the record from the earlier proceeding shall be included in the record on appeal from the unfair labor practice case. *Id.* The legislative history of this section suggests it was intended to allow employers to obtain judicial review of the "entire election procedure." S. REP. NO. 573, *supra* note 373, at 14, reprinted in 2 *NLRA LEGISLATIVE HISTORY*, *supra* note 1, at 2300, 2314.

449. § 2(3), 61 Stat. at 137-38 (current version at 29 U.S.C. § 152(3) (1988)); see Virginia A. Seitz, *Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEG. HIST. 199, 242 (1984) (discussing exclusion of supervisors).

union engaged in objectionable campaign conduct.⁴⁵⁰

On these latter issues employers should have no right to be heard in either a representation case or an unfair labor practices case, even though Board rulings might indirectly affect their duty to bargain. According to longstanding Board doctrine, the question of whether a proposed unit is appropriate turns solely on whether employees in it share a sufficient "community of interest" to be represented by a single union.⁴⁵¹ The law's "primary concern" is that employees grouped together for collective bargaining share "substantial mutual interests in wages, hours and other conditions of employment."⁴⁵² The requirement of appropriateness correlates with the principle of majority rule because without a "community of interest" a single union cannot fairly represent employees. Employers have no standing to assert their employees' right to fair representation.⁴⁵³ As Wagner tersely put it, "This is not an employer's matter at all."⁴⁵⁴

Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct. Because employers have no right to vote, they cast no ballots the significance of which can be diluted by the inclusion of ineligible employees. Nor, obviously, can employers be coerced in the exercise of a franchise they do not have. Because employers lack the formal status either of candidates vying to represent employees or of voters, they should not be entitled to charge that unions disobeyed the rules governing voter eligibility or campaign conduct. On the questions of unit determination,

450. See *supra* note 91 (discussing these exclusions). Employers could also refuse to bargain on the grounds that a unit contained both guards and non-guards. See 29 U.S.C. § 159(b)(3) (1988). But an employer could not refuse to bargain on the grounds that a unit contained both professionals (a majority of whom had not voted for inclusion) and nonprofessionals, see 29 U.S.C. § 159(b)(1) (1988), because this unit rule is designed to protect professional employees rather than employers.

451. 3 NLRB ANN. REP. 174 (1938).

452. 15 NLRB ANN. REP. 39 (1950).

453. See *infra* notes 487-93 and accompanying text.

454. 1935 *Senate Hearings*, *supra* note 3, at 293 (statement of William Baum and Isadore Feibleman, Employees' Mutual Benefit Association), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1679. The makeup of a unit may make collective bargaining less convenient for an employer, but the employer is not obligated to reach agreement with the union representing the employees in the unit. 29 U.S.C. § 158(d) (1988). If employees define a unit that does not match an employer's existing personnel structure, the Board could consider that fact in determining whether the employer negotiated in a good faith attempt to reach agreement with the union.

voter eligibility, and campaign conduct, only the employee constituency⁴⁵⁵ and their potential union representatives should be heard.⁴⁵⁶

This redefinition of the parties to labor representation proceedings would eliminate or, at least, greatly simplify longstanding controversies concerning election timing, constituency, and review of results. The question of timing would be answered decisively: Employees and unions alone could influence the Board's election scheduling, a result the law has intended all along. The Taft-Hartley Act allowed the employer to petition for an election but only after a union demands recognition.⁴⁵⁷ As the House Report stated, the Act preserved the right of unions to "time the holding of an election to suit themselves."⁴⁵⁸ By exploiting their party status in representation hearings, however, employers have effectively influenced election timing. The proposed reform would prevent employers from achieving indirectly what they are not entitled to pursue directly.

Prohibiting employers from interceding in representation proceedings would also simplify the question of constituency. It would preclude employers from objecting to the composition of units and the eligibility of individual employees merely as a way to delay elections. Moreover, it would confirm that, under

455. Employees do not currently have party status in representation cases. NLRB, *supra* note 91, §§ 11008.1, 11194.3. This Article suggests that the Board should change this rule.

456. Critics of this proposal may argue that employers must be party to proceedings that they initiate by filing petitions. It is evident, though, that unions rather than employers are the moving force in these proceedings because an employer may only file a petition upon a union demand for recognition, 29 U.S.C. § 159(c)(1)(B) (1988), and because a union can disclaim interest in the bargaining unit and thereby cause the Board to dismiss the petition, *Ny-Lint Tool & Mfg. Co.*, 77 N.L.R.B. 642, 643 (1948).

Critics may also argue that employers must be party to these proceedings because they provide essential evidence. The Board's subpoena power under 29 U.S.C. § 161 (1988), however, provides an answer to this argument, for if the Board requires the employer's presence for evidentiary purposes, it may simply subpoena the employer.

Finally, an objection that employers should be parties to proceedings in which their own conduct may be at issue applies equally to current procedures in which objections may be based on the conduct of third parties. See generally WILLIAMS, *supra* note 91, at 217-35 (discussing third-party misconduct as grounds to set aside an election).

457. § 9(c)(1)(B), 61 Stat. at 144 (current version at 29 U.S.C. § 159(c)(1)(B) (1988)).

458. H.R. REP. NO. 245, *supra* note 235, at 35, reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 292, 326.

the Wagner Act and its amendments, employees and unions have the initial authority to define the unit in their petitions, and that the Board is generally bound to honor their definitions.⁴⁵⁹ In the early 1930s, the Board's precursors found that the question of whether representation should be "by plant or department" concerned employees alone. "It is not for the employer or for this Board to dictate the type of organization which should be established," the National Labor Board held in 1933.⁴⁶⁰ Under current law, the question before the Board is simply whether the requested unit is appropriate, not whether it is the *most* appropriate one.⁴⁶¹ The exclusion of employers from representation cases would insure, in Wagner's words, that "employees' desire[s] will be followed in nearly every instance."⁴⁶²

Finally, denying employers standing to contest each ruling issued in representation cases would both streamline and bring equity to the review of election results. Congress made the results of representation proceedings nonreviewable precisely to prevent employers from using the appellate process to delay elections. The debate over the Wagner Act reveals that Congress aimed to bar employers from blocking elections through appeal, as was common under the National Industrial Recovery Act.⁴⁶³ In closing one door to employer delay, however, Con-

459. Even if an employer petitions, where the unit defined in the petition differs significantly from the unit in which a union has demanded recognition, the Board will dismiss the petition. See, e.g., *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309 (1974).

460. *Edward G. Budd Mfg. Co.*, 1 N.L.B. 58, 61 (1933).

461. *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950), *enforced in part*, 190 F.2d 576 (7th Cir. 1951), *cert. denied*, 346 U.S. 909 (1953). This principle is based on the language of § 9(a), which requires that the unit be "a unit appropriate for such purposes." 29 U.S.C. § 159(a) (1988).

462. 1935 *Senate Hearings*, *supra* note 3, at 293 (statements of William Baum and Isadore Feibleman, Employers' Mutual Benefit Association), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1617, 1679.

463. Employers' ability to appeal the old NLRB's election orders led to "an almost complete strangulation of the labor boards in their efforts to obtain elections." GROSS, *supra* note 14, at 93 & n.87. Chairman of the Board Francis Biddle reported to Congress in 1935 that "in every case where the employer has not consented to the holding of the election and the National Board has been compelled to use its power to order an election the employer has succeeded in tying up the enforcement of the order almost indefinitely in the courts." 1935 *Senate Hearings*, *supra* note 3, at 97 (statement of Francis Biddle), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 1373, 1473. Congress drafted the Wagner Act, according to the House and Senate Reports, to insure that this experience was not repeated. H.R. REP. NO. 969, *supra* note 90, at 20, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2910,

gress opened another. The result, that employers could obtain review of certifications only by refusing to bargain, added an additional step to the review process.⁴⁶⁴

If employers were neither parties to the original proceedings nor allowed to reopen the issues by refusing to bargain (except where Congress intended to protect employer interests), the existing imbalance whereby employers have two opportunities to raise objections to an election while unions have only one would cease to exist.⁴⁶⁵ Moreover, as the grounds for refusing to bargain after an election would be significantly narrowed, few election questions would reach the courts. Most cases would end at the Board, thereby expediting the advent of collective bargaining.

The closing of this second door to delay would require minor revision of the statute. The Wagner Act provided that the record from representation proceedings would become part of the record in unfair labor practice cases when the order in the latter was based "in whole or in part upon facts certified" in the earlier proceeding. It also provided that appellate courts should base review of the order issued in the unfair labor practices proceeding on this combined record.⁴⁶⁶ This provision clearly suggests that the court, on appeal from an unfair labor practice case, can entertain questions that arose in the representation case, a proposition that the legislative history supports.⁴⁶⁷ Congress should therefore amend the statute to

2930-31; S. REP. NO. 573, *supra* note 373, at 6, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2300, 2305.

464. Unions appeared before Congress in 1939 and 1947 to demand equity in the review of representation decisions. *Labor Relations Program: Hearings on S. 55 and S.J. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 2, 1054 (1947) (statement of William Green, President, AFL). No legislation emerged from Congress in 1939, and although the House approved an amendment that would have allowed either party to obtain review in 1947, the amendment was removed in Conference Committee. 93 CONG. REC. 6602 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 1542. In addition, the 1977 reform bill would have limited employers' ability to obtain judicial review of certification decisions by narrowing the standard of review. H.R. 8410, 95th Cong., 1st Sess. § 6 (1977), *reprinted in* 1977 House Hearings, *supra* note 106, pt. 1, at 3, 10.

465. Opponents might argue that this proposal would create a new inequity because the union would have one opportunity to be heard and the employer none. But, in fact, union and employer alike would have an opportunity to be heard concerning the construction of their own rights.

466. National Labor Relations (Wagner) Act, ch. 372, § 9(d), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 159(d) (1988)).

467. See S. REP. NO. 573, *supra* note 373, at 14, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2300, 2314. The legislative history states that

narrow the scope of review obtainable through a technical refusal to bargain. It should not accord employers party status in representation proceedings, nor should it allow them to reopen questions resolved in the proceedings in a subsequent unfair labor practice case.

Although employers have been recognized as parties to representation cases since the passage of the Wagner Act, they have been denied the formal status of candidates in representation elections. They are not named on ballots; they cannot foster company unions to vie for employee votes.⁴⁶⁸ Nevertheless, through court and Board rulings and statutory amendment, employers have incrementally acquired the rights of candidates—most centrally the right to campaign. To remedy this, the law should not return to the rule of *American Tube*, which barred employers from campaigning against unions.⁴⁶⁹ Rather, employers should cease to gain through legal procedures and economic authority any opportunity to influence employees that is not open to other interested third parties. They should be accorded no special privileges of speech.

Congress should refashion election procedures to eliminate the affirmative accommodation of employer campaigning. Employers should no longer have legal capacity to delay elections in order to gain time to campaign. Further, elections should be removed from the workplace, where employers have the last word.⁴⁷⁰ Wagner himself cited voting “at the plant” as evidence that voting in company-sponsored employee representation plans was “not a free expression of choice.”⁴⁷¹ The Board has

although “there shall be no right of court review anterior to . . . an election,” once the Board has issued an order subsequent to the election, “the entire election procedure becomes part of the record and is fully reviewable by any aggrieved party” under § 10. *Id.*

468. 29 U.S.C. § 158(a)(2) (1988).

469. 44 N.L.R.B. 121, 131 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943).

470. Removing elections from the workplace would be consistent with the practice of earlier labor boards. The old NLRB mandated, “Elections should never be held in the plant where the workers are employed.” LORWIN & WUBNIG, *supra* note 39, at 307 (quoting Memorandum from Francis Biddle, Chairman, NLRB, to the Regional Labor Boards (March 6, 1935)). Both the NLB and the old NLRB found municipal buildings, churches, lodge halls, or vacant shops in which to set up the polls. *Id.* at 159, 307; *see also* Emily C. Brown, *Selection of Employees’ Representatives*, 40 MONTHLY LAB. REV. 1, 13 (1935) (if employees had no objection, the NLB conducted the election in the plant, but in “many cases neutral territory was provided”). The War Labor Board held elections both in and outside plants. NATIONAL WAR LABOR BOARD, U.S. DEPARTMENT OF LABOR, *supra* note 142, at 60.

471. 1935 Senate Hearings, *supra* note 3, at 656 (statement of Clifford U.

plenary discretion over the election site and has rejected objections based on the holding of an election off the employer's premises.⁴⁷² All elections should take place on neutral ground.⁴⁷³

Not only must Congress refashion election rules to recast employers as interested third parties, it must redraw the rules to prevent employers from exploiting their singular economic power to persuade employees to remain unrepresented. This should be the principal objective of Board regulation of campaign conduct. As currently framed, the ostensible focus of Board campaign law is employee free choice, but the Board lacks a coherent theory for judging the impact of a myriad of campaign tactics. The reform proposed here would not require the Board to assess the impact of employer campaigning on employee voting patterns, nor would it require the Board to balance unions' and employers' rights to campaign. Rather, the Board would consider solely whether an employer in any way exploited its authority as employer to augment the impact of its speech. The proposal is not that the Board deregulate union election campaigns, although the reforms would greatly simplify the rules, but rather that the Board systematically elaborate its insight in *General Shoe*—that regulation is necessary to reconcile employers' freedom of speech with employees' free exercise of the franchise.

This new legal framework would entail a body of new campaign rules. For example, employers could not lawfully exploit employee dependence to insure audiences for their anti-union speech. Thus, captive audience meetings at any time, not simply during the final twenty-four hours before an election, should be grounds for overturning an election.⁴⁷⁴ Similarly, the

Cartwright, Secretary-Chairman, Employees' Representation Plan, Oklahoma Pipe Line Co.), reprinted in 2 NLRB LEGISLATIVE HISTORY, *supra* note 1, at 1617, 2042.

472. See, e.g., Corn Prod. Ref. Co., 58 N.L.R.B. 1441, 1443 (1944).

473. The National Organizing NLRB Subcommittee of the AFL-CIO recently urged greater use of mail ballot elections for similar reasons. "The use of mail ballots," it noted, "prevents an employer from presenting the appearance that it controls the election and the election process. Locating the polling booths on the employer's property has a negative psychological impact on the employees and it allows the employer to engage in a wide range of last-minute illegal tactics." Harold McIver & Jeffrey S. Wheeler, Suggested Administrative Changes in the NLRB Proposed by the National Organizing NLRB Subcommittee 5-6 (Feb. 24, 1992) (unpublished manuscript, on file with the *Minnesota Law Review*).

474. This would be consistent with the free speech proviso, 29 U.S.C. § 158(c) (1988), because it would not render such meeting an unfair labor prac-

Board should not hunt through the workplace searching for the "locus of final authority," but instead should acknowledge that employer authority pervades the workplace and that compulsion is implicit when employers campaign during the work day. This would not mean that employers should be unconditionally prohibited from campaigning in the workplace. Rather, employers should be bound by their own restrictions on solicitation and distribution.⁴⁷⁵ Such a rule would make plain to employees that when employers campaign at work they occupy no different position than unions. Forced to obey their own time, place, and manner rules, employers would have to either persuade their employees through the same means used by unions and candidates for political office—calling meetings after work, leafletting at the plant gate—or allow balanced access to the workplace. Requiring employers to create an open forum to exactly the same extent that they use the workplace as a platform would dispel any suggestion that listening to anti-union rhetoric is part of the job.

This new framework would eliminate many of the most ar-

tice, but merely grounds for overturning an election. Moreover, captive audience meetings do involve a threat—that employees will be disciplined if they do not attend. The references to speech on company property in the legislative history do not suggest that Congress intended to insulate this form of threat. See S. REP. NO. 105, *supra* note 234, at 23-24, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 75, at 407, 429-30.

475. If an employer forbids employees from discussing the union during work time, the employer should not be allowed to disseminate its views during work time. If an employer posts its property against all outsiders, including union organizers, it should not be able to bring in a lawyer or labor relations consultant to convince workers to vote against the union.

The Supreme Court rejected an equal access argument in *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1957). The argument in *Steelworkers*, however, was made in the context of an unfair labor practice charge, rather than in support of an objection, and it was issued prior to the development of persuasive empirical evidence that a lack of equal access does "truly diminish[]", 357 U.S. at 363, the ability of unions to communicate with employees. See *GETMAN ET AL.*, *supra* note 6, at 92, 103-04. Moreover, the *Steelworkers* holding rested, in part, on pro-union employees' failure to request equal access. See 357 U.S. at 363.

The 1977 reform bills contained a requirement that the Board adopt rules insuring equal access. S. REP. NO. 628, *supra* note 105, at 47 (1978); H.R. REP. NO. 637, *supra* note 105, at 53. The arguments advanced in favor of such a requirement, however, rested on the notion of "equality of opportunities" rather than on the argument made here. S. REP. NO. 628, *supra* note 105, at 23. Opponents successfully argued that unions actually enjoyed campaign opportunities not available to employers (such as home visits to employees) and that equal access would further disbalance campaign rights in favor of unions. See, e.g., 1977 Senate Hearings, *supra* note 167, at 952-53 (statement of United States Chamber of Commerce).

cane rules currently governing campaign conduct, such as the locus rule, the ban on list-keeping and employer home visits, and the twenty-four hour rule. In their place would be a simpler and internally consistent set of rules unified around the principle of allowing employer speech no power beyond that of persuasion. These rules would impose "laboratory conditions" only so far as to enable employees freely to exercise the political right to representation within a relationship of economic dependence.

C. COUNTERARGUMENTS

The proposals, of course, will generate objections. What follows is a response to the principal objections that may be leveled against each component of the proposed reforms. Opponents of the reforms might advance two sorts of objections—one constitutional and one equitable—to the idea of excluding employers from representation proceedings. It could be argued that this proposed reform, along with the narrowing of defenses to a charge of refusal to bargain, deprives employers of property or liberty without due process. It remains an open question, however, whether Board certification of a union affects an interest protected by the Due Process Clause. Moreover, even if it does, the proposal accords employers due process.

Certification places only temporary or minor restrictions on employers' ability to manage their businesses. Prior to certification, an employer can either deal directly with individual employees or act unilaterally; thereafter, the employer must bargain with the union before altering the terms of employment.⁴⁷⁶ Employers are under absolutely no legal compulsion to reach agreement with unions, however, and if bargaining reaches an impasse, employers can do as they will.⁴⁷⁷

The Supreme Court emphasized the limited nature of employers' interest in the representation process when it upheld procedures under the Railway Labor Act (RLA) that are analogous to the rules proposed here. Under the RLA, the National Mediation Board (the equivalent of the NLRB) has the discretion to decline to hold a hearing concerning unit determina-

476. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

477. Employers are under a continuing injunction against dealing directly with individual workers, 29 U.S.C. § 158(a)(5) (1988), but after bargaining to an impasse they can unilaterally impose the terms they would have proposed to the individuals. *E.g.*, *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1011 (5th Cir. 1990).

tion.⁴⁷⁸ When United Airlines brought suit to compel the Board to hold a hearing on the question, "in which it would participate as a 'party in interest,'" the Court expressly rejected its due process argument.⁴⁷⁹ The airline argued that because the RLA "compels it to treat with the representative chosen by the majority of its employees" in an election, it had a "direct and substantial interest in the scope of the unit" and "due process require[d]" that it be allowed to participate in proceedings at which the issue was resolved.⁴⁸⁰ The Court ruled to the contrary, however, declaring that "United is under no compulsion to reach agreement with the certified representative."⁴⁸¹ The Court concluded that although the resolution of the unit question "might impose some additional burden upon the carrier, we cannot say that the . . . interest rises to a status which requires the full panoply of procedural protections."⁴⁸² Thus, the Court dismissed precisely the objection that might be made here, holding that employers do not have a constitutional right to participate as parties in representation proceedings.⁴⁸³

Although the Supreme Court has refined its due process analysis since the decision involving United Airlines,⁴⁸⁴ the proposed reform is constitutional even under current standards. In the United Airlines case, the Court did not fully analyze whether the certification of a union deprives an employer of either liberty or property, but even assuming that certification works such a deprivation,⁴⁸⁵ the proposal is consistent with the

478. 29 U.S.C. § 152 (Ninth) (1988).

479. *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 666 (1965).

480. *Id.* at 660.

481. *Id.* at 667.

482. *Id.* The Court specifically noted that "[t]o require full-dress hearings on craft or class in each representation dispute would . . . place[] beyond reach the speed which the Act's framers thought an objective of the first order." *Id.* at 667-68.

483. Arguably, the Court based its holding on the fact that the National Mediation Board had "requested, received and considered" United's views on the craft or class issue. *Id.* at 666. Such submission of written argument would be consistent with the proposal at issue here.

484. Key cases redefining liberty and property rights under the Due Process Clause are *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

485. Employers may argue that certification deprives them of their rights under state law to alter conditions of employment unilaterally and at any time (in the absence of express contractual limitations) and to enter into employment contracts with individual workers. *Cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-61 (1987) (accepting the government's concession that "the

Due Process Clause. The Clause guarantees the right to contest the legality of governmental action.⁴⁸⁶ Here, the action is certification of a union. Significantly, the Taft-Hartley Act changed the factual predicate for union certification from majority support for a union to majority selection of a union in an election. Under the Wagner Act, employers may have had a constitutional right to contest the existence of majority support in a hearing. In the Taft-Hartley Act, however, Congress substituted the election as a measure of employee sentiment for the process of hearing and adjudication. By doing so, Congress statutorily altered all employers' protected interest in continuing to deal directly with individual employees. Thus, employers have no constitutional right in each case to argue that the results of an election do not actually reflect majority sentiment, for such an argument would challenge the legislative judgment that an election is an accurate gauge. The Due Process Clause accords no such right.⁴⁸⁷

The Due Process Clause would not have been violated if the Board had never created challenge and objection procedures. As Judge Gibbons of the United States Court of Appeals for the Third Circuit stated in *NLRB v. ARA Services, Inc.*, "Board supervision and Board investigation with no provision for a hearing on employer complaints would be perfectly consistent with due process for employers."⁴⁸⁸ That the Board has created these procedures, which, under the proposal, employees and unions will continue to use, does not give employers a con-

contractual right to discharge an employee for cause constitutes a property interest").

Henry F. Farber argues that employers have no constitutionally protected interest in certification proceedings, but the argument is flawed. He draws an analogy between the employer's position and that of the patients in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). Henry F. Farber, Comment, *Procedures for Resolving Objections to NLRB Elections*, 6 INDUS. REL. L.J. 252, 260-61 (1987). In *O'Bannon*, the Court held that patients displaced from a nursing home as a result of its decertification were due no process. 447 U.S. at 790. But the patients were displaced only as a practical consequence of the government's action, while certification directly alters employers' legal rights.

486. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 n.8 (1985). There is, however, no right to argue for leniency or a departure from legal requirements. *Dixon v. Love*, 431 U.S. 105, 114 (1977).

487. See *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985); *Bi-Metallic Inv. Co. v. Board of Equalization*, 239 U.S. 441, 445 (1915). This construction of the Due Process Clause is consistent with that of Congress in the Administrative Procedures Act, which excepts from the Act's hearing requirement "proceedings in which decisions rest solely on . . . elections." 5 U.S.C. § 554(a)(3) (1988).

488. 717 F.2d 57, 67 (3d Cir. 1983).

stitutional right to invoke or participate in the procedures.⁴⁸⁹

Moreover, the question here is not really *whether* the employer has a right to be heard, but *about what* it has a right to be heard. Employers would continue to have a right to be heard in unfair labor practice proceedings before being ordered to bargain. The factual predicate of employers' obligation to bargain is Board certification of a union after an election. Employers should therefore be allowed to assert that certification has not issued, but they should not be allowed to reopen representation cases, in effect, by asserting the rights of employees who either have chosen not to assert their rights or have been unsuccessful in doing so. In the unfair labor practice proceeding, the employer will be able to contest the inclusion of managers, supervisors, confidential employees, or guards in the unit. It will also be able to argue that the contours of the unit limit its ability to reach agreement with the union. But the employer will not otherwise be able to challenge the representative status of the union or the appropriateness of the unit so long as an election has been conducted. Permitting employers to assert only their own rights is consistent with the Due Process Clause.⁴⁹⁰

Opponents of the proposed reform also might raise an equitable objection to the exclusion of employers from representation proceedings. According to this line of argument, employers should be entitled to participate as proxies for individual employees who oppose union representation but cannot effectively protect their interest. This argument founders for two reasons. First, even accepting the proposition that the direct cost of litigation justifies an exception to ordinary standing requirements,⁴⁹¹ employers are not appropriate parties to rep-

489. *Id.*; cf. *Davis v. Scherer*, 468 U.S. 183, 193 n.11 (1984) (accepting the concession that the failure to follow existing state procedures was not a federal due process violation). *ARA Services* involved a challenge to the Board's practice of declining to hold hearings on challenges or objections that it finds do not raise "substantial and material factual issues." 29 C.F.R. § 102.69(d) (1992). The courts have almost uniformly upheld this practice, although some courts have suggested in dicta, contrary to *ARA Services*, that a hearing is constitutionally mandated if substantial and material issues are raised. *See, e.g., NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1365 (5th Cir. 1980).

490. Moreover, even if employers have some constitutional right to be heard in representation proceedings, they do not have a constitutional right to be parties to such proceedings with all the accompanying prerogatives. Given the limited legal effect of certification on employers, a much more limited form of hearing would be consistent with the Due Process Clause and the proposed reforms.

491. Federal courts' prudential limits on third-party standing, for example,

resent anti-union employees because of likely conflicts of interest.⁴⁹² Suppose, for example, that certain employees oppose representation and therefore wish to be excluded from a bargaining unit, perhaps because they are supervisors. Their employer, whose principal objective is to defeat the union, may argue in a representation proceeding that these employees should be included in the unit in order to increase the "no" vote. Employers' interests thus may conflict with even those of avowedly anti-union employees.⁴⁹³

The employer-as-proxy argument contains an even more fundamental problem. It is premised on the proposition that individual employees lack the resources either to express or to protect their own interests. Yet, the conclusion that follows is that employers should have standing in the representation proceeding in order to prevent employees from gaining union representation. Paradoxically, then, the proxy argument turns employees' lack of effective legal capacity into a rationale for perpetuating their disenfranchisement in the workplace. The problem runs deeper than paradox, however. At bottom, the proxy argument suggests that employers—whose authority is inscribed in the employment relation and whose interests the law presumes to be in conflict with their employees—should stand as their employees' representatives. The law, however, has long maintained a wall between employers and the representation of their employees by prohibiting company unions.⁴⁹⁴ That wall must extend to representation proceedings. Neither the constitutional nor the equitable argument suggests that employers should continue to enjoy party status in such proceedings.

require some special obstacle to the third party's ability to assert his or her own rights. *See, e.g.,* NAACP v. Alabama, 357 U.S. 449, 455 (1958) (allowing third-party association to assert standing on behalf of its members on the grounds that to require the individual members to assert their own right to anonymity would nullify the right).

492. This proposition might lead to the conclusion that the Board should take a more active role in investigating challenges and objections, particularly when they are filed by individual employees. The Board already conducts an *ex parte* investigation to determine whether objections raise questions of fact. *See* NLRB, *supra* note 91, § 11394. The Board also characterizes representation cases as investigations rather than adversary proceedings. *Id.* For the Board to play an independent investigatory role in order to compensate for the lack of resources of individual employees would not be inconsistent with the proposed reforms.

493. *Cf. Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976) (conflict of interest is grounds for denying third-party standing).

494. *See* 29 U.S.C. § 158(a)(2) (1988).

A constitutional objection might also be made to the proposal that employers be denied the rights of candidates. They may argue that such a measure would infringe on employers' right to free speech. Yet the new rules would actually restrict employer speech less than the current rules. No absolute prohibitions, such as the locus, home visit, and twenty-four hour rules, would exist. Employers would be free to speak anywhere, at any time, so long as listening was not explicitly or implicitly a condition of employment. Captive audience speeches would be grounds for setting aside an election, but such a prohibition clearly squares with the First Amendment.⁴⁹⁵ As the Board recognized in *Clark Bros.*, there would be no restriction on speech, merely a ban on the threat of discipline for declining to listen to the speech.⁴⁹⁶

495. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); see also *Lehman v. Shaker Heights*, 418 U.S. 298, 302 (1974) (advertisements in municipal bus system on "captive audience" grounds); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (upholding ban on sound trucks, noting that the "unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it"). As Marcy Strauss points out in *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991), captivity is a question of degree. "[W]e are virtually never captive, because there is almost always something we can do to avoid exposure. . . . The question is, how great a burden would be imposed on the unwilling listener to avoid the message in order to protect someone's right to speak?" *Id.* at 89. Leaving a job to avoid being captive to anti-union speech is a substantial burden—heavier, for example, than forgoing public transportation to avoid being subjected to political advertising.

496. 70 N.L.R.B. 802, 804-05 (1946), *enforced as modified*, 163 F.2d 373 (2d Cir. 1947). Employers will argue that a rule that prevents them from paying employees to listen to their speech and from firing employees if they refuse to listen is the same kind of restriction on speech as the restrictions on expenditure that the Supreme Court struck down in *Buckley v. Valeo*, 424 U.S. 1 (1976). But as the Court noted in *Buckley*, "Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two." *Id.* at 16. Terminating an employee for refusing to listen to a campaign speech is "conduct primarily."

Two arguments in addition to those relying on the captive audience doctrine and the speech-conduct distinction can be made in support of the proposed restrictions on employer speech. First, the question whether employer speech urging employees to continue to bargain as individuals is commercial speech, subject to greater regulation, might be revisited. Cf. *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (describing limited protection of commercial speech). Although the Supreme Court rejected this argument in *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945), since then labor speech has been routinely treated as commercial speech subject to virtually plenary regulation. See Cynthia Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 942-47 (1982);

It is but a short step to the realization that all employer speech to employees during working hours, at the workplace, is speech to a captive audience. Chief Justice Warren so recognized in his separate opinion in *Steelworkers*,⁴⁹⁷ as have other courts and commentators.⁴⁹⁸ The rule proposed here is on at least as firm footing constitutionally as the prohibition in Title VII of the 1964 Civil Rights Act of verbal racial and sexual harassment that creates a hostile work environment.⁴⁹⁹ Indeed,

see also Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1484-88 (1982) (criticizing regulation of picketing as commercial speech). But see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (finding that a prohibition of union handbills urging a consumer boycott of a mall would pose a serious First Amendment question).

A second argument may adopt the rationale recently articulated in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which the Court upheld a ban on use of corporate funds to make independent expenditures in support of candidates for state office. The Court reasoned that corporations may "use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Id.* at 659 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)). The Court explained in *Austin* that use of corporate treasuries to fund political causes is "unfair" because the size of corporations' treasuries in no way reflects public support for their political agendas and the availability of large sums of money may lend a corporation political influence that is "no reflection of the power of its ideas." *Id.* (quoting *Massachusetts Citizens*, 479 U.S. at 258). Employers' ownership of the workplace similarly does not reflect support for their views about unions, but it does yield employers influence beyond the persuasiveness of their position.

497. *NLRB v. United Steelworkers of America*, 357 U.S. 357, 368 (1957) (Warren, C.J., concurring in part and dissenting in part).

498. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (N.D. Fla. 1991) (observing that "female workers . . . are a captive audience in relation to the speech that comprises the hostile work environment"); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 ("Few audiences are more captive than the average worker.")

499. 42 U.S.C. §§ 2000e-2000e(17) (1988 & Supp. IV 1992). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that such non-*quid pro quo* sexual harassment violates the Act. *Id.* at 66-67. The Equal Employment Opportunity Commission's Guidelines make it clear that such harassment may be "verbal or physical." 29 C.F.R. § 1604.11(a) (1992). For a defense of the constitutionality of these restrictions on workplace speech, see generally Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 197 (1990) and Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990). These scholars offer a number of doctrinal justifications for restrictions on harassing speech. Robert Post offers a justification that closely parallels the nonconstitutional argument of this Article. He argues that

even if the first amendment were to immunize from legal regulation the circulation of certain racist ideas in newspapers, it would not follow that the expression of those same ideas could not be restrained by

the proposed rule would not prohibit employers' campaign speech in the workplace, despite the implicit threat of discipline for not listening. The rule would merely prevent employers from gaining unfair advantage through such speech by requiring them to provide others with an equal opportunity to campaign at work. Neither depriving employers of party status nor denying them the rights of candidates in union elections would violate the Constitution.

CONCLUSION

A quarter of a century before the passage of the Wagner Act, the legal scholar Roscoe Pound published a devastating critique of contemporary labor law in the *Yale Law Journal*.⁵⁰⁰ In this now classic essay, Pound attacked the "fallacy" of the doctrine of "Liberty of Contract" as propounded in the leading cases of his day.⁵⁰¹ "[T]he decisions . . . are so academic and so artificial," he wrote, so at odds "with actual industrial conditions."⁵⁰² Pound bluntly asked, "[W]hy [is] the legal conception of the relation of employer and employee[s] so at variance with the common knowledge of mankind?"⁵⁰³ Why do the courts, he asked, hold to "an academic theory of equality in the face of practical conditions of inequality?"⁵⁰⁴ These same judicial deci-

the government within the workplace, where an image of dialogue among autonomous self-governing citizens would be patently out of place.

Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991). Post elaborates,

[S]peech that is appropriately protected when it occurs within public discourse is also appropriately regulated as racial or sexual harassment when it occurs within the context of the employment relationship. This is true because there are good reasons for the law to regard persons as autonomous within the context of political deliberation, but there are equally good reasons for the law to regard persons as dependent within the work-place.

Robert Post, *The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1746 (1990). No court has seriously questioned the constitutionality of Title VII's restrictions on harassing speech, although a few commentators have. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 544-45 (1991) (arguing that verbal elements of harassment are protected); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992) (arguing that "undirected" harassing speech is protected).

500. Pound, *supra* note 123.

501. *Id.* at 454.

502. *Id.* at 454, 487.

503. *Id.* at 454.

504. *Id.*

sions provided the target for Wagner's opening statement in Congress on behalf of the right to labor representation.⁵⁰⁵ Today, however, a half-century after that right was enacted into law, the legal conception of labor relations is no less at variance with the conditions of the workplace than when Pound wrote.

In the spirit of Pound, who inquired into the "potent causes" of the courts' doctrinal fallacies,⁵⁰⁶ this Article has explored the theoretical and political sources of the incoherence of contemporary labor law. It has traced such incoherence to the original metaphor of industrial democracy that legitimated the Wagner Act and that later framed the designation of the union election as the exclusive instrument for exercising the right to labor representation. In itself, as a method of deciding the question of labor representation, the election is hardly the nub of the problem. Rather, this Article has argued that the right to representation has been subverted by lawmakers' interpretation of industrial democracy in terms of an analogy between political and union elections—an analogy that suggests a theory of the union election as a contest between union and employer.

Earlier in the century, it was possible for scholars such as Pound to foresee surmounting the incoherence of judicial regulation of labor relations—to prophesy that "the hope for future labor legislation . . . is bright."⁵⁰⁷ Yet it is difficult to be sanguine today about the prospects of the reforms proposed here. They are likely to be challenged from divergent perspectives. On the one hand, they might be said to turn an adversary proceeding into an *ex parte* one and to encroach on employers' liberty of speech and rights to property. On the other hand, they, like the Wagner Act itself, might be said to provide only a feeble hedge against employers' economic authority. The right to self-organization, labor representation, and collective bargaining inevitably entails limits on employers' legal and economic prerogatives, however, and the proposed reforms would simply give effect to existing guarantees. In so doing, the reforms would buttress the legal apparatus that is indispensable to labor's ability to organize collectively and gain some voice in workplace governance.

The Wagner Act seemed to fulfill the hope that relations in

505. See 79 CONG. REC. 7566-67 (1935) (statement of Sen. Wagner), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 1, at 2325.

506. Pound, *supra* note 123, at 455.

507. *Id.*

the workplace would be reconciled with ideals of freedom. Yet the regime of industrial democracy the Act substituted for liberty of contract has not reordered the employment relationship. Instead, it has reinscribed the inequality between employer and employed. The law of the workplace has been translated from the language of the market into the language of politics, but still it elides the undemocratic authority the Wagner Act was designed to eliminate. One thing therefore is certain. So long as the law construes employers and unions as equals in union elections, industrial democracy will remain as much a legal fiction as liberty of contract.

