Free and Fair?

How Labor Law Fails U.S. Democratic Election Standards

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Introduction

Since its inception, federal labor law has been understood as a means of introducing the principles of U.S. democracy into the workplace. Senator Robert F. Wagner, author of the 1935 National Labor Relations Act (NLRA), explained the law's core purpose. "Only 150 years ago did this country cast off the shackles of political despotism," Wagner declared. "Today… we strive to liberate the common man."[1] The U.S. Senate Report on the NLRA similarly explained that the legislation was motivated by the notion that "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."[2]

In the decades since the Act was passed, thinking about unionization has continued to be framed by this vision of democracy at work, with both pro- and anti-union commentators drawing parallels between the rights of Americans as citizens to elect their own government and the rights of Americans as employees to represent themselves in the workplace. In recent debates over labor law reform, management as well as labor organizations have grounded their arguments in the parallels between political and union elections. Supporters of the Employee Free Choice Act, for instance, assert that it is needed in order to guarantee the rights to self-representation promised by the Wagner Act. On the other hand, those seeking to outlaw the ability of employers to recognize unions on the basis of signed statements from a majority of workers also ground their argument in an appeal to U.S. tradition; the secret ballot is the cornerstone of democracy, they argue, and therefore must be a requirement of union recognition as well.[3] Whatever their particular proposals, everyone seemingly agrees that unionization procedures should follow the norms of U.S. political democracy.

If there is a consensus that the rules for union formation should be based on the practices of U.S. democracy, any discussion of labor law must start with an assessment of the extent to which the current system embodies these practices. This is the subject of this study. In what follows, I will examine how current union election procedures, as overseen by the National Labor Relations Board (NLRB), measure up to the standards of democracy articulated by the founders and enshrined in U.S. law and jurisprudence. While there are upwards of 10,000 annual cases of labor law violation — thus rendering union elections considerably dirtier and less democratic in practice than on paper — that is not a consideration for this paper.[4] The study below provides a best-case analysis, examining how current union election procedures — as they are laid out in law, and assuming they were faithfully upheld by all parties — compare to the standards of U.S. democracy.

Principles of U.S. Democracy: Defining Fair Elections

As the world's first democracy, the United States has long served as the standard-bearer for defining what constitutes "free and fair" elections. But what exactly are these standards? While there are myriad practices that make up a democratic election — and many practices that vary from one state to another — a handful of core principles define the U.S. tradition of democratic elections. In addition to the secret ballot, these include:

- Genuine competition between parties and equal access to voters
- Free speech for both candidates and voters
- Equal access to the media
- Separation of state and party
- Leveling the playing field by controlling campaign finance
- Protecting voters from economic coercion
- Timely implementation of the voters' will

Genuine Competition between Parties and Equal Access to Voters

One of the key principles of the U.S. system of democracy is that elections must be not only "free and fair" but also competitive. In a system where the people are self-governing, it is critical that voters receive thorough and detailed information from each of the major candidates. It is not enough to have two candidates running against each other if one of them is prevented from publicizing his message to the voters. This, indeed, is why the U.S. government consistently denounces elections in countries where state-controlled media refuse to allow equal airtime for opposition candidates.[5] This same principle is the driving motivation behind federal matching funds in presidential elections. While the Federal Elections Commission (FEC) does not require that opposing candidates have the exact same amount of money, the establishment of matching funds aims to create a roughly level playing field. Similarly, the Federal Communications Commission's (FCC) Equal Time Rule, requiring broadcasters to provide equal access to competing candidates, is designed to promote balanced competition between the parties.

Free Speech for Both Candidates and Voters

At the heart of our system is the free speech right of all citizens to engage in unfettered debate of political issues. While the First Amendment is often thought of as a means of safeguarding individuals' right to aesthetic self-expression, constitutional scholars from liberal Alexander Meikeljohn to conservative Robert Bork agree that its primary purpose is to protect free speech specifically on political matters.[6] Free speech is "the only effectual guardian of every other right," Thomas Jefferson explained.[7] The public clashing of viewpoints is integral to the process of voters evaluating competing claims and arriving at judicious decisions. This is the heart of what it means for sovereignty to reside in the people. Jurist Robert Bork has noted that "representative democracy" is "a form of government that would be meaningless without freedom to discuss government and its policies."[8] Rather than voters keeping their opinions to themselves, the standard for U.S. democracy set by the Supreme Court is that "debate on public issues should be uninhibited, robust and wide-open."[9]

Creating an Informed Electorate through Equal Access to the Media

The framers of the Constitution held that public debate was necessary in order to enable common people to arrive at wise political decisions. "It is of particular importance," the Supreme Court has stated, "that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate … their positions on vital public issues."[10] "Those who won our independence," explained Justice Brandeis, "believed that … public discussion is a political duty."[11] For this reason, it was not enough for the founders that competing viewpoints be *available* or *accessible* to voters; they must be widely disseminated and, hopefully, vigorously debated.[12] In the words of the Supreme Court, the principle of free speech "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."[13] Thus, equal access to mass media is not only an issue of fairness to candidates; it is a prerequisite for enabling democratic citizens to make informed choices.

One of the implications of promoting free public debate is maintaining a strict separation between state and party. For the founders, the conflation of the state with a particular clique of rulers was part of the English system they repudiated. In modern times, this remains one of the key distinctions between genuine democracies and authoritarian regimes that seek to gain legitimacy through stacked elections. In the fall of 2004, for instance, Foreign Relations Committee Chairman Senator Richard Lugar condemned elections in the Ukraine for a "disregard for the fundamental distinction between the State and partisan political interests."[14] For a government to be responsive to its voters, public resources, including control of the media, cannot become the tool of one party.

Leveling the Playing Field by Controlling Campaign Finance

The importance of competitive elections and broad debate recently led lawmakers to adopt controls on the ability of wealthy candidates to so severely outspend their competitors as to prevent meaningful

debate. This is the driving motivation behind campaign finance regulations and federal matching funds. While the FEC does not require that opposing candidates have the exact same amount of money, the establishment of matching funds aims to create a roughly level playing field.

Protecting Voters from Economic Coercion

In our economic lives, we reside in a world of great inequalities. The realm of democracy is the one place where we are supposed to meet as equals. But while free speech lies at the heart of the U.S. political system, it cannot by itself guarantee a functioning democracy. In particular, if the country's wealthiest citizens were allowed to use their financial power to bribe or coerce others into supporting a particular party, the notion that government follows the will of the people would become meaningless.

In crafting the Constitution, the founders were so worried about the potential for undue influence on working-class citizens that many advocated restricting the vote to those who owned enough property to be economically independent.[15] In the debates leading up to the framing of the Constitution, framer Governeur Morris worried that those who "receive their bread from their employers" could not be "secure and faithful Guardians of liberty."[16] "Give the vote to people who have no property," Morris argued, "and they will sell them to the rich."[17] In response to these concerns, the country established an extensive body of law designed to guarantee that even propertyless voters would be protected against any form of politically motivated coercion. Thus, for example, FEC regulations prohibit corporations from soliciting employees for a company political action committee (PAC); federal officials may not require their employees to work on political campaigns; and a host of state laws bar employers from pressuring their workers to support a given candidate. All of these are reflections of the country's commitment to guaranteeing that even the worst-off of citizens can participate in the political system without fear of financial penalty.

Timely Implementation of the Voters' Will

Finally, U.S. democracy is based on a system of regular elections and fixed terms of office. While this principle may seem so obvious as to require no explanation, it was a novel innovation at the time of the nation's founding. The government of King George regularly decided to alter or extend the length of parliamentary terms. The founders were particularly concerned with preventing incumbents from manipulating the electoral system in order to extend their tenure in office. To this end, Thomas Jefferson went so far as to argue that the Constitution should limit presidents to one term. Otherwise, he worried, "if once elected, and at a second or third election out voted by one or two votes, [the president] will pretend false votes, foul play, hold possession of the reins of government…"[18] While this proposal was not ultimately included in the Constitution, the sentiment behind it informs our current system — including the principle that once a winner is certified in an election, he or she must take office promptly, and cannot be deprived of office on the basis of procedural delays.

Even when the electoral process is flawed, and challenges are raised concerning the legitimacy of the outcome, these challenges do not stand in the way of the winner taking office. This motive was embraced, for instance, by the Supreme Court in *Bush v. Gore*, and more recently in the certification of Washington governor Christine Gregoire.[19] In both cases, the election was characterized by unsettled procedural disputes with a potentially decisive impact on the outcome. Nevertheless, in both cases, it was deemed more important to have the apparent winner take office on a timely basis rather than facing a prolonged delay in the turnover of office.

These principles — competitive elections, free speech, broad public debate, the separation of economic from political power and of state from party, and the insistence on prompt implementation of the popular will — describe the core of our political system. As such, they also provide an effective yardstick with which to compare this system with that of union elections. In what follows, I will compare the procedures for NLRB elections with those for political elections, based on the principles articulated above. The analysis proceeds through a series of comparisons based on these key dimensions

of the electoral process. Finally, I will also compare the enforcement mechanisms underpinning the electoral standards in both the NLRB system and the U.S. system for political elections. Unfortunately, it appears that the secret ballot is the *only* point of agreement between U.S. electoral politics and union elections as they are currently conducted. In virtually every other aspect of the electoral process, union elections look more like those of discredited foreign regimes than those by which we elect our own senators and representatives.

Overview of Union Election Procedures

Before taking up the comparison of union and political elections, it may be useful to provide a brief overview of the NLRB's process for conducting union elections. Under federal law, an employer may recognize a union on the basis of any showing of majority support, including signed statements from employees, but an employer is not *required* to recognize a union unless it has been chosen through a secret ballot vote supervised by the Board. Thus, many unions are formed through such procedures.[20]

For a vote on unionization to be held, workers must first show the Board that they have the support of at least 30 percent of employees. Following that showing, the Board will set a date for an election and draw up a list of eligible voters. Both the employer and the union may contest the Board's determination of which employees should be included in the potential union, and the adjudication of such disagreements may delay the election. Once an election has been set, employees are free to recruit their coworkers either to support or to oppose unionization. In addition, both the union and the employer may contact employees, urging them to vote one way or the other. For the union, such contacts must occur away from the workplace — either at workers' homes or in restaurants, meeting halls, or other public venues. The employer (including all managerial employees) may communicate its views directly to employees at the workplace.

On the day of the election, the voting is generally held in the workplace, on the clock. One pro-union and one anti-union employee may be present to monitor the voting, and otherwise campaigning is generally restricted to outside the room in which voting booths are placed. During the organizing campaign, management can talk to workers anywhere on the premises, while employees can campaign only on break time and in break areas.

Following the vote, the Board counts the ballots and certifies an outcome based on a simple majority of votes cast. If there are no procedural challenges, the union is either certified or not, and the process is completed. However, if either the union or the employer challenges the results of the election, the outcome is suspended pending adjudication. In extreme but not uncommon cases, it can take several years for such a dispute to work its way through the Board and federal courts. During this time, the firm is governed as if the union lost the election.

Terms of Comparison

To compare the systems of union and political elections, it is first necessary to specify the terms of comparison. Some points are obvious: both systems have voters, ballots, and an election timetable. Beyond this, however, the parallels are less clear-cut. What, for example, is the "government" of a workplace? Who are the "candidates?" What are the "mass media?" There is not a simple and obvious correspondence between these features of U.S. politics and the cast of characters that animate a union election; yet to make any comparison of the two systems, we must determine which elements in one correspond to those in the other.

In the analysis that follows, I treat the management of a company as the "government" of the workplace. I believe that this reflects the reality of workplace governance, where management sets the policies, terms, and conditions according to which work life is run.

It is clear that the union, or at least the decision to unionize, is one of the "candidates." But who or what is the other candidate? Some analysts portray the vote to form a union as an election between the union (or workers who desire to organize) on one side and the company on the other. Indeed, this is often how union elections appear to play out. However, as a conceptual category, this cannot be right. The NLRA stipulates that employers may not "dominate or interfere with the formation … of any labor organization."[21] Employers thus cannot possibly be a "candidate" in a union election: employees cannot vote for their employer to represent them, since a company-run or company-dominated union is illegal. Nor is this merely a technicality of the law. As John Adams noted, it is critical that representatives "should think, feel, reason and act like" the people they represent.[22] But there is only one function for which employees might want a representative — to represent them in negotiations with their employer. Since an employer obviously cannot negotiate with itself, it cannot be the "representative" of employees in such a process. Thus, the only two bodies that might sensibly be thought of as "candidates" are the group of employees who want to form a union and those who oppose unionization.

What, then, is the employer's role in a union campaign? Some have suggested that employers are akin to foreign observers of an election — ineligible either to vote or to hold office, and thus essentially outside the electoral process. This was the reasoning of the AFL's counsel in his testimony on the original Wagner Act, urging 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?"[23] To the extent that we think of employers as citizens of a different polity, they would be banned from any participation whatsoever in union elections, including financial support for one side or the other.[24]

We alternatively might think of employers as akin to financial backers of the anti-union employees in a workplace. There are, of course, numerous problems with this formulation — above all, the fact that in many instances, there *is* no significant or organized group of anti-union workers until the employer begins its own anti-union campaign. Nevertheless, the relation of financial backer to the "candidacy" of anti-union employees seems to be the best analogy through which to view the role of employers.

Thus, the employer occupies two distinct roles. First, the employer is the currently existing government of the firm. Second, the employer also functions as the primary supporter for the anti-union campaign. Here we have already run into a fundamental discrepancy between the two systems: if management acts as both the "government" of the workplace and an active partisan in the campaign, this violates the fundamental democratic principle of separating state from party. Unfortunately, this dual identity accurately captures the reality of employers' role in union campaigns, and thus the analysis that follows will track management behavior in both roles.

Finally, then, what is the workplace? I believe that it makes the best sense to think of the workplace as akin to general public space in a political election, and to think of workplace communication as analogous to the mass media in electoral politics. This is clearly not a perfect analogy. In campaigns to create unions, the workplace is not the only forum for partisan communications. Union organizers are free to visit workers in their homes, and both union and management representatives are free to talk with workers in restaurants, parks, shopping malls, or any other public place.[25] Moreover, both unions and employers are free to publicize their claims in the general media. Nevertheless, the workplace serves as a unique forum for union campaigns. Mass media provide an extremely limited opportunity to communicate with workers; they are prohibitively expensive and do not target the appropriate audience.

Conversations with individual workers away from the workplace may be significant — whether in their homes or in some public venue — but are generally difficult to arrange, and, therefore, are often quite limited. At a time when workers' homes may be spread across 50 or 100 miles, and in an economy where many hourly workers hold more than one job, it has become increasingly difficult to catch anyone at home or even set up an appointment to meet at a pre-established time. As a result, recent evidence suggests that in the majority of campaigns, union supporters are unable to visit even half of the employees.[26]

The workplace is the only place where workers see each other every day — the only place they are all together as a group. As the Board itself has noted, the workplace is "the one place where all employees involved are sure to be together … the one place where they can all discuss with each other the advantages and disadvantages of organization, and lend each other support and encouragement."[27] The Supreme Court likewise has recognized that work is "the one place where [workers] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."[28] If management is the government of a company, then the workplace is the society that is governed. Thus, speech, media, and communication within the workplace must be compared with speech, media, and communication in the society at large during a political election.

Having established the terms of comparison, what follows is a detailed exploration of how NLRB procedures measure up against each of the democratic principles articulated above. In discussing each principle, I will first describe the standards established for political democracy and will then examine the corresponding standard enforced in union elections.

A Word About Secret Ballots

Because recent labor law debates revolve around the use of "card check" procedures, in which unions are recognized after demonstrating support from a majority of employees but without a formal election, much attention has been focused on the role of secret ballots in safeguarding democracy. Although the secret ballot *i*s a cornerstone of democratic elections, it is important to avoid simplistic equations that reduce the whole practice of democracy to secret ballots and nothing more.

There are some fundamental acts of democracy — such as New England town meetings or the signing of the Declaration of Independence — which rely not on secrecy but on public affirmation. For the founders, who were looking to create a radically new and more democratic form of government for the country, it was essential to "mutually pledge to each other our lives, our fortunes and our sacred honor" as a public act.[29] A secret vote — with no oversized "John Hancock" or any other public signatures — could never have accomplished the same goals. To the extent that unionization represents a similar effort — not to elect representatives to an existing government but to create a new and more democratic form of governance within the firm — it may be important for employees to make a public statement of support *as a democratic act*.

However, even if we simply think of union elections as needing to meet the same standards as congressional elections, it is not sufficient simply to focus on the institution of the secret ballot. Casual observers sometimes suggest that as long as a union election ends in a secret ballot, the election as a whole must be fair. Employees may be pressured to take one stand or another, but even if this pressure comes from those who control one's livelihood, the pressure is ultimately unenforceable. In the worst case, employees who are afraid to disagree with their supervisors may pledge to oppose unionization, but once they enter the privacy of the voting booth, they remain free to vote their conscience without fear of being identified as a union supporter.

U.S. democracy — from the founders to the present — fundamentally rejects this view. In our system, a secret ballot by itself is not enough to guarantee that elections are free and fair. Everything that precedes and leads up to the act of voting — voter registration systems, campaign financing, access to mass media, and public debate of the issues — must also meet clear standards to render an election legitimate. Indeed, our government has often declared other countries' elections illegitimate — even when there was no dispute about the fact that they ended in a secret ballot — because they failed to establish such safeguards in the campaign leading up to the vote.

Unfortunately, the secret ballot turns out to be the *only* point at which current union election procedures meet the standards of U.S. democracy. In every other area of democratic practice, the conduct of NLRB-supervised elections looks more like the discredited customs of rogue regimes than anything we would call American. There is, for instance, no right of free speech for voters in union elections. There is no equal access to media. Indeed, there is not even equal access to the names and contact information of eligible voters. There is no protection against partisan economic coercion of voters, virtually no regulation of campaign finance, and no separation between the "government" of a firm and the partisan behavior of anti-union managers. Finally, there is no guarantee that the will of the voters will be implemented on a reasonable schedule, and no meaningful enforcement for violators of electoral procedure. In this context, it is simplistic to focus solely on secret ballots and ignore the rest of the system. What is needed is a thorough analysis of the union election system and a comprehensive commitment to bringing this system into line with the norms of U.S. democracy. The following study aims to provide just such an analysis.

Competitive Elections: Equal Access to Voters

The first prerequisite of a competitive election is allowing candidates equal access to the list of potential voters. As a general rule, voter rolls are in the public domain and available to any citizen. Specific procedures for getting copies of voter names and addresses are set by each state or county, but it is axiomatic that whatever information is available must be provided to competing candidates on an equal basis.[30]

By comparison, labor law denies workers equal access to voter lists. When workers become interested in forming a union in their workplace, neither they nor any union with which they are affiliated can get a list of potential voters; nor do employees have the legal right simply to take home a list of coworkers for use in union organizing. For pro-union employees to obtain a voter list, they must first get at least 30 percent of their coworkers to sign cards asking the NLRB to sponsor a vote on unionization.[31] Needless to say, the fact that employees must contact this 30 percent without any list to work from is a daunting prospect. If candidates for federal office were required to produce signed statements of support from 30 percent of eligible voters simply in order to have an election scheduled — and to collect these statements without access to a voter list — it is hard to imagine how any challenger could prevail. Certainly if a foreign country operated in this manner, we would not hesitate to denounce this as a sham electoral system. But it is exactly such a system that U.S. citizens must endure in workplaces across the country.

Once there is a showing of 30 percent support, the union is entitled to a list of employee names and addresses.[32] Under federal law, the right to this list is presented as a guarantee of unions' ability to campaign effectively. As the Board has explained,

> As a practical matter, an employer, through his … ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.[33]

What is striking here is not the Board's decision to grant access to employee lists, but its assumption that this is sufficient to lay the groundwork for a fair election. Thus, the Board's standard is not that competing parties must have *equal* opportunity to address voters, but something much more minimal: merely that pro-union employees must have *some* means of communicating their message to coworkers.

However, even this goal has proved largely unattainable. To begin with, the list provided the union does not include either telephone or email contact information. In addition, since the law merely requires employees' "addresses," employers often omit details such as apartment numbers or ZIP codes, further complicating the work of union organizers.

The absence of phone numbers is particularly damaging in an age when workers live far apart from one another and often spend their free time running between kids, schools, sports, stores, doctors, and second jobs. The notion that union supporters should simply drive around, hoping to find workers at home who would welcome unannounced visitors, is unrealistic. Even worse, this process is further restricted by the timetable of NLRB elections. Once employees show 30 percent support for a vote, the vote should take place within 40 days.[34] The employer is not required to provide a list of eligible voters until seven days after the union's showing of support.[35] Thus, even when the system works perfectly,

union activists normally have just over four weeks between first receiving the voter list and the vote itself. In this time, union supporters must find a way to reach perhaps hundreds of coworkers, many of whom have otherwise received no information about the union drive.[36]

By contrast, management is free to campaign against the union at any time and in any part of the workplace. Indeed, anti-union lawyers specializing in "preventive labor relations" often recommend that anti-union communications begin with new employee orientations to forestall any thought of organizing.[37] Thus, by the time a union first receives the list of eligible voters, management may have been plying these same workers with anti-union messages over a period of years. Again, if we imagine a congressional election in which one candidate has been running aggressive attack ads for a period of years, while the other is prevented from contacting the voters until four weeks before the election day, no one would deem this a fair contest. The fact that it ends in a secret ballot in no way changes the fundamentally undemocratic nature of such a vote.

Free Speech

The right to free speech stands at the heart of the U.S. system. In the words of the Supreme Court, it is "the guardian of our democracy."[38] It goes without saying, of course, that for free speech to be meaningful, it must be applied equally to both sides of a debate. Unfortunately, however, the rules governing union elections essentially safeguard the free speech rights of employers while denying entirely those of employees.

Under federal labor law, management is permitted not only unlimited reign to voice anti-union arguments to employees, but also nearly unlimited reign to stifle employees' own political speech. Indeed, one federal commission found that there are upwards of 10,000 cases per year of workers being punished for engaging in pro-union speech.[39] Labor law states that employees may talk to each other about the union, or hand out union literature, only when both they and the person they're talking to are on break time and in a break area.[40] Outside this narrow window, an employer may enforce a total ban on employees talking about the union or distributing union information anywhere in the workplace, even if managers themselves are engaged in ongoing anti-union discussions and distribution of anti-union literature throughout the workplace.

In political elections, opposing camps as a matter of course are guaranteed equal speech rights. Indeed, federal law takes particular care to guarantee that employers do not create an uneven playing field within their workplace for political candidates; thus the FEC bans corporations from inviting one candidate to address employees without allowing a similar opportunity for his or her opponent.[41] By contrast, union campaigns are framed by a fundamentally unequal playing field.

Under law, anti-union managers are free to speak every day — or multiple times per day — to every worker. Employers may require individual workers to meet one-on-one with anyone from the CEO to their immediate supervisor. In these meetings, the same person who controls an individual's schedule, assigns job duties, approves vacation requests, grants raises or promotions, and has the power to terminate employees "at will," now conveys in the strongest possible terms the arguments for why employees should oppose unionization. These meetings are mandatory, and may be scheduled as frequently as the company wants, even every day. The only conceivable way a union might come close to matching this form of campaigning is by having full-time union representatives in the workplace who could speak to employees with the same frequency as supervisors. Yet under federal labor law, union organizers have no right to set foot in the workplace.[42] As one management consultant explains,

> the employer's greater opportunity to communicate with its employee, the virtually complete access to the minds of voters during working hours, and the control management can exert over employees give the employer a considerable advantage over his union counterparts. The advantage can legally be utilized to produce a winning vote on election day.[43]

In addition to speaking with individual employees in the workplace, labor law grants employers the right to require their employees to attend mass anti-union meetings. These meetings, too, can be held as often as management chooses, except in the last 24 hours before a vote.[44] The Board has ruled that employers have "no statutory obligation to accord the employees the opportunity to speak" at such meetings.[45] Not only is the union not granted equal time, but union supporters may be banned from such meetings, or may be permitted to attend on the condition that they not ask questions or venture opinions; those who speak up despite this condition can be legally terminated.[46]

In explaining the rationale for such "captive audience" meetings, the Board suggested that "if the privilege of [employer] free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation."[47] The "negation" in this case would be the invitation for pro-union employees to speak out in opposition to management's stated views. Thus, the very principle that the Supreme Court and the founders saw as the core of political democracy — the "uninhibited, robust and wide-open" debate among voters — is treated by the Board as an intolerable "negation" of management rights.

It is unsurprising that forced anti-union meetings are popular among employers. One study, surveying over 200 union elections in the late 1980s, found that 67 percent of employers required attendance at anti-union campaign events.[48] Data from the 1990s suggest that this figure has recently risen to as high as 92 percent.[49]

Finally, the impact of denying employees free speech rights has been even further compounded by Board rulings protecting employers' right to issue negative statements about unionization even if these turn out to be false. The Board has declared that it will police campaign propaganda only to the extent that printed materials must be identified as coming from one side or the other; beyond this, the Board does not "probe into the truth or falsity of the parties' campaign statements, and … will not set aside elections on the basis of misleading campaign statements."[50] The Board's reasoning is that, as long as information is clearly identified as coming from one party or the other, employees are sufficiently savvy to investigate all claims with appropriate skepticism. Such a standard may make sense in campaigns for federal office. In the context created by the founders — an atmosphere of free speech, where assertions may be readily challenged, dissected, and met with counter-claims — such a practice is reasonable. It has become routine, for instance, that presidential debates are followed by next-day scorecards reporting the accuracy of each candidate's claims. But the Board's standard has a wholly different effect in the context of the workplace, where there is no right of reply and no public forum in which to challenge such assertions. As Thomas Jefferson noted, "reason and free inquiry are the only effectual agents against error."[51] In the absence of employee free speech rights, the ability of management to issue misleading statements without having to confront opposing arguments on an equal footing undermines the essential goal of U.S. democracy: creating an electorate that is sufficiently well informed to choose wisely among competing camps.

In this sense, union campaigns are conducted under a particularly counterintuitive logic. Employers, who are ineligible to vote or stand for election, have almost unlimited scope for campaign activities, while the actual employees and "voters" are largely prohibited from engaging in similar actions.

The Tyranny of Mandatory Campaign Communications

Beyond the quantitative advantage that employers enjoy in the frequency with which they can communicate with voters, managers conducting anti-union campaigns also enjoy a *qualitative* advantage that is built into the very nature of their communication. Whereas all pro-union discussion is voluntary, anti-union discussions are mandatory. While considerable attention has been paid to the problem of mass "captive audience" meetings — where employees are forced to sit through anti-union presentations — the fact is that employees are "captives" in *all* workplace communication with supervisors. When a manager walks up to an employee on the job and launches into an anti-union speech, the employee is not free to leave, to start another conversation, to talk over their supervisor, to plug up their ears, or even to avoid paying attention.[52] Once again, if we were told of an electoral system in which the ruling party forced voters to attend its campaign events as a condition of employment — and in which voters would be laid off if they did not respond respectfully to an ongoing stream of one-sided jokes, comments, and speeches — we would assume that this system belonged to some tin-pot dictator. And again, the fact that such an election might culminate in a secret ballot would in no way undo our judgment. To discover that this regime is, in fact, operating all across our country is profoundly disturbing to anyone who hoped to see the norms of U.S. democracy upheld in the workplace.

A Candidate that Cannot Be Voted Out of Office: The Irreducible Power of Management

Beyond the power to compel voters' attention, anti-union managers enjoy a second form of unequal power that is inherent in the structure of the firm: even if management "loses" the election, it continues to control almost everything in the economic lives of its employees. This fact reinforces the impossibility of imagining management to be a "candidate" in union elections, because it is a candidate that can never be voted out of office. If workers vote to unionize, their union *joins* management, but does not *replace* it, in governing the workplace. But this fact creates a dramatic imbalance in the weight voters must accord to each side's campaign statements. Both pro- and anti-union representatives may pressure employees to side with them. However, if employees vote against unionization, the union has no power to punish them for this choice. On the other hand, if employees vote to organize despite management's anti-union campaign, virtually all aspects of their work lives remain under the control of the management they have opposed. Statements that convey management's disapproval of unionization must lead rational workers to fear that they will be subject to retribution even if a union is voted in. By comparison, we would never permit a system where the election for president occurred midway through the incumbent's term, with the incumbent administration guaranteed another two years in power even if it lost. Under such conditions, governors, mayors, lobbyists, and federal contractors would be understandably wary of campaigning against the incumbent; even if their candidate won, they would look forward to two years of disfavor from those who controlled the federal budget. Unfortunately, this is exactly the sort of pressure that every employee must confront in union campaigns.

Thus federal labor law grants employers a series of extremely powerful one-sided privileges: the use of supervisors to carry a partisan message to their subordinates; unlimited anti-union campaigning matched by a near-total ban on pro-union campaigning; and a nearly unlimited right to mandatory anti-union meetings with absolutely no corresponding pro-union response. Each of these is an activity that not only *would be* banned if transposed onto an analogous political election, but *is actually* prohibited employer behavior in political campaigns. Yet the protections we take for granted in political campaigns are absent in the workplace.

Equal Access to the Media

As with rights to free speech, labor law also provides management with highly unequal access to the media. Here too, NLRB practice departs radically from the norms of U.S. democracy.

In elections for public office, our system aims at enabling both parties' messages to reach the broadest possible audience. While media outlets are under no obligation to provide coverage to any candidate, federal law seeks to guarantee that whatever airtime is available is offered to both parties on an equal opportunity basis. In part, Congress has sought to make it affordable for even modestly funded candidates to reach as broad a public as possible. In drafting the 1971 Federal Elections Commission Act (FECA), the Senate declared that it aimed "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[53] Thus, federal statute mandates that in the two months leading up to a general election, broadcast television and radio stations must sell advertising time to political candidates at the lowest rate they charge to any other customer. Furthermore, these outlets are banned from charging a higher rate to one candidate than to another.[54]

As communications media have evolved over the past century, Congress has acted repeatedly to ensure that the new technology is not used to unfair advantage. This principle may be most clearly evident in the "Equal Time Rule" governing broadcast media. In brief, this rule mandates that if any station provides airtime other than normal news coverage for one candidate, it must provide equal time for his or her opponent.[55] The rule — first established in 1927 in response to radio, then amended after the development of television — reflects a keen understanding of the importance of mass media in political campaigns.[56] From the beginning, lawmakers focused on broadcast media as posing a unique challenge to politics. For both lawmakers and the courts, broadcast media are unique in two ways. First, because the airwaves are physically finite, candidates depend on a limited number of outlets for public exposure. In theory, there could be an infinite number of newspapers, limited only by the ability to remain financially solvent; the same is not true of broadcast media. To guarantee that any one candidate is not shut out of broadcast access, federal regulation was deemed necessary.[57] Beyond their technological limits, broadcast media were also perceived as uniquely influential. In formulating the original legislation, one congressional supporter argued that:

> [radio broadcasters] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.[58]

Similarly, the advent of television prompted Congress to add regulations governing what was fast becoming "the most important medium of political information."[59]

Both principles undergirding the Equal Time Rule apply with equal logic to union elections. While communication in the workplace is not the sole medium for talking with workers about unionization, it is a finite resource, and it is by far the most influential possible forum for campaigning. Yet where federal law insists that both sides of a political campaign have equal access to mass media, labor law is content to allow one party to exercise near-monopoly control over workplace media.[60] Indeed, in union election campaigns, communication within the workplace operates much like state-controlled media in a totalitarian nation. Employers may post anti-union information on bulletin boards, in cafeterias and in work areas, while banning similar postings by pro-union employees. Even a company that has a general "No Solicitation" rule in the workplace is permitted to violate its own rule by distributing anti-union

literature while enforcing the rule against pro-union handouts.[61] "Management prerogative," the Board has explained, "certainly extends far enough so as to permit an employer to make rules that do not bind himself."[62]

Competing Logics: Equal Access for Citizens, Minimum Access for Workers

Underlying the specific differences between the laws governing political elections and those for union formation, there is a deeper contrast in the fundamental principle that undergirds each body of law. The standard for U.S. elections is that candidates should each be enabled to "fully and completely inform the voters" of their positions.[63] Thus, the Equal Time Rule aims to "give the public the advantage of a full, complete, and exhaustive discussion, on a fair opportunity basis."[64] By contrast, labor law proceeds on the assumption that as long as pro-union employees are not *completely* prohibited from communicating their message to potential voters, the process is fair. The courts have asserted, for instance, that as long as the union has access to some avenue of communication with workers, it need not have access to the workplace.[65] Labor law thus effectively functions on a "minimum access" standard. Were this logic extended to federal elections, the law might hold that there is no problem with one candidate monopolizing the airwaves as long as his or her opponent is at least free to hand out leaflets at shopping malls.[66]

Campaigns for public office are never completely evenly matched, and the candidate with the larger war chest often uses it to buy superior airtime. However, both parties have access to all the same media. By contrast, the inequality built into union elections is not one of resources, but one of rights. No matter how much money a union may have, pro-union workers may be denied the right to post notices, make announcements, or circulate newsletters as a matter of company policy. As the Supreme Court has explained, labor law:

> does not command that labor organizations …. be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.[67]

Yet in political elections, federal law *does* command that such a standard be upheld; any medium that is made available to one candidate must be available to the other. That such a mundane and obvious principle of electoral democracy is so foreign to the framework of union elections points again to the discrepancy between the norms that govern the country and those that rule the workplace.

Leveling the Playing Field by Controlling Campaign Finance

Traditionally, one of the most important means of creating a level playing field among competing candidates is through regulation of campaign financing. While the law does not mandate that campaigns operate with the same amount of money, it does seek to establish a rough balance between them. One of the core notions of democracy is that elections are determined by the popular judgment of the merits and faults of each candidate. If the candidates' resources are so unequal that one can saturate the voters with his message while the other is barely heard, this defeats the purpose of democracy since citizens cannot make a truly informed choice. Following the introduction of television advertising in the 1960s, legislators became concerned that "expenditures have been escalating so as to threaten to make money the principal determinant of election."[68] In order to "protect the integrity of the federal election process," the 1971 FECA established the first limits on campaign spending.[69] The previous absence of limits, House members explained, "makes the law seriously defective because [it] … tends to give a candidate with large financial resources an undue advantage over one whose resources are limited," threatening to create a political system "dominated by special interests and unresponsive to the public will."[70]

Thus, the fundamental goal of federal campaign law is to maintain a balanced playing field between the candidates by controlling the size of campaign budgets.[71] The establishment of public matching funds within the presidential election context is intended specifically to induce candidates to accept such limits.[72] Generally, this incentive has been sufficient to guarantee that the resources of opposing candidates, while certainly not equal, are roughly in the same ballpark. Recently, however, a number of independently wealthy candidates have chosen to eschew matching funds in order to make use of their own superior resources. To solve this problem, Congress in 2002 passed a "Millionaire's Amendment" to the FECA.[73] Under this statute, candidates for federal office who face wealthy, self-funded opponents are permitted to increase both donations and expenditures beyond the normal limits.[74] Thus, Congress has acted repeatedly, if imperfectly, to maintain the rough balance of resources needed to ensure competitive elections.

When measured against the norms of political elections, NLRB procedures fall far short. In contrast to the FEC, there are absolutely no limits or penalties, and very limited reporting requirements, governing the amount of money that parties may spend on union campaigns.[75] Moreover, the Board has completely ignored the principle of fair competition that is so central to U.S. democracy. Aggressively anti-union employers frequently make use of outside consultants, on-the-clock meetings, legal strategies, internal communications, the use of company property and equipment to support these efforts, and, above all, the paid time of supervisors who function as anti-union campaign staff. All of these expenditures would be both reported and strictly limited under the FEC. And taken together, they add up to a level of resources that few unions can ever hope to match. The fact that none of this is reported or limited in any way allows employers to exploit their superior financial resources in order to run campaigns on a fundamentally unequal footing.

Guaranteeing Voters Protection from Economic Coercion

It is, of course, axiomatic that U.S. citizens cannot be threatened, coerced, intimidated, or bribed into voting for one party or another. Beyond the fact that no individual is permitted to bribe another, the law is particularly concerned to prohibit the potential economic coercion of employers over their employees.

A concern about employer-employee relations dates back to the Founding Fathers. Thomas Jefferson invoked "yeoman farmers" as the ideal democratic citizens because they were economically independent; employees, by contrast, were dependent on the will of others and, therefore, vulnerable to pressure and manipulation. While exceptional individuals may resist such pressures, as Alexander Hamilton noted, "in the main it will be found that a power over a man's support is a power over his will."[76] For this reason, electoral law draws a wide arc designed to protect the economically vulnerable from even vague or implicit threats designed to influence voting behavior.

Federal law makes it illegal even to indirectly promise someone a job in return for political support, or to pledge support for someone's future appointment to a government post, in exchange for political support.[77] The law specifically bans managers in federal agencies from exercising any form of intimidation or coercion over their employees in order to control their political behavior; those who violate this statute are subject to imprisonment for up to three years.[78] So too, the Hatch Act prohibiting federal employees from participating in political campaigns is partly designed to protect such employees from the demands of elected officials who may control their salaries.[79] Finally, elected officials are banned from using any federally funded economic benefit — for instance, cash welfare, food stamps, or housing assistance — to influence voters.[80] It is noteworthy that this law specifically focuses on benefits for the poor. These are the voters whose economic vulnerability makes them most susceptible to political intimidation. Thus, while the law is clearly aimed at preventing federal corruption, it also reflects a keen insight into how easily the economically dependent may be manipulated.[81]

This insight is also embodied in the regulations governing solicitation for PACs. While corporations are free to operate PACs, they are severely restricted in the extent to which they may call on employees to support these efforts. Corporate PACs may solicit contributions from shareholders and managerial employees at any time. However, if they wish to solicit non-supervisory employees, they may do so only twice a year, and then only in written letters mailed to employees' homes.[82] If rank and file employees are solicited for a corporate PAC, the mailing must include something akin to a political "Miranda warning," specifically stating that they need not contribute, and that there will be no consequence for not participating.[83] Moreover, corporate PACs are required to establish accounting systems that make it impossible for the employer to know whether any individual employee has made a contribution.[84] Finally, if a unionized company solicits its employees for a corporate PAC, it must make its fundraising methods (including all mailing lists) available for the union to use in its own PAC solicitations.[85] This law is based on the understanding that workers are often extremely sensitive to the need to make a good impression on their boss. So many rewards and punishments depend on the personal will of supervisors — hiring and firing, increased or decreased hours, convenient or inconvenient days off, flexibility to care for sick children, and myriad other terms of employment — that many employees shy away from any behavior that might be displeasing to those in charge. Thus federal law in this area provides multiple layers of protection to insulate workers from any possible pressure to mold their political behavior to suit the boss' desires.

State laws similarly recognize the particular importance of safeguarding employees from the undue influence of those who control their economic lives. States have commonly adopted statutes such as Michigan's, making it a misdemeanor (punishable by fine and imprisonment) to threaten an employee

with termination on the basis of supporting one candidate or another.[86] Moreover, state laws generally regulate indirect as well as direct threats. Many states, for instance, ban employers from including any form of political advertisement or advocacy in employees' pay envelopes.[87]

Under electoral law, things that are perfectly legal for unrelated individuals to say to each other become illegal when conveyed by an employer to his or her employees. For instance, a homeowner can declare that he or she doesn't want any Republicans in the house, but in most states, an employer cannot make a similar declaration about his or her workplace. This reflects legislators' recognition that the same words coming from one's employer carry an additional weight — and an implied threat of retaliation — which is not present in the speech of random individuals or neighbors. So too do both federal and state statutes recognize the potentially coercive nature of employer-employee communications even when they do not include an explicit threat. The Hatch Act, for instance, does not state that federal employees can work on their bosses' campaigns unless the boss explicitly makes the work a condition of employment. Coercion does not need to be spelled out to be understood.

By contrast, the Board appears blind to the insight that animated the founders.[88] Under labor law, while explicit threats or bribes are illegal, anything that falls short of an explicitly articulated threat is permitted.[89] For instance, employers may not tell workers that "if you wear a union button, you'll never get a promotion," but they are perfectly free to state that "a union is a declaration of disloyalty to me personally, and an affront to everything this company stands for." To any reasonable human being, there is little material difference between these two statements. Yet under labor law, the second is perfectly legal.

This same implausible distinction applies to threats aimed at the workforce as a whole. Employers may not threaten to close up shop in retaliation for a pro-union vote. But they are free to "predict" that unionization will lead to a shutdown. Specifically, an employer is permitted to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," but not to issue "threats of economic reprisal to be taken solely on his own volition."[90] While this distinction may be theoretically intelligible, it is virtually meaningless in practice. Indeed, anti-union lawyers have become adept at counseling their clients on how to intimidate employees effectively while obeying the letter of the law. One such text, for example, advises that:

> Management may … say that it could not state with 'certainty,' but would predict that if the union wins the election and the firm has to operate under a union contract that adds considerably (not minimally) to costs, then, 'as a good businessman,' the employer would have to carefully consider the necessity of moving operations out of the country, so that costs would be reduced, and the product could be sold at a profit.[91]

It may be unsurprising, then, that according to one survey, while only one percent of companies actually close up shop after their employees vote to unionize, 71 percent of manufacturing employers threaten to close in the course of a union election campaign.[92] The issue of "predicted" versus "threatened" layoffs provides one of the clearest contrasts between electoral and labor law. Neither federal nor state statutes governing election to public office recognize such a distinction. Instead, most state laws are premised on a "reasonable person" logic. Employers are prohibited from making statements that would serve to influence a reasonable person's voting behavior, even if they contain no explicit threat. In at least a dozen states, predictions of layoffs in the context of an election are specifically prohibited by law. Arizona, for instance, mandates that within 90 days of an election, an employer may not:

> put up or otherwise exhibit in any place where his employees are working or are present in the course of employment a handbill, notice or placard containing a threat, notice or information that if any particular ticket or candidate is elected or defeated work in his place or establishment will cease in whole or in part, or his establishment will be closed, or the wages of his workmen will be reduced, or other threats, express or implied, intended or calculated to influence the political opinions or actions of his employees.[93]

Thus, what is expressly prohibited in political elections is explicitly condoned in union elections.

Indeed, under current labor law, it is hard to determine what employer behavior would *not* be permitted in the course of a union election, short of a clumsy and explicit threat. Employers are free, for instance, to report that major customers will stop buying from them in the event of unionization,[94] or to inform employees that personal relationships in the company will suffer if a union is voted in.[95] Likewise, an employer who threatened to eliminate "special personal arrangement[s]" such as "time off when your children [are] sick, weddings, for haircuts, a school prom, emergencies at home, and to catch up on studies" was deemed within his legal rights.[96] Even an employer who told workers that "I hope you guys are ready to pack up and move to Mexico" was found to have acted legally.[97] An employer who exhibited a series of posters depicting factories that were closed as a result of unionization was thought to have approached the "brink" of acceptable behavior, but was ultimately judged to have engaged merely in persuasive, not coercive, communication.[98]

The impact of this sort of officially "non-coercive" speech is not lost on employees. One survey found that 70 percent of U.S. workers believed that "corporations sometimes harass, intimidate, or fire employees who openly speak up for a union."[99] Another poll reported that 79 percent of workers thought it was either "somewhat" or "very" likely that employees "will get fired if they try to organize a union."[100] If these are the assumptions that frame employees' thinking about unionization even before a union drive begins, it is unsurprising that they would be extremely sensitive to the anti-union statements of their supervisors. As labor attorney Kate Andrias notes, "It is only logical that a worker who already believes that pro-union speech leads to termination, and who then hears carefully phrased predictions from her employer, would suppress her pro-union speech."[101]

The failure of labor law to protect workers from what any reasonable person would interpret as economic threats is particularly disturbing given that the need for such protection is even greater in union campaigns than in those for public office. In the context of congressional elections, for instance, the behavior of individual employees is much less consequential — and much less noticed — than in union elections. In most federal campaigns, the outcome only marginally impacts any individual employer. Further, the result is determined by several hundred thousand voters, among whom any single employee counts for little. Thus, there is little reason for an employer to police or punish the political behavior of subordinates. All of this is reversed in union campaigns. The outcome matters greatly to management, and because employees all look to see who among their coworkers has taken a stance for or against unionization, the behavior of individual employees may matter greatly. As a result, managers have much greater incentive to coerce or threaten employees into abandoning the union effort. Thus, in exactly the setting where protection against economic coercion is most needed, the law is weakest.

The range of fears that workers may experience during a union election does not necessarily prevent them from voting for a union in the privacy of the polling station. But it does inhibit them from participating in all of the pre-election-day activities that make up a political campaign. Even if threatened workers are not afraid to vote their conscience, they will be understandably wary of wearing buttons, signing petitions, going to rallies, handing out leaflets, or displaying bumper stickers. Again, if we imagine a country in which the ruling party is free to engage in all the public hoopla of campaigns, while its opponents put their livelihood at risk by doing likewise, no American could think this counted as "democracy."

Guaranteeing Voters Protection from Coercion at the Polls

When workers decide to form a union, they are generally required to vote at work, where they may be easily observed by supervisors.[102] Placing the voting booths in a location controlled by management creates myriad opportunities for subtle coercion. While the ballot itself remains secret, management may call individual workers to the polls on a schedule of its choosing, making it easy to monitor voting activity.[103] Employees who show up at the polls together with known union supporters, or who are seen conversing with pro-union employees, may understandably fear that they have been marked for retribution, even though their ballot *per se* remains secret.

It is the concern to avoid situations such as this that has driven election officials to mandate that polling places for political elections be located in neutral spaces. While the siting of polling places is local rather than federal law, the FEC advises local officials that the importance of "impartiality at the voting booths" creates a "strong public policy reason" to guarantee that polling places are situated in nonpartisan locations.[104] In this way, not only is the ballot itself secret, but the choice of whether or not to vote, or who to vote with, cannot be a cause for fear of retribution. In political elections, voting cannot take place at an office owned by one of the campaigns, or even by a relative of a candidate. Nor would employees be required to vote at their workplace if the employer in question had taken a very active and public role in support of a particular candidate. Thus, for example, Texas' code mandates that polling places be located in a "public building," and specifically prohibits polling places located at the residence of a candidate or party official.[105] Indeed, that state is so intent on guaranteeing impartial voting locations that, in the event that no public building is available for use as a polling place, county commissioners are authorized to purchase a new building for that purpose.[106]

Thus, both federal and state officials embrace a higher standard for voting procedures than is available to U.S. workers seeking to create a union. The practice that is nearly universal in U.S. workplaces — requiring employees to vote in their places of work, easily monitored by their managers and supervisors even when these individuals have engaged in ardent campaigning against unionization — is prohibited in political elections as a matter of course.

Timely Implementation of the Voters' Will

As described earlier, one of the cornerstones of U.S. democracy is that elections must be held on a regular and timely basis. If union elections were run in keeping with these principles, the vote would be held within a fixed period of time. This would guarantee that the process was responsive to the will of the voters, and would prevent the incumbent administration (here, the management) from manipulating the timing, and thus potentially the outcome, of the election. Instead, labor law provides none of these protections. When workers petition for a vote on unionization, the Board is required to hold a hearing determining exactly which employees should be included in the union, and the employer is a fully recognized participant in this hearing. Thus, employers are provided an opportunity to delay the election, using this time to campaign more aggressively against unionization. "As a practical matter," one anti-union consultant explains, "the union controls the initiation of the organizing drive … but the company controls the end. This is done by delaying the election."[107] In many cases, employers' other advantages over pro-union workers are sufficient to deter unionization even within the normal time period. However, if employers deem it to their advantage to delay the election, the Board generally has no ability to force a timely election and no choice but to permit delays. And indeed, where employers choose this strategy, the evidence suggests a direct correlation between election delays and the proportion of employees voting against unionization.[108]

Even more disturbing is the incidence of delay in certifying the outcome of an election once it is held. In political elections, the law requires that procedural challenges be resolved in time for a winner to take office on a timely basis. While laws vary from state to state, a common principle is that embodied in Texas statute, which mandates that even in the case of an election whose outcome is contested, the apparent winner must take office pending the outcome of an investigation.[109] This principle was affirmed in litigation following a particularly unusual election for Justice of the Peace. The election in question was marred by irregularities, including eligible voters having been prevented from voting due to errors by election officials. The candidate who lost the election filed a challenge immediately following the vote, and the challenge was upheld by a state judge. Nevertheless, the candidate who won the election was sworn in on schedule and took office pending the outcome of the investigation. Ultimately, the judge ordered the election to be rerun. Nonetheless, the candidate who won the first round of voting was allowed to hold office until the new election was run, and acted with full authority in that position pending the new vote.[110]

If this principle were followed in union elections, workers who voted to organize would have their union immediately recognized by their employer, who would immediately commence good faith bargaining. In elections where employers file procedural objections, these challenges would be thoroughly investigated. If necessary, a new election would be ordered. While the challenge was being adjudicated, however, the employees would have a union with full legal authority to represent themselves.

Instead, when the outcome of a union election is challenged by an employer, the union is barred from taking office for as long as it takes to resolve the complaints. Since employers may pursue an appeal through five levels of adjudication — the regional NLRB office, an administrative law judge, the full NLRB in Washington, DC, federal district court, and finally the U.S. Supreme Court — appeals may take many years. During all this time, the workplace is governed as if employees voted against unionization, no matter what the polls may have shown.

Under these conditions, it is understandable that anti-union employers have an incentive to pursue prolonged appeals, since the appeal itself will forestall unionization, and in the meantime many union supporters will get despondent or move, leaving a weakened workers' organization to pick up the pieces if it is ever recognized. But this process marks a dramatic departure from the norms that define U.S. democracy. It is inconceivable that we would allow a political election — whether for President of the United States or a local Justice of the Peace — to be upheld in this fashion. Yet these are the conditions that frame workers' efforts to represent themselves in collective bargaining.

Enforcement and Penalties

The final point of comparison between political and union elections is the manner in which each system enforces the rights and standards it has established. In electoral politics, the law provides a combination of fines and imprisonment for those who violate the norms of democratic process. Under federal election law, for instance, a radio or television station that refuses a candidate airtime may have its broadcast license revoked.[111] Similarly, violation of federal campaign laws is punished by a combination of financial penalties and imprisonment, with the penalty for illegal donations reaching up to ten times the amount contributed.[112] The IRS code additionally stipulates that candidates that "knowingly and willfully" exceed allowed expenditure limits are subject to a $5,000 fine and one year in prison. Those who "knowingly and willfully" make false or misleading statements to the FEC, with the goal of covering up illegal contributions or expenditures, are subject to a $10,000 fine and five years in prison.[113]

Nor are such penalties restricted to violations of campaign finances. A federal employee who "uses his official authority for the purpose of interfering with, or affecting, the … election of any candidate for [federal] office" is subject to both fines and imprisonment.[114] Anyone who offers an economic incentive for someone else to vote, to avoid voting, or to support a particular candidate is subject to fines and up to two years in prison.[115] Finally, any individual who lies, conceals, or covers up information regarding attempts to intimidate voters is subject to fines and up to five years imprisonment.[116]

All of this is in striking contrast to union elections, where even employers who knowingly, willfully, repeatedly, and explicitly threaten employees, bribe employees, fund anti-union campaigns, destroy union literature, fire union supporters and lie to federal officials in an effort to cover up these deeds — even employers who commit all these acts in a single campaign and are convicted of having done so in federal court — can never be fined a single cent, have any license or other commercial privilege revoked, or serve a day in prison.

Compared with the enforcement mechanisms for electoral law, the process of enforcing labor law is complex, delay-ridden, and largely toothless. In the event that an employer illegally coerces employees in an election campaign, the employee must file a complaint with the local office of the Board. This office investigates the charge and, if it believes it to be meritorious, may issue a formal complaint. The complaint is heard by an administrative law judge. However, the judge's ruling here is not binding. Either party may file an appeal to this ruling, which will be heard by the Board itself. Again, Board decisions themselves are not self-enforcing; if an employer refuses to obey a Board ruling, the Board must go into federal court to seek enforcement. In 2003, the median wait for an unfair labor practice case pending a Board ruling was nearly three years from the filing of the charge;[117] employers who choose to appeal the Board's ruling to the federal courts could add years of delay to this process.

Furthermore, throughout this process, employees have no private right of action in seeking to redress illegal employer activity. If employees believe that their employer illegally sabotaged a union election campaign, they have no standing to bring this charge in open court. Instead, they must file a complaint with the Board, which makes an unreviewable decision on whether to take the case.[118] If political elections were run this way, it would mean that neither Al Gore nor George W. Bush would have had access to the courts in their battle over the results of the 2000 election. Instead, each would have had to file a complaint with the FEC; if the FEC chose not to pursue their complaint, the case would be dead, with no alternative possibility of redress or appeal. Finally, in the event that the NLRB decides to proceed with a case, the Board takes over "ownership" of the complaint. Thus, Board agents may choose to drop a case at any time, or to settle on unfavorable terms, even over the opposition of the original plaintiffs.

Beyond the delays and frustrations built into the prosecution of labor law violators, there are virtually no penalties for those ultimately found guilty. Employees who are fired for advocating unionization, for instance, bear the burden of proving that their termination was due to this activity.[119] If, after years of proceedings, an employer is found guilty of having illegally terminated union supporters, the maximum possible penalty is that the employer may be required to hire the worker back, and to provide backpay for the period the person was laid off, *minus whatever money the person earned at another job in the meantime*.[120] Since most individuals find another job, the total back payment may be quite small. If earnings in the replacement job equaled those of the former position, the employer may not owe any backpay whatsoever. It should be noted that the Board considers illegally fired employees to have an affirmative burden to seek work proactively; a fired worker who does not look for another job after being illegally laid off may find his or her backpay cut as a result, even after winning the case.[121]

It is unsurprising that this type of penalty is not an effective deterrent against illegal behavior. Rational employers might well decide that the modest penalty for firing a few union supporters was worth the benefit of scaring hundreds more into abandoning the cause of unionization. Nevertheless, even repeat offenders of labor law can never be subject to punitive fines of any amount by the Board.[122]

It is telling that even other areas of employment law provide stiffer penalties for illegal employer activities. For instance, the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination Employment Act all provide for attorneys' fees and punitive damages as a remedy for employer violations. Indeed, even administrative laws such as the Occupational Safety and Health Act or the Employee Retirement Income Security Act, provide punitive fines or allow for damages through private litigation. But in the most critical arena of workplace regulation, the law is virtually toothless.[123]

In the case of willful and egregious offenders, the Board has the power to issue an order compelling an employer to recognize a union and commence negotiations. However, the Board is extremely reluctant to use this power. Recently, the Board overturned just such an order that was issued by an administrative law judge. In the case in question, three-fourths of the engineering employees in South Florida's Hialeah Hospital signed cards indicating their support for unionization. Shortly thereafter, the hospital secretly videotaped and then fired a pro-union employee, threatened reprisals if workers voted to organize, and promised to promote an employee if he convinced others to vote against unionization. After these actions, a majority of employees ultimately voted against unionization. The Board found the employer guilty of multiple violations of the law but insisted that the only appropriate remedy was to rerun the election.[124]

Yet since there is no possibility of punitive damages under the NLRA, even when a bargaining order is imposed, an aggressively anti-union employer ultimately faces almost no sanction for flouting the law. When a union has been certified after winning an election, employers are legally required to negotiate a contract in good faith. However, if an employer refuses to bargain in good faith, the legal remedy is simply to order the employer, once again, to negotiate in good faith.[125] One of the most extreme such examples is the case of the Sparks Nugget casino. In 1977, the Board found that the Sparks Nugget had been guilty of bargaining in bad faith for the three previous years, and instructed the employer to return to the negotiating table in good faith. In 1980, the Court of Appeals enforced the Board's order, but the employer continued in its refusal to negotiate. In 1984, an administrative law judge once again found the employer was illegally bargaining in bad faith. In 1990, the Board upheld this decision, ordering the employer back to the table. Again, the employer appealed to the Ninth Circuit Court of Appeals, and in 1992, more than 17 years after the employer began disregarding the law, the court enforced another Board order requiring the company to return to the negotiating table.[126]

Thus, even those protections that exist on the books under labor law become illusory when one seeks to enforce them. But any electoral system that lacks effective enforcement cannot possibly safeguard the democratic rights of its participants.

How America Judges the World: Higher Standards Abroad than at Home?

One way to illuminate U.S. standards of what constitutes "free and fair" elections is to examine the criteria that our government uses to evaluate the legitimacy of other countries' elections.

The National Endowment for Democracy (NED) has been charged by Congress with the mandate to "strengthen democratic electoral processes abroad."[127] According to the NED, for elections to be legitimate they must be not only "free," but also "competitive."[128] In 2002, the State Department invoked this principle in criticizing the government of Ukraine for failing to "ensure a level playing field for all political parties" in its national elections.[129]

Among the criticisms leveled at Ukraine were that employees of state-owned enterprises were pressured to support the ruling party; mineworkers were pressured to withdraw from a trade union supportive of the opposition; faculty and students were instructed by their university rector to vote for specific candidates; ruling party candidates took advantage of public offices for meeting spaces while denying suitable meeting space to the opposition; and the governing party enjoyed "uncritical coverage from regional and local media outlets" while the opposition was faced with restricted access to billboards, local media, and state-funded television.[130] If transposed onto the grounds of a U.S. workplace, everything that occurred in this flawed election in Ukraine would be legal. Employers are perfectly free to use workplace space for partisan meetings while denying use of that space to union supporters, to monopolize communications media within the workplace, to instruct employees on how to vot,; and to pressure employees (in every way short of an explicit threat) to vote against unionization. It is particularly telling that the State Department never raised any doubt that the Ukrainian election was conducted by secret ballot. Such an election may be "free" in the sense that it ends in a secret ballot, but it is neither "fair" nor "competitive."

Similarly, in 2003 the State Department issued a statement criticizing the Republic of Armenia for an "election process [that] fell short of international standards."[131] The United States ambassador to the Organization for Security and Cooperation in Europe specifically cited "violations by state-run television of the principle of equal access for all candidates."[132] In addition, election monitors reported allegations that "public sector employees, factory workers, teachers, students and others were instructed to attend the incumbent's rallies."[133] Again, the same things that disqualify an election abroad — including forcing employees to attend partisan meetings or rallies — are perfectly legal in every private sector workplace across the United States.

In the leadup to 2004 elections in Ukraine, the House and Senate passed concurrent resolutions calling for electoral reforms in that country. Apart from the specific criticisms of Ukraine, the resolution outlines some of the core principles defining democratic elections:

> a genuinely free and fair election requires a period of political campaigning conducted in an environment in which … the candidates [may present] their views and qualifications to the citizenry, including … enjoying unimpeded access to television, radio, print, and Internet media on a non-discriminatory basis.[134]

In conclusion, Senator Ben Nighthorse Campbell insisted that "the Ukrainian authorities … need to ensure an election process that enables all of the candidates to compete on a level playing field."[135] We can only hope that this same standard of democracy may one day be applied in the U.S. workplace.

Conclusion

At every step of the way, from the beginning to the end of a union election, NLRB procedures fail to live up to the standards of U.S. democracy. Apart from the use of secret ballots, there is not a single aspect of the NLRB process that does not violate the norms we hold sacred for political elections. The unequal access to voter lists; the absence of financial controls; monopoly control of both media and campaigning within the workplace; the use of economic power to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures — every one of these constitutes a profound departure from the norms that have governed U.S. democracy since its inception.

While the nation's elected officials include many talented and tireless campaigners, it is hard to imagine anyone — Republican or Democrat — who could win election under the conditions that workers must use to form unions. Indeed, almost any single one of the problems listed above would be enough to sink all but a handful of campaigns. If congressional elections were run just as they are now, except that a challenger was required to show signed statements of support from 30 percent of registered voters before the district would schedule an election, this by itself would make elections impossible in most of the country. Similarly, if the only change were that one candidate had access to voter lists and the other did not, this by itself would make victory virtually unattainable for the disadvantaged candidate. It is easy to imagine a similar result for each of these failures of the NLRB system: if the only problem was that one candidate had monopoly control over the media; if it was just that one could talk to voters every day at work while the other had to visit them at night in their homes; if it was only that local businesses threatened to lay off employees if a certain candidate was elected; or only that one candidate had the power to compel all voters to attend one-sided campaign rallies — any single one of these would result in certain defeat for the vast majority of candidates.

Intuitively, one would think that if there were any difference between union and political elections, it would be that union elections provided even greater protections to participants, out of recognition of their greater vulnerability. In political elections, the actions of either employer or employee are part of a much larger electorate and, therefore, contribute in a much more indirect way to the election's outcome. In addition, since most political campaigning — as well as the final act of voting itself — takes place outside the workplace, there is much less opportunity for employer surveillance of, knowledge of, and influence over employees' political behavior. In union elections, all of this is reversed; the campaign primarily takes place in the workplace, where employers know who is talking pro-union, who is wearing what kind of button, who has signed what petition, and who shows up to vote (and in whose company) on the election day. Given the far greater opportunity for undue influence in the workplace, one might suppose that protections against voter coercion would be more stringent in union elections than in political elections. Just the opposite is true.

The analysis above points to an inescapable conclusion. The high hopes and bold words that accompanied the passage of the Wagner Act have not been realized. It is possible for scholars, lobbyists, and lawmakers to hold widely divergent beliefs regarding how unions should be formed. But it is no longer possible to believe that the current system mirrors the procedures we use to elect public officials. Indeed, from the point of view of the framers of the Constitution, of U.S. jurisprudence, and of state and federal statute, the current NLRB system is profoundly broken — and profoundly undemocratic. Whatever path labor law reform may take, it must begin with this understanding.

References

[1] 79 Cong. Rec. 7565 (1935), reprinted in 2 Leg. Hist. 2321 (NLRA 1935).

[2] Senate Report No. 1184, 73rd Cong., 2nd sess. (1934) 4, reprinted in 1 Leg. Hist. 1103 (NLRA 1935).

[3] Office of Congressman Charlie Norwood, "Norwood Blocks Democrat Attempt to Steal Worker Voting Rights," News Release, 17 Feb. 2005, 7 Apr. 2005 <www.house.gov/norwood>.

[4] In Fiscal Year 2003, over 28,000 charges of unfair labor practices were filed with the NLRB. Of these, the Board found that over 10,000 had merit. Sixty-Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2003 (Washington: 2004).

[5] For one such example, see Bureau of African Affairs, Department of State, Zimbabwe: Initial Findings of U.S. Election Observer Team, Fact Sheet, 14 Mar. 2002 <www.state.gov/p/af/rls/fs/8781.htm>.

[6] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (New York: Harper & Bros., 1948); Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971) 20-35.

[7] Thomas Jefferson, "Madison's Report to the Virginia General Assembly" (1800), reprinted in Kenneth M. Dolbeare, ed., American Political Thought, (Chatham, NJ: Chatham House, 1989) 178, 182.

[8] Bork 23. Bork goes on to note that "Freedom for political speech could and should be inferred even if there were no first amendment." And indeed, even before the First Amendment was adopted, the Constitution established a standard of unlimited free speech for congressional debates, mandating that nothing said on the floor of the House or Senate could be used as the basis for slander or libel suits. (Article I, section 6 of the Constitution states that "for any speech or debate in either House, they shall not be questioned in any other place.") However, the founders repeatedly remarked that the only reason we have a representative government is that the country is too big for all citizens to participate in direct democracy. Ultimately, every citizen is charged with the same duty as representatives to debate all sides of an issue and vote wisely. Thus, while speech on the floor of Congress is provided an extra layer of protection, the principle of free, broad-ranging and uninhibited political debate applies to the population at large and is not restricted to its elected representatives (On this point, see Meiklejohn 35). The insistence that national sovereignty resides in the people rather than any elevated office led to the creation of an ambitious system of public debate that constitutional scholar Cass Sunstein has dubbed "government by discussion" (Cass Sunstein, Democracy and the Problem of Free Speech (New York: The Free Press, 1993) xvi).

[9] *New York Times Co. v. Sullivan*, 376 US 254, 270 (1964).

[10] *Brown v. Hartlage*, 456 US 45 (1982), quoting *Budkley v. Valeo*, 424 US 1, 52-53 (1976).

[11] *Whitney v. California,* 274 US 357, 375 (1927).

[12] Thus Thomas Jefferson insisted that "the diffusion of information and the arraignment of all abuses at the bar of public reason," was among the "essential principles of our government" that have "guided our steps through an age of revolution and reformation" (Thomas Jefferson, "First Inaugural Address" (1801), reprinted in Dolbeare 186).

[13] *New York Times Co. v. Sullivan*, quoting Judge Learned Hand in *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943).

[14] Organization for Security and Cooperation in Europe, "Statement of Preliminary Findings and Conclusions," International Election Observation Mission, Kiev, Ukraine, 22 Nov. 2004.

[15] This view was broadly held by the political thinkers of the 17th and 18th centuries who inspired the revolutionary generation. See, for example: C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962; New York: Oxford University Press, 1988) 222-231. Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York: W.W. Norton & Co., 1972) 169, notes

that for most of the founding generation, people without property were "supposed to have no will of their own."

[16] Morris, a delegate to the Constitutional Convention from Pennsylvania, is quoted in James Madison, Notes of Debates in the Federal Convention of 1787 (Athens: Ohio University Press, 1984) 402. Madison himself argued that if propertyless men were given the vote, they would inevitably "become the tools of opulence and ambition" (Madison 403).

[17] Ibid.

[18] Thomas Jefferson, "Letter to James Madison" (1787), reprinted in Dolbeare 191.

[19] On the Gregoire inauguration, see: Rebecca Cook, "Inauguration then litigation," *King County Journal* 12 Jan. 2005 <www.kingcountyjournal.com/sited/story/html/183039>.

[20] The NLRA only covers private sector employees. Public sector employee unions are certified through various state or federal procedures that are generally modeled on the NLRB election process.

[21] 29 USC §158(a)(2).

[22] John Adams, "Thoughts on Government" (1776), quote reproduced in Wood 165.

[23] In the same hearings, Twentieth Century Fund chairman William H. Davis explained by analogy that "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" (1935 Senate Hearings at 718, 750, reprinted in Craig Becker, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 *Minnesota Law Review* 495, (1993) 530.

[24] 2 USC 14, §441e(a) makes it illegal for a foreign national, "directly or indirectly," to make any contribution of "money or other thing of value," or even an "implied promise to make a contribution," "in connection with a Federal, State or local election." They are also banned from making an "independent expenditure, or disbursement for an electioneering communication."

[25] Unions have the legal right to visit employees in their homes, but employers do not have this right. This doctrine has been developed in *Plant City Welding and Tank Co*., 119 NLRB 131, 133 (1957); and *Peoria Plastic Co*., 117 NLRB 545, 547-48 (1957).

[26] Kate Bronfenbrenner and Tom Juravich, "It Takes More than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy," in Kate Bronfenbrenner et al. (eds.), Organizing to Win: New Research on Union Strategies (Ithaca, NY: ILR Press, 1998) 19-36.

[27] *May Department Stores Co*., 136 NLRB 797, 802 (1962).

[28] *NLRB v. Magnavox*, 415 US 322, 323-24 (1974), quoting *Gale Products*, 142 NLRB 1246 (1963).

[29] *The Unanimous Declaration of the Thirteen United States of America*, 4 July 1776, 28 Apr. 2005 <www.earlyamerica.com/earlyamerica/freedom/doi/text.html>.

[30] For example, Texas law mandates that a complete voter list be provided to anyone who requests it, with no charge beyond the actual cost of reproducing the list, specifically requiring that no party be charged more than another for a copy of the list. Texas Election Code §18.008 and §18.010 (2004). The law mandates that lists must be provided "as soon as practicable" but not later than 15 days after the request, and must be provided "on magnetic tape" if available and requested.

[31] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[32] Ibid.

[33] Ibid.

[34] Sixty-Eighth Annual Report of the National Labor Relations Board.

[35] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[36] In *Washington Fruit and Produce,* 343 NLRB 125 (2004), the Board further undermined union access to employees by allowing the results of a "no union" vote to stand, despite the fact that the employer provided an *Excelsior* list with incorrect addresses for 87 employees. This case is described further in American Rights at Work's "Workers Denied Access to Critical Information Before Election,"*Workers' Rights Watch: Eye on the NLRB,* Feb. 2005 <www.americanrightsatwork.org/workersrights/eye2_2005.cfm>.

[37] For example: John G. Kilgour, Preventive Labor Relations (New York: American Management Association, 1981) 210, stresses that "the important work of preventive labor relations takes place before the active campaign begins."

[38] *Brown v. Hartlage* 60.

[39] Committee on the Future of Worker-Management Relations, *Fact Finding Report* (1994) 81. Cited in Kate E. Andrias, "NOTE: A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections," 112 *Yale Law Journal* 2415 (2003).

[40] *Republic Aviation v. NLRB*, 324 US 793 (1945). Even then, the ability of employees to undertake such a task is impaired by their own job duties, by the ability of supervisors to transfer activist workers to more isolated workstations, and by their own fears of reprisal. If workers are allowed to talk about other non-work topics on the job, they must also be allowed to talk about unionization. On this point, see *South Nassau Hospital*, 274 NLRB 1181 (1985). However, if employers have a general rule prohibiting employees from talking about anything but work while on work time, employees are banned from discussing the union while working. This is true even if supervisors use work time as an opportunity to campaign against unionization.

[41] Federal Election Commission, Campaign Guide for Corporations and Labor Organizations (Washington: June 2001) 63-64, stipulates that if corporations allow any candidate for federal office to address rank and file employees, they must provide a similar opportunity to opposing candidates.

[42] *NLRB v. Babcock & Wilcox Co.*, 351 US 105 (1956).

[43] Alfred DeMaria, How Management Wins Union Organizing Campaigns. (New York: Executive Enterprises Publications Company, Inc., 1980) xvii.

[44] *Livingston Shirt Corp.*, 107 NLRB 400 (1953). The ban on captive audience meetings within 24 hours of the vote is established in *Peerless Plywood*, 107 NLRB 427 (1953). Employers retain the right to communicate individually with employees during the last 24 hours, even systematically speaking with every individual in the workplace, as long as they are not brought together in a group meeting. It is striking that federal courts have generally prohibited "captive audience" communications, except in the context of union elections. Thus, a Florida judge banned pornographic materials in a workplace on the grounds that offended female workers constituted "a captive audience in relation to the speech that comprises the hostile work environment" (*Robinson v. Jacksonville Shipyards, Inc*, 760 F. Supp. 1486 (N.D. Fla. 1991)). So too did a Pennsylvania court side with construction workers who had been the target of demonstrations and harassment at their worksite, because they could not escape the communication except by quitting their jobs and thus constituted a captive audience (*Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383 (E.D. Pa. 1980)). By comparison with worksite demonstrations, captive anti-union meetings might seem significantly more invasive; yet labor law remains the one area of the law where captive audience speeches are fully permitted.

[45] *Hicks-Ponder Co.,* 168 NLRB 806, 814 (1967).

[46] In *Litton Systems, Inc.*, 173 NLRB 1024 (1968), the Board supported an employer who fired an employee for discreetly leaving a captive meeting, affirming that employees 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 antiuion [*sic*] speech designed to influence the outcome of a union election." (reprinted in Becker 559). In one of the landmark cases concerning captive audience meetings, the Board acknowledged that an employer "did its best to inhibit the free play of discussion," but nevertheless ruled the behavior legal. *Luxuray of New York*, 185 NLRB 100 (1970).

[47] *Livingston Shirt* 406.

[48] John J. Lawler, Unionization and Deunionization: Strategy, Tactics and Outcomes (University of South Carolina Press, 1990) 145.

[49] Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing," U.S. Trade Deficit Review Commission (Washington: 2000). The prohibitions on employee free speech — the employer's right to ban union organizers from its property, to prohibit distribution of union literature even while actively distributing anti-union literature, and to require employees to attend anti-union meetings at which union supporters are prohibited from speaking — were codified in the Taft-Hartley amendments to federal labor law, enacted in 1947. It is telling that this law was established at the height of McCarthyist anti-communism. The bill's supporters argued that the constraints on union activity would prevent political mobilization on the left; without such a bill, they asserted, "it is inevitable that we will drift into a socialist dictatorship" (quoted in "House Bill Likely to Curb Walkouts," *New York Times* 21 Feb. 1947: 3, reprinted in Andrias 2427). Indeed, the bill included a prohibition on certifying a union if any of its officers had Communist affiliations. The authors of the law saw it as part of a broader agenda aimed, in part, at depriving free speech rights to those deemed un-American. Representative Hartley, for instance, promoted an additional proposal that would have banned newspaper editorial writers from joining the Newspaper Guild, arguing that with this measure "people ... will be able to get honest opinions, not influenced by communistic influence" (quoted in H. Walton Cloke, "Hartley Outlines Labor Law 'Equity,'" *New York Times* 26 Feb. 1947: 19, reprinted in Andrias 2428). Many of the McCarthy-era restrictions on free speech have since been rescinded; by 1961, for instance, the Supreme Court ruled that membership in the Communist Party, in and of itself, could not be grounds for criminal punishment (*Noto v. United States*, 367 US 290 (1961)). However, since Congress has not mustered the political support to amend the law, and since labor law provides no right of private action and, therefore, has not been developed through private litigation, the nation's labor laws remain uniquely fixed by the views of this particular historical moment. For a broader discussion of the Cold War context of the Taft-Hartley Act, see Andrias. In addition to making partisan speeches, the Board has supported the right of employers to show virulently anti-union movies in "captive audience" meetings. When one union objected to employees being required to watch a film depicting a union member shooting to death a non-striking employee and maiming a young child, the Board concurred that the film represented "antiunion propaganda at its effective best in creating feelings of revulsion and fear of unions and of the tactics of union sympathizers" — but permitted its screening. By analogy, if the 2004 presidential election were conducted under Board rules, every voter in the United States might have been required to watch only the Swiftboat Veterans for Truth's documentary *Stolen Honor* — or, if the Democrats controlled things, perhaps only *Fahrenheit 9/11* — with no airtime for alternative viewpoints. What would clearly be a travesty of federal electoral law is a perfectly legal and quite common feature of union elections.

[50] *Midland National Life Insurance Co.*, 263 NLRB 127, 129-30 (1982).

[51] Thomas Jefferson, "Notes on Virginia" (1785), reprinted in Dolbeare 182.

[52] For further discussion of these dynamics, see Becker.

[53] Committee on Commerce, Senate Report No. 92-96, 92nd Cong., 1st sess. (Washington: GPO, 1971) 20.

[54] 47 USC 5, §315(b). The same restriction applies to the 45 days leading up to a primary campaign.

[55] 47 USC 5, §315(a). Exceptions are for bona fide newscasts, interviews, documentaries, or on-the-spot coverage. In the 2004 presidential race, the Equal Time Rule gained national attention after the Sinclair Broadcasting Group announced plans to air a program critical of Democratic candidate John Kerry on its television stations. The legal arguments that ensued revolved around whether or not the program constituted legitimate documentary news coverage or whether it amounted to privileged airtime for the Bush campaign.

[56] The rule was first articulated as part of the Federal Radio Act of 1927. It was later incorporated into the 1934 Communications Act, and finally into the FECA in 1971. For a brief history of the legislation, see Thomas Blaisdell Smith, "NOTE: Reexamining the Reasonable Access and Equal Time Provisions of the

Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Fails?" 74 *Georgetown Law Journal* 1491 (1986).

[57] Justice Frankfurter explained that "unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation." *National Broadcasting Company v. United States*, 319 U.S. 190, 226-27 (1943).

[58] Statement of Representative Johnson, 67 Cong. Rec. 5558 (1926), reprinted in Smith 1520.

[59] Statement of Senator Holland, 105 Cong. Rec. 14, 1451 (1959), reprinted in Smith 1498.

[60] The only "media" right guaranteed to pro-union employees in the workplace is the right to hand out literature in a break room, and then only when both the distributor and recipient are on break time.

[61] On this point see *NLRB v. United Steelworkers, CIO (NuTone, Inc.),* 357 US 357 (1958); *NLRB v. Babcock & Wilcox Co*. Management communication to employees — including anti-union campaigning — is treated as privileged. A company may not ban distribution of union literature if it allows distribution of other non-work-related literature; that would constitute discrimination. However, management communication is treated as a class of its own, whose one-sided distribution does not constitute discrimination as long as all other types of literature apart from management communication are treated the same.

[62] *NLRB v. United Steelworkers, CIO (NuTone, Inc.)*, reprinted in Becker 564.

[63] Senate Report No. 96, 92nd Cong., 2nd sess. (Washington: GPO, 1971) 1.

[64] 40 FCC 398, quoted in *Chisholm v. FCC*, 176 US App. D.C. 1; 538 F.2d 349, 355 (DC Cir. 1976).

[65] In *NLRB v. Babcock & Wilcox Co.* 112, the Court ruled that union organizers may be banned from company property "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."

[66] Similarly, the Board's logic in defending forced anti-union meetings in the workplace is that "The equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting … to make the facilities of the one available to the other" (*Livingston Shirt Company* 407).

[67] *NLRB v. United Steelworkers, CIO (NuTone, Inc.).*

[68] Committee on Interstate and Foreign Commerce, House Report No. 92-565 (accompanying HR 8628), 92nd Cong., 1st sess. (Washington: GPO) 4.

[69] Ibid.

[70] Committee on House Administration, House Report No. 92-564 (accompanying HR 11060), 92nd Cong., 1st sess. (Washington: GPO) 4.

[71] "The whole theory behind our law," explains the FEC, "is to prevent dominance in the economic sector from spilling over to dominance in the political sector." Interview with FEC Office of Election Administration Deputy Director William C. Kimberling, in Paul Malamud, "Keeping Track of Campaign Contributions," *Issues of Democracy: Free & Fair Elections* 1, No. 13 (Washington: U.S. Information Agency; Sept. 1996) 6.

[72] 2 USC Ch. 14, §441a(b). In presidential elections, any candidate who accepts federal matching funds must comply with specific limits on the amount of money that can be either raised or spent on the election.

[73] Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107-155, §304 (27 Mar. 2002), amending FECA (2 USC Ch. 14, §441a(i)). An outline of the amendment is available at <www.fec.gov/pages/brochures/millionaire.shtml>.

[74] 2 USC Ch. 14, §441a(i). These candidates still receive federal matching funds, but their fundraising and

spending limits are increased proportional to the size of the war chest of their wealthy opponents.

[75] Employers are required to file reports with the Department of Labor regarding the amount of money spent on anti-union consultants. However, the definition of "consultant" is sufficiently narrow that much anti-union advice and support work goes unreported. Apart from hiring such consultants, no other expenditure on anti-union efforts is reported. For more on this subject, see John Logan, "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal* 33 (2002) 197-214.

[76] Alexander Hamilton, "Federalist 73," The Federalist Papers, ed. Clinton Rossiter (New York: Penguin Books, 1961) 441.

[77] 18 USC, Ch. 29, §599.

[78] 18 USC, Ch. 29, §610: "It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of Title 5, US Code, to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both."

[79] In *United States Civil Service Commission et al. v. National Association of Letter Carriers, AFL-CIO, et al.*, 413 US 548; 93 S. Ct. 2880, 2885 (1973) , the Supreme Court explained the purpose of the Hatch Act as protecting, in part, against "the danger to the [civil] service in that political rather than official effort may earn advancement."

[80] 18 USC, Ch. 29, §600: "Whoever, directly or indirectly, promises any employment, position, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined under this title or imprisoned not more than one year, or both."

[81] On this point, see Pamela S. Karlan, "Not by Money But by Virtue Won? Vote Trafficking and the Voting Rights System," 80 *Virginia Law Review* 1455, Oct. 1994.

[82] 2 USC Ch. 14, §441b(b)(2)(A). The same restrictions apply in reverse to unions: a union PAC may solicit nonsupervisory employees at any time, but may only solicit managerial employees or shareholders twice a year, and under similar conditions to those applied to corporate PACs.

[83] 2 USC Ch. 14, §441b(b)(3)(C).

[84] 2 USC Ch. 14, §441b(b)(4)(B). The one exception to this rule is for employees making donations of $50 or more. The identity of all such donors must be reported under federal law.

[85] 2 USC Ch. 14, §441b(b)(6). The company may charge the union only for its actual costs in providing this service.

[86] Michigan Election Law, Act 116 of 1954, §168.931 (1)(d). Among other states with similar laws is Louisiana Revised Statute 23 §961, mandating that "no employer having regularly in his employ twenty or more employees shall … adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character."

[87] See, for example: Rhode Island Code, Title 17, §17-23-6 (violators permanently forfeit the right to vote or hold public office, and corporations forfeit their charters); Maryland Code §13-602 (a)(7) (violators face

a fine of up to $1,000 and up to one year in prison, and are banned from holding office for four years); Arizona Code §16-1012. Ten other states have similar statutes.

[88] Legal scholar Cynthia Estlund notes that other areas of employment law, such as anti-discrimination statutes, recognize much more subtle forms of coercion than does labor law. Indeed, the entire framework of anti-discrimination law bans expressions in the workplace that are legal outside the workplace. These laws implicitly acknowledge that the workplace as a whole is a place of coercion, where one cannot simply walk away from hostile statements without unacceptable repercussions to one's livelihood (Cynthia Estlund, "Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment," 75 *Texas Law Review* 687, 692, Mar. 1997).

[89] The Taft-Hartley Act specifies that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit. 29 USC §158(c) (2000). This view was affirmed by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575, 618 (1969), where the Court found that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit."

[90] *NLRB v. Gissel Packing Co.* 618-619.

[91] DeMaria 68.

[92] Bronfenbrenner (2000).

[93] Arizona Code 16-1012. Violators of this statute are guilty of a class 1 misdemeanor. Maryland §13-602 (a)(8) includes identical language (violators are subject to $1,000 fine and/or one year in prison, and are banned from holding office for four years). Similar language is found in the state codes of Colorado, Indiana, Montana, New Jersey, Ohio, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

[94] *NLRB v. Champion Labs, Inc.*, 99 F 3d 223 (7th Cir. 1996).

[95] *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

[96] *NLRB v. Golub Corp*, 388 F.2d 921, 920 (2d Cir. 1967).

[97] *NLRB v. Champion Labs, Inc*.

[98] *Kellwood Co.*, 299 NLRB 1026 (1990).

[99] Paul C. Wiler, "Governing the Workplace: Employee Representation in the Eyes of the Law," Employee Representation: Alternatives and Future Directions, eds. Bruce E. Kaufman and Morris Kleiner (Madison, WI: Industrial Relations Research Association, 1993) 85.

[100] Richard Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion Labor Market," Employee Representation: Alternatives and Future Directions, eds. Bruce E. Kaufman and Morris Kleiner (Madison, WI: Industrial Relations Research Association, 1993) 29.

[101] Andrias.

[102] The NLRB Casehandling Manual of 1989, pt. 2, § 11302.2, instructs Board agents that the "best place to hold an election" is the worksite and that absent "good cause to the contrary," it must be held there, reprinted in Becker 566.

[103] *Red Lion*, 301 NLRB 7 (1991).

[104] FEC staff, interview, by Elizabeth Conklin Dority (research assistant to the author), 6 Oct. 2004. United States Election Assistance Commission, Best Practices Tool Kit (Washington: 30 July 2004) 2, similarly describes the "most likely polling place[s]" as being in "public schools, churches, and community centers."

[105] Texas Election Code §43.031 (2004). Polling places are prohibited at the residence of anyone "related within the third degree by consanguinity or the second degree by affinity" to a candidate.

[106] Texas Election Code §43.032(a) (2004).

[107] John G. Kilgour, Preventive Labor Relations (New York: AMACOM, 1981) 260.

[108] Michael Goldfield, The Decline of Organized Labor in the United States (Chicago: University of Chicago Press, 1987) 201-202.

[109] Texas Election Code Ann. §221.051 states that "If the official result of a contested election shows that the contestee won, on qualifying as provided by law the contestee is entitled to occupy the office after the beginning of the term for which the election was held, pending determination of the rightful holder of the office."

[110] *John D. Stevens, Relator v. Honorable Don E. Cain, Judge, Respondent,* 735 S.W.2d 694 (Tex. App. – Amarillo, 1987).

[111] 47 USC 5 §312 states that the FCC may revoke any station license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office."

[112] 2 USC 14 §437. To date, the Commission has issued fines of up to $850,000 for campaign funding violations. FEC fines of $50,000 or more are available at <www.fec.gov/press/bkgnd/history.sthml>.

[113] 26 USC 95, §9012.

[114] 18 USC 29, §595.

[115] 18 USC 29, §597.

[116] 18 USC 29, §1001.

[117] Sixty-Eighth Annual Report of the National Labor Relations Board.

[118] The decision of a Board agent not to take a case is not appealable to any authority. *Detroit Edison Co. v. NLRB*, 440 US 301, 316 (1979).

[119] 29 USC 169 (c) (2000).

[120] *Phelps Dodge Corp. v. NLRB*, 313 US 177, 198-200 (1941); *Retailer Delivery Systems, Inc.*, 292 NLRB 121, 125 (1988).

[121] *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992).

[122] The ban on punitive damages for repeat offenders was established in *Ex-Cell-O Corp.*, 185 NLRB 107, 108 (1970). Board remedies are limited to backpay, requiring employers to stop illegal activities, and requiring them to post notices acknowledging that certain practices are illegal. If employers continue to violate such orders, the Board can go into federal court to seek a contempt order. However, the Board never has the option of imposing punitive fines.

[123] Labor law is unique even among employment regulations in prohibiting any form of punitive damages, providing no right of private action, and precluding states from enacting parallel statutes with stricter enforcement mechanisms. On this point, see: Cynthia Estlund, "The Ossification of American Labor Law," 102 *Columbia Law Review* 1527, 1553-54, 1612, Oct. 2002.

[124] *Hialeah Hospital*, 343 NLRB 52 (2004). This case is described further in American Rights at Work's "Is Another NLRB Election Really A Solution For These Workers?" *Workers' Rights Watch: Eye on the NLRB,* Dec. 2004 <www.americanrightsatwork.org/workersrights/eye12_2004.cfm>.

[125] In *H.K. Porter Co. v. NLRB*, 397 US 99, 102 (1970), the Supreme Court found that even when a company refuses to bargain in good faith, the NLRB is powerless to "compel a company … to agree to any substantive contractual provision of a collective bargaining agreement."

[126] See *Sparks Nugget, Inc. v. NLRB*, 968 F. 2d 991 (9th Cir. 1992) and related discussion in Andrew Strom, "Rethinking the NLRB's Approach to Union Recognition Agreements," 15 *Berkeley Journal of Employment and Labor Law* 50 (1994) 86.

[127] National Endowment for Democracy, "Statement of Principles and Objectives," 21 Nov. 2003 <www.ned.org/about/principlesObjectives.html>.

[128] Ibid.

[129] Philip T. Reeker, Deputy Spokesperson, U.S. Department of State, "Ukrainian Parliamentary Elections," Press Statement, Washington, DC, 1 Apr. 2002.

[130] These problems are detailed in Organization for Security and Cooperation in Europe, "2002 Elections to the Verkhovna Rada of Ukraine: Statement of Preliminary Findings and Conclusions," International Election Observation Mission , Kiev, Ukraine, 1 Apr. 2002 <www.osce.org/documents/odihr/2002/04/1292_en.pdf>. The State Department's Press Statement of 1 Apr. 2002 affirms that "the United States concurs with the OSCE mission's preliminary statement."

[131] Stephan M. Minikes, U.S. Ambassador to the Organization for Security and Cooperation in Europe, "Statement to the OSCE Permanent Council," Vienna, Austria, 27 Feb. 2003 <www.state.gov/p/eur/rls/rm/2003/19833.htm>.

[132] Ibid.

[133] Quote is from Organization for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights, Preliminary Statement on Presidential Elections in Armenia, February 19, 2003, 20 Feb. 2003 < http://www.osce.org/odihr/>. The Feb. 2003 statement of U.S. Ambassador Minikes states that "The United States agrees with the preliminary joint assessment of ODHIR."

[134] Senate Concurrent Resolution No. 106, 108th Cong., 2nd sess. (Washington: GPO, 12 May 2004). The resolution was introduced in the Senate by Senator Ben Nighthorse Campbell (R-CO), co-chairman of the United States Helsinki Commission. The House version was introduced by Representatives Henry Hyde (R-IL), Chairman of the International Relations Committee, and Chris Smith (R-NJ), Chairman of the Helsinki Commission.

[135] Statement of Senator Ben Nighthorse Campbell, reported in *BRAMA News and Community Press: News from and about Ukraine and Ukrainians*, 12 May 2004 < www.brama.com>.