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WHAT'S MORE DEMOCRATIC THAN A SECRET BALLOT? THE CASE FOR MAJORITY SIGN-UP

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The election procedures of the National Labor Relations Board (NLRB) fall dramatically short of American standards defining "free and fair" elections, and indeed embody practices that our government would reject in any other country. This article examines the ways in which the Employee Free Choice Act, mandating union recognition based on signed statements from a majority of employees, redresses some of the most undemocratic aspects of current NLRB practice. Finally, the article argue that the analogy between unionization and elections to public office is fundamentally misplaced. When the act of union formation is correctly understood, the logic of creating a union through signed statements is even clearer. Ultimately it is unionization itself—not the process through which employees choose to form a union—that creates lasting democratic practices within the workplace.

Introduction

In the spring of 2009, it is likely that the U.S. Congress will consider the first significant reform of federal labor law in sixty years. While the outcome of that session is unknown, the arguments that each side will make are already clear. This is particularly true of the business lobbies and conservative Republicans that stand in opposition to the proposed Employee Free Choice Act (EFCA).

When Congress held hearings on EFCA in 2007, the response of the bill's opponents was a near-unanimous drumbeat: by mandating union recognition on the basis of signed statements from a majority of employees, EFCA denies workers the right to a secret-ballot election and therefore violates the most fundamental norms of democracy. In a series of full-page ads, for instance, the Center on Union Facts, a mouthpiece of antiunion businesses, lumped UNITE-HERE president Bruce Raynor with Kim Jong-Il and Fidel Castro as dictators who sought to deny the common people their right to vote.[1]

The notion that secret-ballot elections as administered by the NLRB are the cornerstone of democratic process in the workplace is heralded not only by Congressional Republicans, but also by the Labor Board itself. While majority sign-up was a standard form of recognition at the time the National Labor Relations Act (NLRA) was passed, it has since been relegated to inferior status. Under current law, employers are free to voluntarily recognize a union based on a majority of signatures, but only secret ballots are binding. Employer lobbyists

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regularly assert that the use of secret ballots makes NLRB elections the "gold standard" for determining workers' desire to form a union.[2]

Indeed, the Labor Board in 2007 issued a new set of restrictions on using signed statements even for voluntary recognition. Asserting "the superiority of Board-supervised secret ballot elections," the board explained that it sought to encourage the use of board elections rather than majority sign-up because the former "provide greater protection for employees' statutory right of free choice."[3] While this ruling imposes significant restrictions on majority sign-up, it is likely that the board will consider yet further restrictions in future cases.

Thus, the claim that secret ballots constitutes the "gold standard" of union recognition is at the heart of critical debates in Congress, at the Labor Board, and likely in the federal courts.

What Makes Elections Democratic?

The assertion that the NLRB system embodies the core values of democratic process rests on one fact: that board elections end in a secret ballot. Many defenders of the current NLRB system implicitly suggest that as long as an election ends in a secret ballot, whatever comes before must be fair. Indeed, this is the argument of the current Labor Board, which has argued that even if an antiunion employer has "a one-sided advantage to exert pressure on its employees throughout each workday of an election campaign," this is mitigated by the fact that "an employee's expression of choice is exercised by casting a ballot in private."[4]

From the Founders to the present, the American democratic tradition fundamentally rejects this view. While secret ballots are required in voting for elected representatives, there are an equally critical series of standards that must be met in the lead-up to the election for a vote to be deemed democratic. Indeed, the U.S. government regularly condemns elections in other countries as undemocratic even when there is no doubt that they ended in a secret-ballot election because they violated these other norms. Among these are the right to free speech for both candidates and voters, equal access to voters for all competing parties, equal access to the media, voters' freedom from economic coercion, and timely enactment of the voters' will. Without these guarantees, secret-ballot elections become sham elections, exercises in simulating the superficial form of democracy while eviscerating its substance. All three members of the "Axis of Evil," for instance, have been able to maintain dictatorial rule despite the use of secret ballots. Even Saddam Hussein had secret ballots. The ease with which undemocratic rulers have been able to manipulate elections despite the use of secret ballots—through tactics such as one-party domination of the media or threats to the livelihoods of political opponents—highlights the importance of democratic standards governing the course of the election campaign as well as the moment of balloting.

Unfortunately, when measured against these standards, the NLRB election system fails to meet every single one of the principles used by the U.S. to define

"free and fair" elections, with the partial exception of the secret ballot. I have written elsewhere concerning the details of these standards and the failure of the NLRB to live up to them. I will not repeat that analysis here, except to note that the NLRB system fails to guarantee such fundamental standards as the right to free speech, equal access to the media, and protection of voters from economic coercion.

In what follows, I will briefly outline some of the most undemocratic aspects of NLRB elections and will then discuss the ways in which these may be remedied by mandating union recognition through majority sign-up. In the second section of the essay, I will examine the limitations of the analogy between union formation and elections to public office, and will suggest new ways of understanding the act of unionization and the logic of creating a union through public statements rather than secret ballots. Finally, I will address the ways in which majority sign-up furthers the goal of workplace democracy envisioned by the original authors of the Wagner Act. I believe that all three parts of this analysis point to the superiority of majority sign-up as a tool for advancing the principles of American democracy into the world of work.

What Makes NLRB Elections Undemocratic, and How Will Majority Sign-Up Remedy the NLRB System?

Among the most common practices that render NLRB elections undemocratic, the first is unequal access to voter lists. In elections to public office, competing candidates must be given equal access to the voter rolls for their districts. In NLRB elections, by contrast, employers possess the full contact information of every worker from the day he or she is hired. But pro-union employees cannot get a copy of such lists until after an election has been scheduled and all legal maneuvers exhausted. As a result, the most recent federal commission to examine this issue concluded that on average, unions and pro-union employees did not get a list of eligible voters until ten to twenty days before the vote.[5] If we imagine elections to Congress run on this basis—with one candidate given access to the list of eligible voters two years before the election, while the other received it only twenty days before the vote—no one would call this a "free and fair" election. And the fact that it might end in a secret ballot would in no way alter this judgment.

Beyond the unequal access to voter lists, federal labor law grants employers a series of extremely powerful one-sided privileges during the course of an election campaign. Antiunion managers are free to campaign against unionization all day long, any place in the workplace, while pro-union employees are banned from talking about the advantages of unionization except on break time. Management can cover the walls, rafters, and bulletin boards with antiunion messages while banning pro-union employees from doing likewise. Supervisors can distribute antiunion leaflets to every worker, at any time or any place, including while they are on the job; while pro-union employees can only distribute their handouts when both the giver and the recipient are on break time

and in a break area. Management can force employees to attend antiunion propaganda meetings in individual, small-group or mass settings as often as they like. Pro-union employees can be ordered to attend on the condition that they keep their mouths shut, and if they speak up anyway, they can be fired on the spot. Employers typically have supervisors take each of their subordinates aside for intensive one-on-one conversations in which the person with the most immediate control over one's livelihood stresses how destructive unionization would be. In these individual meetings as well as in larger groups, management is free to tell workers that they may lose their jobs as a result of unionization, to characterize union supporters as "troublemakers" or "the enemy within," and to warn employees that "an employee's family is dependent on his paycheck."[6] Each of these activities is prohibited in the course of elections to Congress or the presidency, but it is standard operating procedure under the NLRB.

Majority Sign-Up as a Remedy for the NLRB's Shortcomings

Upon learning of the NLRB's profoundly undemocratic election process, most observers' reaction is not to call for majority sign-up. It is, instead, to insist that NLRB procedures be brought into line with the norms of electoral democracy by requiring equal access to bulletin boards, equal ability to distribute leaflets, free speech rights for pro-union employees, and management neutrality in debates over unionization. There are significant legal challenges to such a vision—limiting the speech of supervisors would entail overturning a Supreme Court decision and requiring that union organizers have access to the workplace would challenge the private property rights of company owners—but the logic of such proposals is clear and compelling. By comparison, mandating recognition on the basis of majority sign-up is a much more modest proposal, which will leave unchanged many of the most egregious practices of the current NLRB system. Management will still be free to monopolize workplace media while maintaining tight restrictions on the distribution of pro-union information. Antiunion supervisors will still be able to force workers to attend mass one-sided propaganda meetings and to press the antiunion message in intimidating one-on-one meetings with their subordinates.

But mandating recognition by majority sign-up will eliminate several of the key undemocratic practices that now characterize NLRB elections. The best way to gauge the impact of majority sign-up may be by considering the reasons for which it is so vehemently opposed by management representatives. First, majority sign-up will go a long way toward solving the problem of unequal access to the list of eligible voters. It will still be the case that management has complete contact information that is denied to pro-union employees, who will still be forced to develop their own contact list through the cumbersome process of covertly speaking with fellow employees. It may still take months for the employees' list to be assembled. But the consequences of this delay will be far less damning than under the current system. In NLRB elections, pro-union employees typically get the list of eligible voters less than twenty days before the

vote and face an unwinnable scramble to contact coworkers within this compressed framework. With majority sign-up, workers are not up against a board-imposed deadline. They can take their time, making sure to speak with each employee as it becomes possible to contact them. Employees may still be bombarded with antiunion messages at the workplace. But by allowing workers to proceed at their own pace, majority sign-up means that a greater share of workers will be able to hear *both* sides of the issue before making a decision. Thus, majority sign-up provides at least a partial remedy to the inequality of access to voters established by the NLRB and thus allows for a more informed electorate and a more balanced discussion of the issues.

Timing Is Everything: Delay and Depression as Management Campaign Strategies

Second, majority sign-up allows employees rather than management to control the pace of their debate and decision making on the question of unionization. In elections for public office, every candidate seeks what George H. W. Bush called "The Big Mo" and carefully plots campaign events in order to have his or her support peak in the days leading up to the vote.[7] In NLRB elections, pro- and antiunion campaigners likewise seek to time their efforts in order to build to a peak of support just before the election. NLRB election dates, however, are subject to repeated delays, often the result of disingenuous legal maneuvers. While both sides have the right to file procedural objections, it is generally in the union's interest to have speedy elections and in management's interest to delay. Thus, it is a commonplace observation that while the union determines when an election campaign begins (by filing a petition), management determines when it ends.

Employer antiunion strategies largely depend on wearing workers down through a prolonged campaign of fear, intimidation, and tension that serve both to scare workers away from union support and to convince them that management is omnipotent and unionization therefore futile.[8] In an article entitled "Time Is On Your Side," the Jackson Lewis firm's newsletter advises employers that preelection legal maneuvers should be considered "an opportunity for the heat of the union's message to chill prior to the election."[9]

Common management strategy is simply to refuse to agree on anything related to the election process. Marty Levitt worked with one of the pioneering management attorneys of the 1970s, whose "specialty was delay tactics, for he understood that management would always win a war of attrition."[10] Levitt explains that

> [this attorney's] centerpiece technique, now a common strategy among management lawyers, was to challenge everything. He tried to take every challenge to a full hearing, then prolonged each hearing as much as he could. Finally he appealed every unfavorable decision. . . . Almost invariably [he] refused to work out agreements with the union on such issues . . . out-of-court agreements on matters of fact are meant to save court time and speed the legal process. But

> such legal congeniality would short-circuit [his] strategy. He knew that if he could make the union fight drag on long enough, workers would lose faith, lose interest, lose hope.[11]

The Labor Board provides employers with multiple opportunities to engineer delays. "The company may dispute the jurisdiction of the NLRB, that the union is a labor organization, or that the proposed bargaining unit is appropriate," suggests one consultant.[12] Under federal law, the board is required to hold a hearing whenever any challenge is raised to any aspect of the election—no matter how trivial or ill founded. To argue that a given union is not a "labor organization," for instance—when the same union has already been recognized in scores of other elections—may appear to be patently disingenuous. Nevertheless, the board is powerless to ignore it. In 2002, for instance, EcoLab argued that the International Association of Machinists (IAM) was not a "labor organization" despite the union's having been recognized in employer contracts going back more than one hundred years. The board actually held a hearing on this question, ultimately concluding that the IAM is, in fact, a labor organization, but delaying the election by one month in order to settle this issue.[13]

The last federal commission to study this issue concluded that "many board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage" and called for "an end to frivolous election challenges."[14]

While manipulation of the election date would be troubling in any electoral system, it has even more profound ramifications in the workplace. The very act of contemplating unionization is an act of workers' pinning their hopes on the ability to come together in order to change management's behavior. A quick election makes change seem possible, whereas a long-delayed vote serves as an object lesson in the implacability of management and the weakness of collective action. As union buster Mart Levitt explains,

> [t]he beauty of such legal tactics is that they are effective in damaging the union effort no matter which side prevails. . . . That kind of delay steals momentum from a union-organizing drive, which is greatly dependent on the emotional energy of its leaders and the sense of urgency among workers. By dragging a union through the plodding legal system, we showed workers that the labor organization was sluggish and inefficient, certainly not the quick fix they might have hoped it would be.[15]

Because the decision to form a union is so deeply shaped by employees' sense of their own collective power, the very fact of delay may impact the way people vote. Finally, even when a vote is ultimately scheduled, its timing is often the result of political manipulation. When the Labor Board first convenes a hearing to set the election groundrules, one of the issues that the two sides negotiate is the date of the election. Generally, management has the superior leverage in these discussions; because the union is anxious for a quick election, union representatives often give in on other aspects of the process. Management consultants urge their clients to schedule the vote for payday whenever possible,

so that workers will be grateful toward their employer and so the employer can have the last word of the campaign by distributing "Vote No" flyers with employee paychecks. Likewise, management typically seeks to hold the vote early in the morning, so that employers can host an antiunion dinner the night before, and union supporters will have no opportunity to rebut that message.[16] And always, Fridays are better than Mondays if one wants happy rather than disgruntled voters. Thus, the schedule of the election itself may be a product of management strategy—a partisan advantage that is, of course, never permitted in elections for public office.

Majority sign-up removes the incentive for frivolous legal delays as well as management's undue influence over the schedule of voting. By letting workers rather than management control the timing of the campaign, workers' debate, discussion, and decision making takes place on their own schedule, with momentum building or falling according to the natural pace of conversations and card signing rather than the artificial manipulation of delay tactics. One often-discussed proposal for reforming the NLRB is to require that elections be held on schedule, with legal objections heard after the voting is completed. Under this system, employers would still have the right to mount as many legal challenges as they like, and these would still have the potential to invalidate the election. But they would not serve to delay the vote date. Thus, issues of timing and momentum would not be manipulable by legal delaying tactics. This proposal has never been enacted. But a switch to recognition by majority sign-up would accomplish exactly this goal. Management might still file multiple legal objections to a bargaining unit definition, status of a labor organization, or any other aspect of the proposed union. However, the process of workers making their decisions and casting their ballots (in the form of signed cards) would all take place without delay. As a result, there would also be far less incentive to file frivolous motions.

Election Day on Management's Premises

One might think that even if the whole campaign leading up to an NLRB election is slanted toward management, at least election day itself must run the same as a normal election. After all, the act of voting itself seems straightforward—one enters a private booth, marks a ballot, and an impartial authority counts the votes. How much room for manipulation could there be? Unfortunately, the answer turns out to be much more than one might expect.

Physical control over the workplace affords management control over the campaign environment while voting is ongoing—which is why one party's headquarters can never serve as the voting site in elections to public office. In NLRB elections, the actual room in which workers cast their ballots is off-limits to campaigning. However, voters walk to the polls through rooms and hallways, past posters and bulletin boards that are all dominated by one-sided antiunion campaign propaganda. On election day, like all other days, antiunion supervisors may walk around the company, having mandatory one-on-one conversations

with every voter; neither union representatives nor pro-union employees have the right to do likewise. Indeed, the Jackson Lewis attorneys urge employers to take care even regarding the union observers who, by law, must be allowed to monitor the balloting; they recommend that employers plan out a route for them, from the front door to the voting room, that will minimize exposure to employees, and make sure that they are escorted by a management representative in order to prevent them from engaging in the same type of conversations supervisors will be having all day.[17] Furthermore, controlling the polling site allows management to stage events that influence the environment in which voters cast ballots. In one case, for instance, an employer who had previously never had use of security guards, but who had campaigned on the notion that unionization would lead to violence, hired an armed guard (complete with guard dog) to patrol its property during election day—thus dramatizing the level of conflict and retribution that might result from a "yes" vote.[18]

Management consultants generally hold that a large turnout favors the antiunion side, and use control over the balloting site to guarantee partisan turnout. It is believed that union supporters are, by nature, more motivated to vote. If, as Cohen and Hurd's survey suggests, there is a large body of fence-sitters who, above all, want to avoid conflict, it is likely that many of these employees would naturally avoid voting at all if given the chance. If they do vote, however, many are likely to vote "no" simply because they have been convinced that management is implacable, that the union cannot win real improvements, and therefore that a "yes" vote is a vote for continued conflict. Under these assumptions, management works hard to turn out the vote.[19] The fact that management can target slackers with repeated reminders to vote—under conditions where refusing to vote will be understood as an act of displeasing one's supervisor—is recognized by consultants as a crucial advantage.[20] Indeed, Jackson Lewis go so far as to advise employers that "a check of absentees should be made on the morning of the election, and transportation offered them."[21]

The Jackson Lewis advice points to the unique power of controlling the polling site. The ability to get an immediate list of employees who have not come in to work and arrange to ferry them in to vote is a power that only management has; pro-union employees have no equal right of access to election-day attendance sheets. The ability to monitor and follow up on voters with such exactitude is, again, a power that management has but union supporters do not. And, again, it is a power that no party would be permitted in a regular election. No polling place would ever be situated in Democratic or Republican headquarters; no party would ever be allowed unilateral access to the list of who had shown up to the voting place, nor unilateral ability to send partisan representatives to personally escort those who had not yet voted; nor, finally, could the turnout push come from a party that had both a highly partisan position and control over voters' financial future.

For all these reasons, it is unsurprising that management typically resists any suggestion that even a standard NLRB ballot should take place in a school, church or other neutral location off the company's premises. Likewise, manage-

ment advocates have vigorously resisted proposals that the NLRB adopt a "mail ballot" (in reality, voting by internet or touch-tone telephone) system such as is currently used by the National Mediation Board (NMB), the federal agency overseeing elections for the railway and airline industries. The process is efficient, secure, and significantly cheaper than on-site voting.[22] With the NLRB facing continuing budget restrictions, the cost savings alone are a strong reason to adopt the NMB system. But employers have repeatedly lobbied against such a change.

"Sophisticated employers know well that mail ballots are 'bad news' for employers," notes one national law firm, explaining that "in mail ballot elections, employers have a much more difficult time controlling the timing of campaign strategy."[23] New York attorney Al DeMaria's *Management Report* explains not only that it is harder to turn out antiunion voters when the election is off-site, but also that mail balloting diminishes management control over the emotional atmosphere on election day. When the NLRB holds elections at the employer's premises, employers are allowed to hold forced-attendance antiunion meetings up until twenty-four hours before the vote; typical campaign strategy calls for a mass event in the final hour permitted, commonly dubbed the "25-hour presentation." Under the NMB, "mail ballots" generally enforce a more extended voting period—sometimes up to thirty days—and employers are prohibited from forcing workers to attend mass meetings throughout this period. The newsletter explains that

> [t]he whole idea of the 25-hour presentation is to bring the campaign to an emotional pitch, so that employees walk out of the final employer presentation revved up to vote for the company based upon the "last word." Mail balloting destroys this dynamic, because employees can vote several weeks later after the impact of the employer's final presentation has worn off.[24]

Recognition by majority sign-up completely eliminates this partisan control of the voting environment, enabling workers to make their decision about supporting unionization wherever and whenever they want, away from the watchful eye of those who control their economic lives. If either Democrats or Republicans insisted that voting take place in their headquarters and that all voters be forced to attend a partisan rally twenty-five hours before casting their ballots, with no equal opportunity for response for their opponents, none of us would be fooled into thinking this a "democratic" election. By eliminating these practices, majority sign-up provides a significant step toward providing employees a more balanced choice.

Freedom of Association and the Arguments against Card Signing

The debate about union formation should boil down to a simple question: if a majority of employees sign statements saying they are forming a union and want to commence good-faith negotiations, why should that not be enough? The right to form voluntary associations is enshrined in the Constitution and

celebrated in the history of American democracy. We do not require a vote to form a chapter of the Rotary Club, to charter a country club, or to start a baseball team. A group of people get together, decide they want to undertake a joint venture, and it is done; there has never been a case of the IRS insisting that it would not legally recognize a nonprofit sports league until all the members had cast secret ballots affirming their desire to participate. Moreover, the sufficiency of voluntary sign-up extends even to organizations that levy dues on their members. Neighborhood associations, downtown business districts, and chapters of the American Bar Association are all examples of dues-assessing organizations that are formed without need for a secret-ballot vote. Organizations that negotiate financial arrangements on behalf of their members are likewise chartered by mutual agreement without need for an election. Physicians practices and other professional partnerships, sports leagues, church groups, and charter schools are among the myriad of organizations that engage in negotiations with suppliers, employees, and business partners on behalf of their members. No such negotiations have ever been declared illegal because the organization was not constituted through a secret ballot. Indeed, the very employers' associations that often sit across the table from unions in negotiating industry-wide agreements are empowered to make legally binding agreements even though they were constituted without an election.

Why, then, should labor unions be treated differently than any of these other voluntary associations? At first glance, it might appear that the answer lies in the fact that unions are not truly voluntary associations. Once a majority of employees support a union, all employees in the company become subject to the terms of the union's contract as well as to its dues requirements.[25] Given this arrangement, it may be particularly important to insist on voting by secret ballot. In fact, this aspect of unions is not unique among civic organizations. A practicing lawyer, for example, is required to join the Bar Association, pay its dues, and abide by its rules, even if he or she believes there should be no Bar Association. The problems with this argument, however, run even deeper. The argument against sign-up conflates two issues: the fact that unions become the exclusive bargaining representative for all employees in a firm and the notion that the process of card signing is more open to coercion or misinformation than a secret ballot, and therefore provides an unreliable measure of employees' will. If we disentangle these two strands of argument and examine each on its own terms, it becomes clear that neither has merit.

The first objection to majority sign-up is that signatures may be coerced by union supporters. However, this danger appears to be more imagined than real, with little supporting evidence. While it is an oft-repeated assertion of business lobbies, these groups have yet to produce convincing data—despite presumably trying their hardest.[26] The Labor Board already provides processes for the veracity of signed cards to be verified by independent authorities. If something more were needed, it would be simple, on the day the cards were counted, for individual workers to be spoken to privately by a Labor Board agent or by another independent authority in order to verify that they signed of their own

free will. Coercion by union organizers or fellow employees is a problem easily solved; therefore, the vehemence with which it is protested—and the assertion that it can only be remedied by retaining the NLRB election system—point to ulterior motives.

If the argument about coercion were convincing, it would have to be applied to many other settings, including NMB elections, many of the voluntary organizations listed earlier (how do we know an individual physician is really on board with a decision to affiliate with a hospital if they cannot cast their ballot in secret?) and much current electoral practice. In Oregon, for instance, elections are run entirely and exclusively by mail ballot, and there is nothing that prevents a partisan advocate from standing next to someone else while they fill out their ballot. But repeated studies have found that these elections are at least as clean as those conducted in secret-ballot voting booths.[27]

Most fundamentally, the coercion argument makes no sense given the reality of workplace power. Neither unions nor pro-union workers have any coercive power over employees. It is certainly possible that workers could be threatened with physical violence—but there is absolutely no evidence to suggest that this happens with any regularity, nor any reason to believe it would be more likely to come from pro-union than antiunion sources. Most importantly, it is management that retains virtually all of the coercive power in the workplace. When workers are asked to sign a statement supporting unionization, they are overwhelmingly afraid not of the pro-union fellow employees whom they have seen harassed and ostracized over the past months, but of the wrath of antiunion managers. Management, not workers, is the source of coercive power in the workplace. This is why federal electoral law prohibits managers from urging their subordinates to support one candidate over another but puts no limit on employees urging the same of their coworkers. Management has control over all aspects of working conditions; neither workers nor (in an unorganized plant) unions have any whatsoever. This point was brought home most forcefully by a former union organizer turned "union avoidance" consultant, who claimed in Congressional testimony that organizers would "coerce" their way into workers' homes, but under repeated questioning by members of Congress was unable to provide a single example of coercion or intimidation that she had witnessed.[28]

Thus, the notion that majority sign-up must be rejected as a system inherently given to coercion is unsupportable on its merits. Adding in the issue of exclusive bargaining rights changes nothing in this conclusion. If exclusivity is a problem, it is no less a problem with secret ballots. If it is acceptable in secret-ballot elections, there is no demonstrable reason why the standard should be any different for sign-up. Indeed, there is a long history of minority unions that represent and bargain on behalf of only those workers who choose to affiliate as members. Recently, a very compelling case has been made that the NLRA still requires businesses to recognize unions with minority membership.[29] If we imagine a minority union, the opposition to sign-up becomes all the more strained: if a group of employees walk into the boss' office and declare they all want to negotiate together, just for themselves, why should this not be sufficient

basis to recognize their organization? It is hard to imagine what the objection might be in this case. But if minority unions can be constituted by majority sign-up, why not majority/exclusive unions? The standard for the veracity of signatures should logically be the same whether the union represents a minority or all of the employees. Yet if even minority unions require elections because it is impossible to trust in the veracity of signed statements, why would the same standard not apply to any voluntary organization with the capacity to levy dues or negotiate agreements? The fact that none of the business lobbyists leading the opposition to sign-up have ever voiced this conviction suggests again that their arguments are driven by something other than their prima facie claims. Thus, the more the logic of opponents' arguments is teased apart, the clearer it becomes that these objections are simply further strategies to prevent workers from organizing and the harder it becomes to think of any reason why it should not be sufficient for workers to form a union by signing verifiable statements attesting to their desire.

The Limitations of the Election Analogy

When we compare NLRB elections with American democratic norms, it is clear that the NLRB is not a "free and fair" electoral system. It is also clear that majority sign-up provides workers a process that is at least somewhat more democratic by removing several of the forms of undue influence that employers enjoy under the NLRB.

Ultimately, however, the comparison between NLRB and federal elections is based on a flawed analogy. Indeed, the more closely one considers what's involved in forming a new union, the less the analogy seems to fit. The decision to form a union is not equivalent to the choice of which candidate should occupy a preexisting slot in the government. It is rather an attempt to change the form of government in the workplace, from one-party rule to something slightly more democratic. Unionization is not simply a choice of who should represent workers in negotiating with management; it is a decision to create a system of democratic representation where none previously existed.

Not only is the decision to unionize a fundamentally different type of decision than that of selecting a candidate for office, but it also takes place under radically different circumstances. The act of union formation generally must be carried out under conditions of intense pressure from the current "government" of the firm, which is fiercely committed to maintaining its unilateral rule. In addition, workers' decision must be made with full knowledge that even if they succeed, they will remain under the control of the very managers who so vehemently oppose this effort. In political terms, management is a government that can never be voted out of office; this is one of the irreducible facts that makes the electoral analogy fall apart. When workers form a union, their union *joins* management but does not *replace* it in governing the workplace. This fact underlies the intense fear and anxiety that workers must overcome in order to publicly support unionization. Both pro- and antiunion representatives may

pressure employees to side with them. But 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 objections, 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 lead rational workers to fear that they will be subject to retribution even if a union is voted in. To return to the electoral comparison, we would never permit a system where the election for president occurred midway through the incumbent's term, with the current 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 control the federal budget. This sort of pressure—unheard of in the world of public elections—is exactly what every employee must overcome in order to form a union, except that the period of potential retribution is not limited to two years but extends for the duration of one's tenure at the company.

If unionization is not like an election for public office, what is it like? In analytical terms, what is it equivalent to in the political processes we are more familiar with? There is no act in national politics that is a perfect analogy to union formation. But in many ways, unionization may be more akin to forming a new political party, or a new country, than like choosing a candidate to fill a preexisting position in the government. Both party formation and declarations of independence are celebrated acts within the democratic tradition. But they are different kinds of acts than electing representatives. Most importantly, they are acts that traditionally are done through public statements of support and commitment.

Drawing analogies between union formation and the American Declaration of Independence is a tricky business. The parallels are limited, and the exercise inevitably suggests a type of grandiosity that is inappropriate. It is certainly not my intent to overstate the similarities. But the comparison is instructive in several ways, particularly regarding the role of public commitments in the life of a democracy. It is impossible to imagine the Declaration of Independence as a document produced through secret-ballot voting. If a press release had simply been issued in 1776 noting that by a majority vote, the group assembled in Philadelphia had decided to form a new country—but with no statement as to whether Washington was in or out, or where Jefferson stood on the issue—the enterprise would have died stillborn. If there was any chance for the public to support the attempt to break free of the British crown, it was critical that they see the colonies' leading figures publicly declare their commitment to the cause. The mass of colonists who would choose sides in the coming years were not merely deciding whether they supported the principle of independence. They were also judging whether they believed the Revolutionary movement had enough chance of success that it was worth risking legal, financial or corporal punishment to join it. When John Hancock, the first to sign the document,

announced that he was penning his signature extra large to make sure King George would be able to read it, he was trumpeting his confidence in the rebellion and his fearlessness in the face of potential royal retribution. Both messages were critical in encouraging others to conclude that they too could take on the crown and win. Unlike voting for representatives, this foundational act was not simply a statement of belief in political principles. It was a declaration of confidence, commitment, and courage of exactly the type necessary to rally rebellion against an entrenched power. It is this aspect of the Declaration of Independence that sheds light on the act of union formation.

Stand up and Be Counted: Union Formation as a Public Act

In deciding to support unionization, employees are not merely expressing their principled preference regarding collective bargaining. They are deciding whether they have confidence in their fellow employees' capacity to come together in an organization with sufficient power to win concessions from management. If a union cannot produce some improvement beyond what management would do on its own, there is no point in creating it. And yet there is no source of union power other than the strength and commitment of the employees themselves. There is nothing in the law, and no cleverness or tenacity of union professionals, that can win a good contract without the active support of rank-and-file employees. This, then, marks another distinction between union formation and elections to public office. When we vote for U.S. representatives, we are electing someone else to carry out our agenda in Washington; once we cast our ballot, our work is done. But in forming a union, workers are essentially electing themselves as those responsible for doing whatever it takes to win a fair contract. Ultimately, the challenge of organizing a union is, in the words of one former consultant, "to round up workers from the bottom of the economic and social barrel—people who [are] frightened, isolated, vulnerable—and turn them into a united force willing to do battle with rich and powerful corporations."[30]

Here again is a parallel between union formation and nation building. The American Declaration of Independence marked the beginning, not the end, of a political struggle. It was, above all, a declaration of collective intent to engage in the struggle to create a new nation. The signers "mutually pledge[d] to each other our lives, our fortunes and our sacred honor" in this public statement of commitment to the cause.[31] So, too, the act of creating a new union—understood as workers' pledging to each other their commitment to work together to secure a fair contract—makes most sense as a public act. This is why pro-union workers so often publish a public petition of support even in the context of secret-ballot elections. In union elections, everyone is literally looking around to see who else is in or out, and for good reason. This is the fundamental calculation workers must make in deciding their vote: are enough of us on board to make this a worthwhile endeavor?

At their heart, unionization campaigns are about the creation of a new organization within the workplace. But this organization is independent of the

firm's management and organized at cross-purposes with the structure of the firm's authority. In an unorganized company, employees relate to each other only through their roles in the management-established hierarchy of the firm. These interactions reproduce the distinctions and competition between employees and reinforce the identity of individual employees based on their role in the firm's profit strategy. At the simplest level, employees in a large firm tend to socialize only with those in their own work units. By contrast, the organization of a union is one in which employees build relationships that cut across management's organization of the firm—across occupational and departmental lines, across pay grades, across race and gender. Moreover, these same employees who are otherwise separated by status, authority, pay, and demographics come together in an organization whose central logic is one of solidarity and whose central goal is not maximizing the profit of the firm but maximizing employees' quality of life.

It is common for union organizers to talk about the need for workers to "act like a union" long before any election takes place. This means sharing wage and other information that might previously have been held confidential, supporting each other in resolving workplace grievances, and coming together to build broad support for attending to problems such as pensions or childcare even if they directly impact only a small fraction of the workforce. By creating such an organization as a "fact on the ground" long before it has any legal status, union organizers aim, in part, to give potential voters the experience that it is indeed possible to create an alternative political organization within the firm, within which workers experience a new type of dignity and the potential of their collective power. Conversely, when workers are unable to create such an organization, employees are less likely to vote union because their experience during the election campaign is that management remains all-powerful. Thus, the experience of creating a collective organization within the firm is not merely a useful vehicle for disseminating union campaign messages; it lies at the heart of convincing employees that a different type of workplace is possible.

The importance of workers' ability to "act like a union" in the lead-up to an election is clearly grasped by antiunion strategists, who, as a rule, encourage employers to crush such efforts in their infancy. Consultants direct managers to watch for early warning signs of an independent workers' organization being formed. Among the danger signals highlighted by Jackson Lewis attorneys are "[c]omplaints . . . made by a delegation, rather than by a single employee."[32] Another training manual urges supervisors to be wary if "new groups form and new informal leaders suddenly emerge . . . groups of employees bring complaints to you in a militant manner . . . assertive of their 'rights'—not asking, but demanding satisfaction of their complaints."[33]

Over and over again, it is this sense of solidarity and empowerment that management seeks to eliminate. "The enemy was the collective spirit," explains confessed union-buster Marty Levitt. "I got hold of that spirit while it was still a seedling; I poisoned it, choked it, bludgeoned it if I had to, anything to be sure

it would never blossom into a united work force, the dreaded foe of any corporate tyrant."[34]

As Levitt and his fellow consultants make clear, management's strategy for destroying the collective spirit of their employees rests on three broad tactics: convincing workers that unionization is futile; engaging in unilateral actions designed to demonstrate the omnipotence of management and, by implication, the impotence of employees; and finally, punishing the most visible union leaders—including targeted firings—in order to undermine their resolve and scare everyone else away from the cause. For all three of these tactics, the most critical response employees can muster is a public demonstration of continued commitment to unionization. At first glance, it may seem odd that employers would emphasize the notion that unions are powerless because it stands in direct contradiction to another favored argument, that is, that unionization will result in such a drastic change as to drive the employer out of business. Nevertheless, in the campaign manuals and advice columns of antiunion consultants, this is the single most common theme. By law, employers are prohibited from explicitly telling employees that unionization is futile. But like so much else under the NLRB, as long as employers avoid this specific wording, they are free to say almost anything.[35]

Management campaigns hammer repeatedly on the elements that add up to the pointlessness of organizing: the company's wages are already the best it can afford, it will refuse to increase them no matter what workers demand, contract negotiations may result in wage cuts rather than raises, the workers' only recourse will be to strike, and the result of a strike will be extreme hardship followed by permanent unemployment. One company—in an effort that *Management Report* recommends as "an excellent campaign tactic"—went so far as to force workers to attend a mass meeting at which the company staged a skit showing that negotiations would come to no good. As the play proceeded,

> [t]he union negotiator asked for improvements in benefits. The company negotiator turned down each request. He also rejected a union wage proposal, and countered with a management proposal to pay minimum wage. The union representative then pounded on the table and called the management proposal ridiculous, but he was unable to obtain agreement to anything more than a 50-cent *annual* increase, instead of the 50-cent *hourly* increase the union negotiator wanted. The mock negotiations had the union representative saying that it was the best he could do.[36]

A standard antiunion campaign stresses the theme of futility from the very first stages of organizing to the final day of voting. DeMaria recommends a model "Speech to Employees at the First Sign of Union Activity," which includes the admonition that

> it's important for you . . . to understand how there is no guarantee that you will be one penny better off with a union. . . . Unions have never been able to stop companies from opening a plant overseas. . . . A union cannot guarantee that a year from now you will be working here.[37]

At the end of the campaign, DeMaria's newsletter recommends a remarkably similar theme for a model speech to be delivered by the CEO the evening before the election:

> I would like to see the union totally defeated. . . . [If it wins, t]he union . . . would have the right to come in and say "we want the employees to have an increase." . . . But I would have the right to say "what I now pay and what I now give is the best that I can afford." . . . What happens if there is no agreement? It's a free country. The union has a right to tell you to go out on strike. I also have a right to run my business. I've told you that before. Make no mistake. You know me. We did not start this company to see it controlled by a union. If there is a strike, we will service our customers with new drivers. No union is going to run my business . . . I have the right to hire permanent replacements and if the strike is over, I do not have to fire the replacements to make way for strikers to return.[38]

This "model" speech is remarkable for the brazenness with which its central message is misleading. If a company truly cannot afford improvements, it must open its financial books to the union to demonstrate its inability to meet employees' demands. There is no known case of a union voting to strike over demands that an employer has already shown to be unrealizable. Even without an employer going so far as to open its books, there will not be a strike without employees voting to do so. In reality, unionized employees enjoy an average compensation level that is nearly 30 percent higher than their nonunionized counterparts in the same occupations and industries.[39] While this fact does not guarantee that any particular employer can afford higher wages, it suggests that there are many employers that are not now paying the "best that they can afford" and that—under the pressure of worker action—can indeed improve compensation levels while remaining competitive. In this sense, the message that unionization only leads to an inevitably futile strike is both false and misplaced. If there is a place for such statements, it would be at the end point of contract negotiations, when workers are deciding whether or not to strike over outstanding demands. To issue such predictions before a union has even been established is clearly a scare tactic. And yet, for workers whose vote to form a union is partly predicated on their expectation of success or failure, such a naked declaration of intransigence can be powerfully effective.

A Prolonged Climate of Fear

As hinted at in DeMaria's model speech, many employers go beyond predicting the futility of organizing, declaring their personal opposition to honoring the result of a vote to unionize. One company's owner, for instance, concluded his final campaign speech by telling workers that "if we defeat this union, then we can get on with it. If the union wins, well, then as far as I'm concerned, the battle has probably just begun."[40] Another promised that if a union were voted in, he would "fight this to the very end, and that could take

years."[41] In such a situation, workers who vote to unionize are signing up for a long-term conflict that they will face every day when they come to work.

At another workplace, the company's human resources director called employee activists "union slime"; a worker sporting a union button was cursed by his supervisor, and another who refused to put on an antiunion button was forced to clean up the basement. After a period of such tactics, the company's manager complained to employees that the plant was suffering because of the "high tension" caused by the union campaign. On the eve of the election, the general manager's message to employees was "[y]ou can vote for this union and make me negotiate against the union, or you can vote against this union and help me shape [the company] into a team."[42]

For many employees, the specter of an indefinite continuation of such tension is unbearable and becomes in itself a reason to vote "no." This dynamic was illustrated in a survey of communications workers who had recently gone through NLRB election campaigns.[43] The majority of employees in this survey were not strongly either pro- or antiunion. When asked "the best reason not to join any employee organization," only 5 percent worried about union dues. By far, the most common reason given was that a union would "create conflict at work."[44] These employees had not become antiunion; on the contrary, a majority still believed they would be better off with a union. However, they did not believe a union could succeed against such vociferous management opposition, and they worried for their own jobs; 42.3 percent of respondents stated that the primary reason their coworkers did not support unionization was the fear of management retaliation.[45]

Threats, Firings, and the Destruction of Workers' Organization

The ability to punish, intimidate, and humiliate employees is one of the primary powers management wields in its campaign to prevent organizing, and it is wielded with disturbing frequency. When simple rhetorical appeals to the impotence, sleaziness or destructiveness of unions fail to turn workers against the cause, employers commonly fall back on the crudest of tactics. As celebrated management attorney Al DeMaria explains, for workers who have a "sense of belonging" and solidarity with coworkers,

> [y]ou gotta blast it out. You have got to make them perceive that if they carry out on their sense of belonging and join the union, consequences to them will be so dire they will be better off subverting their sense of belonging and voting no. . . . The majority of campaigns are based on fear. [Because if] the employee has a sense of belonging, you can't overcome that by saying "I'm wonderful, vote for me." The way you overcome the sense of belonging is you make a bomb, and you throw it in.[46]

The use of firings to deflate organizing drives has become so common that workers have come to expect such repression as a standard component of organizing drives. In one poll, 69 percent of American adults stated their belief that

"corporations sometimes harass and fire employees who support unions."[47] Another survey found that 79 percent of adult Americans believed it was either "very" or "somewhat" likely "that nonunion workers will get fired if they try to organize a union." Among nonunion respondents, 41percent believed that "it is likely that I will lose my job if I tried to form a union."[48]

Supporters of NLRB elections often insist that secret-ballot elections provide the most reliable snapshot of workers' preferences. In reality, however, much of what this snapshot captures is not so much workers' *preferences* as their calculation regarding whether a union can be effective in countering management's power. For nearly three decades, opinion polls have consistently shown that roughly one-third of nonunion workers wish they had a union in their workplace.[49] The reasons American workers give for wanting unions are unsurprising. The single most extensive set of worker surveys is that conducted by the Wilson Center, which has conducted polls in hundreds of workplaces where unions were considering launching organizing drives. As the unions' purpose was to evaluate the worthiness of investing time and resources in a given company, the polls' objective was to obtain the most accurate possible read of workers' attitudes, and there is no suggestion that the data has been skewed in any way. Over a period of fourteen years, the center conducted in-depth interviews with 150,000 employees.[50] Their findings show that workers' desire to organize is based on perceived mistreatment coupled with *a belief in the union's ability to win improved conditions*.[51] Here, management's hardball opposition translates not only into individual workers' fears of retaliation, but a perception that any union will be powerless to control the boss and therefore will be irrelevant. When the Wilson Center asked workers who had recently been through an election to name "the most important reason people voted against union representation," the single most common response was management pressure, including fear of job loss.[52] Those who vote on this basis cannot be said to be expressing a *preference* to remain unrepresented. Indeed, many might still prefer unionization if they believed it could work. What is captured in the snapshot of the ballot is not preference but despair.

Union elections thus contain a feedback mechanism that makes them fundamentally unlike elections for Congress or the presidency. The likelihood of people voting "yes" depends on their perception of union strength; but this perception itself is based on the extent of public support for unionization visible in the workplace. This is so because the strength of any union lies primarily in the unity and militance of its members.

It is this show of collective resolve that management antiunion campaigns aim to destroy. When management attorneys advise that employers use the fear of firings to "blast out" workers' sense of being part of a collective project, they are not solely aiming to scare the individual leaders of the nascent union. By making employees afraid to be seen as vocal union supporters, they aim to prevent employees from ever experiencing the strength of a united workforce or from ever feeling confidence in their own organization. All of this makes a public statement of workers' commitment critical to the process of creating a union.

The NLRB at best treats firings as an offense committed against individual employees. But the larger goal of fear and repression is to destroy the collective political right to self-representation by making impossible the show of collective resolve and self-confidence on which every organizing effort depends.

Thus, standard management behavior is to maximally undermine workers' confidence in the potential power of their own collective action, to demonstrate that the boss is all-powerful and that even pro-union employees can be cowed into silence, to ostracize union leaders by portraying them as reckless troublemakers, to turn the workplace into a battlefield laden with daily tensions, and to brazenly suggest that such a war footing will continue forever until workers give up the hubris of wanting to bargain with their employer. This set of pressures is the core force that drives away union supporters during the course of a typical NLRB election. Studies show that when unions petition for an election, they typically have the support of two-thirds of employees. Unions seek such high levels of pre-petition support because they know it will be eroded by management's campaign; the hope is to start with 65 percent and still have at least 50.1 percent left on election day. A falloff in union support may, of course, be caused by many factors. In the back and forth of campaign communications, voters change their minds in all sorts of elections. But the pattern under the NLRB—workers' commitment nearly always being very high at the outset and then nearly always receding in the face of management's campaign—does not suggest the result of people being swayed in various directions through the currents of political debate. It points instead to the unique dynamics of NLRB elections: voters are not being *convinced* of the merits of remaining without representation; they are being intimidated into the belief that unionization is at best futile and at worst dangerous.

What kind of campaign could possibly stand up to such a withering attack? What kind of organization could convince workers that talk of forcing improvements in the workplace is not reckless radicalism but reasoned leadership? What steps could inspire employees to believe that despite it all, a majority of workers will be able to come together and force management to bargain in good faith? Only a public show of unity from the majority of employees can possibly counterbalance the intimidating power of management and the widespread fear it naturally instills. In all these ways, then, the act of forming a union is fundamentally unlike that of voting in elections for public office. Most importantly, it is an act where public declarations of support are integral to the democratic process.

Creating a Democratic System within the Workplace

The Hypocrisy of NLRB Defenders

In debates over proposed reforms to federal labor law, business organizations frequently oppose alternatives to the NLRB election process (such as majority sign-up, a/k/a "card check" recognition) on the grounds that anything but a board-supervised, secret-ballot election undermines the core imperative of labor

relations: the fundamental right of workers to a free and uncoerced vote on the question of whether or not to unionize. The U.S. Chamber of Commerce, for instance, has argued that a system of union recognition based on majority sign-up "would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election."[53]

In reality, however, the foremost goal of management strategists is not to assure workers the right to an election—secret ballot or otherwise. It is, instead, to prevent workers from ever having an opportunity to make this choice at all. The near-universal mantra of management consultants is, as the Burke Group puts it, "You can't lose an election that never takes place."[54] Or, as attorneys from the Jackson Lewis firm advise, "winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!"[55] Antiunion consultants devote considerable attention to the art of deterring employees from signing union authorization cards in order to avoid ever having an election scheduled.[56] "That, dear reader, is the goal of this manual," explains a typical management tome—"to help you avoid an election."[57] Indeed, the most celebrated antiunion consultants brag not only about how many elections they have defeated, but also about how many they have prevented from ever taking place.[58]

Indeed, management's drive to prevent workers from petitioning for NLRB elections is part of a broader effort to keep the workplace free of democratic practices of any kind—which are understandably viewed as anathema to the autocratic rule that management enjoys in unorganized firms. Thus, one consultant warns that firms should avoid elections even to nonunion bodies such as internal disciplinary committees. "Elections are dangerous," he explains, warning that "they generate attitudes that are too closely associated with unionism."[59] Even the language of democracy is viewed as a sign of trouble for antiunion managers. Thus, the Jackson Lewis volume urges supervisors to report as dangerous warning signs employees overheard using "new vocabulary that includes such phrases as . . . 'freedom,' 'dignity' and 'justice.'"[60]

Understanding Wagner's Vision

In working to suppress workplace democracy, employers are campaigning against the core aim of the Wagner Act itself. In describing the intent of his Act, Senator Wagner stated that the law's core purpose was "to provide industrial democracy" to American workers.[61] "Only 150 years ago did this country cast off the shackles of political despotism," Wagner explained. "Today . . . we strive to liberate the common man."[62] It is critical to understand the clear meaning of Wagner's words. Congress made it federal policy to encourage *collective bargaining*—not merely to encourage the ability to choose between collective bargaining or its absence. The meaning of this policy becomes clearer by considering the type of political right that is entailed in collective bargaining.

There are certain freedoms whose exercise is of no interest to the state. In these cases, the law guarantees people's right to make certain choices but does

not really care which choice we make. Freedom of movement is one such example. American citizens have the right to leave their hometowns and live in a place of their choosing. But there is no public policy interest in encouraging us to either move or stay put. What is important is that we have the choice, not what we do with it.

There are other rights where the law not only establishes a right but also has an affirmative interest in our exercising this right. One such example is the freedom of speech. When the founders crafted the Constitution, they were seeking to create what political philosopher Cass Sunstein termed a "deliberative democracy" in which a wise government emerges from the robust debate of an informed electorate.[63] Unlike movement, the country has an affirmative interest in encouraging the exercise of political free speech. Of course no one is *forced* to speak up. But Americans did not need the First Amendment to remain silent; they could do that under the British crown. The purpose of the law is to facilitate speaking out. The concern that led to the establishment of a right to free speech is not one that is neutral regarding the exercise of that right. The First Amendment does not reflect an *equal* urgency to protect *either* our right to speak out or our right to keep our mouths shut. Remaining silent is not an alternative form of exercising one's First Amendment rights; it is a choice to not exercise those rights. This, then, marks a particular class of freedoms, whose goal is not to secure our *choice*, but to enable and encourage our participation in the political life of the nation.

Unsurprisingly, this category of what might be called "affirmative rights" is concentrated primarily in the political process. The single clearest example may be the right to vote. As with free speech, Americans are not required to vote. But it would be wrong to say that the law is equally concerned with securing our right to vote or our right to choose not to vote. Voting is the lifeblood of a democracy and is promoted both as a personal civic virtue and as necessary for producing a government that legitimately represents the will of the people. For this reason, voter registration and get-out-the-vote drives are encouraged, while voter suppression efforts are illegal.

The right to collective bargaining, like that of speech or voting, is an affirmative right. The legislative history of the Wagner Act makes it clear that the plain purpose of the Act is to facilitate and encourage collective bargaining. While unionization is not mandatory, the law is *not* equally concerned with protecting either workers' right to form a union or their right to remain without any form of collective representation—a "right" we have all enjoyed since time immemorial, independent of the Wagner Act. This may seem an obvious point, but much of contemporary conventional wisdom has embraced exactly this wrongheaded understanding of the law. The Labor Board appointed by President George W. Bush, for example, asserted that the "fundamental value" protected by the Act is employees' free choice as to whether or not to form a union.[64] This is wrong.

The Senate Report on the NLRA explains 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."[65] The workplace democracy heralded by Wagner and his colleagues was not the right to choose whether or not to organize. It was, instead, unionization itself—the right of workers to "self-organization . . . to bargain collectively through representatives of their own choosing."[66] In this sense, the attention devoted to the question of NLRB balloting is radically misplaced. Business lobbies and conservative officials have voiced great concern over the democratic nature of the process of choosing unionization, but appear utterly unconcerned with the democratic nature of the workplace following that choice. Indeed, their clear preference is that workers choose to forego the right to collective bargaining and instead continue toiling in a workplace that lacks any democratic process whatsoever—in other words, a workplace exactly identical to those Wagner witnessed *before* drafting his law. A company where workers have been convinced to forego self-representation is not one that has embraced the Act in its own way. It is rather one that has entirely evaded Wagner's vision of expanding democracy and has managed to remain an unreconstructed autocracy, the same as if the NLRA had never been penned.

Why would collective bargaining be promoted as an affirmative right? Simply put, the Wagner Act intended to introduce a measure of democracy into the workplace. That measure of democracy *is* unionization. If workers vote to form a union, it is the first of many votes they will cast. They will vote on who they want for union officers, who should be on their negotiating committee, what proposals to present to management, and whether to accept or reject management's proposals. They will be voting continuously, every few years, for as long as they remain in the workplace. By contrast, if workers vote against unionization, it will be the last vote they ever cast. A "no" vote is a vote to never vote again. Thus, the measure of democracy that Wagner sought was not the right to vote in NLRB elections, but the right to actually create a union and thereby create a lasting democratic structure within the firm.

Political scientists have coined a phrase for an election in which people are asked to vote to do away with their own electoral rights: "one person, one vote, one time." It is not unheard of for dictators to be voted into office. In Czechoslovakia, voters in 1948 voted in a free and fair election to elect a Stalinist government; and they never had another open election for forty years. The phrase "one person, one vote, one time" originates from the Bush State Department in the early 1990s, expressing that administration's concerns for the Middle East following the rise of Islamist parties in Algeria and elsewhere. The U.S., they explained, does not support a system under which people are asked to vote in democratic elections for a party that does not itself believe in democracy and that, once in office, is likely to abolish future elections.[67]

Management antiunion campaigns are explicitly promoting a system of "one person, one vote, one time." They focus intense pressure on one political moment in order to convince workers to relinquish the right to ever vote again. For the same reasons that the Bush administration deplored such elections abroad, the Wagner Act looks with disfavor on them in the workplace. Workers

are not required to unionize, but the law promotes unionization as an affirmative right precisely because it marks the creation of a democratic process within the firm.

For this reason, to the extent that majority sign-up makes unionization easier, it is not merely furthering the interests of workers or unions; it is furthering the goals of federal policy. As long as workers' signatures are not the product of deception or coercion—and this is easily verified—the logic of the Wagner Act is to make it as easy as possible for workers to form unions. Because this, and this alone, is the realization of Wagner's vision of finally introducing the principles of American democracy into the workplace.

Conclusion

In conclusion, the evidence discussed earlier points to the dramatically undemocratic nature of NLRB elections and to the modest but significant ways in which majority sign-up will make this a more free and fair system. Furthermore, it should now be clear that the analogy between union formation and electoral politics does not ultimately hold up and that when we understand the type of democratic act that unionization is, we also understand the logic of forming unions through public statements of support. Finally, it has often been argued that if majority sign-up makes unionization easier, this fact should be irrelevant to debates over democratic procedure. A close examination of the Wagner Act shows that making unionization easier is in itself an act of democracy promotion within the workplace and is exactly the embodiment of the political vision that drove Wagner and his colleagues.

While it is understandable that the self-interest of employer associations may lead them to defend the current system and resist majority sign-up, this stance cannot be grounded in democratic principle. For all the reasons discussed, if one's goal is simply the advancement of American democratic practice into the work world, it is clear that majority sign-up is a significant step forward from the failed regime of the NLRB.

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Notes

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1. http://www.unionfacts.com/ads.cfm
2. See, for example, Mark Mix, "Why Not Liberate the American Worker," *Wall Street Journal*, December 31 2005. Mix is president of the National Right to Work Foundation.

3. *Dana Corporation*, Decision on Review and Order, September 29, 2007, 351 NLRB No. 28, at 4.
4. *Dana Corporation*, Decision on Review and Order, September 29, 2007, 351 NLRB No. 28, at 6.
5. The Dunlop Commission on the Future of Worker–Management Relations, *Report and Recommendations*, 1994, 47.
6. Al DeMaria's newsletter informs managers that the NLRB has ruled that calling union supporters "the enemy within" or "troublemakers" and issuing the paycheck warning are all examples of non-coercive, legally acceptable speech. See "Question and Answer: 'The Enemy Within,'" *Management Report* 26.5 (2003): 8; and "From the Editor: Proper and Improper Communications," *Management Report* 27.6 (2004): 3 (citing *Fern Terrace Lodge*, 297 NLRB 8 [1989]).
7. Bush first used this term to characterize his narrow win over Ronald Reagan in the 1980 Iowa Republican Party caucuses. Cited in Mark O. Hatfield, Senate Historical Office, Vice Presidents of the United States, 1789–1993, U.S. Government Printing Office, Washington, DC, 1997, 529–38. Accessed October 14, 2005 at http://www.senate.gov/artandhistory/history/resources/pdf/george_bush.pdf
8. Kilgour, 259, notes that longer elections help whittle away union support. "Some [loss of union support] may be due to the employees becoming discouraged as the elections is postponed. And some may be due to the replacement of union supporters by more carefully selected nonunion employees as a result of normal turnover."
9. *UnionkNOw*, September 2001, quoted in Logan 2003, 8, fn. 28.
10. Levit, 1993, 58.
11. Ibid.
12. Kilgour, 261.
13. This case is discussed in Theodore 2005, 14.
14. Dunlop Commission Final Report, 41–2.
15. Levitt, 1993, 13.
16. While it is illegal for companies to hold mandatory meetings in the last twenty-four hours before a vote, it is standard practice for employers to invite all workers to a company dinner the night before the vote, at which they engage in last-minute antiunion politicking. Although the dinner is paid for by the company, and employees are urged to attend, attendance is not mandatory, and therefore the NLRB rules that such events are legal even within the final twenty-four-hour period. A sense of why employees may feel compelled to attend these non-mandatory dinners may be gleaned from the text of an invitation suggested by members of the Jackson Lewis firm in Lewis and Krupman, 200: "Dear Fellow Employee: You and your spouse are cordially invited to attend a special Employee Dinner Meeting to be held next week on Thursday evening starting at 6:00 pm. Important announcements of special significance to all employees and their families will be made immediately following the dinner. The program will be concluded at 9:00 pm. Tickets are enclosed. Sincerely, . . . General Manager."
17. Jackson Lewis et al., 205, explain that "the employer should arrange to escort the union representatives to the conference to avoid any last-minute union campaigning."
18. *Quest International*, 338 NLRB no. 123, discussed in "Campaign Workshop: Stationing Security Guard and Guard Dogs on Premises During Election," *Management Report*, vol. 26, no. 12, (December 2003): 4. A regional hearing officer ruled the employer's behavior illegal, but the full board overturned this decision on appeal, partly by insisting that it was up to the union to prove that a determinative number of employees changed their votes as a result of the increased security presence.
19. Until relatively recently, it was common for employers to hold an election-day raffle in which every employee who showed up to vote would be entered in a drawing for company-bought prizes. This was ruled illegal in 2001 but was widely practiced until that time. "Get-out-the-Vote Raffle Is Unlawful," *Management Report* vol. 24, no. 5 (May 2001): 8.
20. Kilgour, 291, for instance, concedes that "an election conducted on 'neutral' ground would probably reduce the size of the vote in the wrong quarters." This is so, he surmises, because "union supporters are, almost by definition, more determined or dedicated than company supporters and those who remain uncommitted." Likewise, *Management Report*, vol. 24, no. 5 (May 2001): 8 notes that "a high turnout on election day generally favors the employer."
21. Jackson Lewis et al., 196. Jackson Lewis notes that it is legal for an employer to pay the expenses to transport absentee employees to the polls.

22. Dan Hildebrand, representative of CCComplete, conversation with the author, August 8, 2005. CCComplete is the firm that provides NMB the software, technology, and voting systems to run union elections. The NMB's own acting director of the Office of Legal Affairs, Mary Johnson, explained that the NMB had "done a lot of research and feel the system is very secure." Quoted in "NMB Will Launch Telephone Balloting in Representation Elections Sept. 30," *Daily Labor Report*, September 26, 2002. Bureau of National Affairs.
23. Richard H. Wessels, "NLRB Makes Mail Ballots Easier," Wessels & Pautsch, P.C., May 16, 2002. http://www.w-p.com/page.asp?type=articles&id=121, accessed August 5, 2005. Employer opposition to mail ballots is also discussed in Levitt, 1993, 108, 112; and Levine 2005, 25–6.
24. "Reasons Employers Should Resist Mail Ballots," *Management Report* vol. 23, no. 4 (April 2000): 4–5.
25. The disingenuousness of this argument is evident in the fact that while mandatory dues have been abolished in the twenty-two "right to work" states, employers in these states remain as committed as ever to opposing majority sign-up.
26. The Labor Policy Association submitted Congressional testimony including a list of 113 cases over the past sixty years purporting to document union coercion or deception involved in card-signing efforts. However, the record on these cases reveals that union misconduct was found in only forty-two of them. Daniel Yager, "Testimony before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, United States House of Representatives, Hearing on Compulsory Union Dues and Corporate Campaigns," Washington, DC, July 23, 2002. The identical list is included in the HR Policy Association's *Policy Brief: Mistitled "Employee Free Choice Act" Would Strik Workers of Secret Ballot in Union Representation Decisions*, Washington, DC, January 29, 2004. The record of forty-two cases over sixty years stands in stark contrast to the over 30,000 employees who received backpay as a result of illegal antiunion discrimination in 2005 alone.
27. Oregon adopted vote-by-mail as the sole and universal form of voting for all elections in 1998. A recent assessment concluded that vote-by-mail systems "result in a more accurate count" than other systems. Paul Gronke, *Ballot Integrity and Voting by Mail: The Oregon Experience*, Early Voting Information Center, Reed College, June 2005, 2. There are now twenty-five states that place no restrictions on vote-by-mail, aka "absentee" balloting. "Voting by Mail," Editorial, *San Diego Union-Tribune* (May 2, 2005), http://www.signonsandiego.com/uniontrib/20050502/news_mz1ed2top.html, accessed October 19, 2005.
28. Jennifer Jason. Testimony and questioning is contained in *Hearing before the Subcommitee on Health, Education, Labor and Pensions of the Committee on Education and Labor, U.S. House of Representatives, 110th Congress, 1st Session, Hearing Held in Washington, DC, February 8, 2007*. Serial No. 110-04, 2007.
29. Charles Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Ithaca, NY: ILR Press, 2004).
30. Levitt, 1993, 126.
31. *The Unanimous Declaration of the Thirteen United States of America*, http://www.earlyamerica.com/earlyamerica/freedom/doi/text.html, accessed November 26, 2007.
32. Lews and Krupman, 89.
33. Alfred T. DeMaria, *The Supervisor's Handbook on Maintaining Non-Union Status* (New York: Executive Enterprises, Inc., 1986), 29–30.
34. Levitt, 1993, 2.
35. Since it is illegal, employers generally avoid using the word "futile" when attacking unionization. However, this does not stop them from talking about futility as a communication goal in internal communications. The Sodexho corporation's manual for managers, for instance, suggests a list of "potential disadvantages of union membership" for supervisors to convey to their subordinates, including "Futility of Bargaining Process." Sodexho, 1998, 1.
36. *Management Report*, vol. 23, no. 2, February 2000, 5, "Mock Negotiations: An Excellent Campaign Tactic." In National Health Care, Ltd., 327 NLRB No. 195, the Labor Board ruled this tactic illegal. However, 6th Circuit Court of Appeals overturned the board and found that the skit was within the employer's legal rights.
37. *Management Report*, vol. 27, no. 3, March 2004, 3–4, "From the Editor."
38. *Management Report*, vol. 27, no. 11, November 2004, 6, "Sample 25-Hour Speech."

39. Lawrence Mishel and Matthew Walters, *How Unions Help All Workers*, Briefing Paper, Economic Policy Institute, Washington, DC, 2003. Mishel and Walters's analysis is based on a series of studies of the union premium, drawing primarily on data from the Current Population Survey of the U.S. Census Bureau.
40. This statement was from the owner of Lundy Packing, in Clinton, North Carolina, cited in Cohen and Hurd, 1998, 183.
41. Statement is from owner of Home Style Foods in Hamtrack, Michigan, quoted in Hurd and Uehlein, 1994, 63. In a memo to employees of Crown Cork and Seal, reproduced in Hurd and Uehlein, 1994, 65, employees were warned well before the vote that "if there is an election and the [union] win[s], the company would challenge the results. . . . This means that the company would nullify the need to negotiate with the [union]. 7. If the [union] does not like the company's refusal to negotiate, it would have to file ULP charges—the company would appeal to the NLRB and the court of appeals. This process could take two years or more."
42. Cohen and Hurd, 1998, 182. Case is Teksid Aluminum in Dickson, Tennessee.
43. Cohen and Hurd, 1998. The study is based on interviews with 320 NCR computer technicians. There had been both a history of antiunion communication from the company, and deunionization within NCR over the previous decades, as well as Communications Workers of America (CWA) organizing efforts ongoing. So by the time the campaigns happened in which these workers were interviewed, they had already been operating in an atmosphere framed by efforts on both sides. Out of 1,500 customer engineers in the nine regions of NCR that had active union-affiliated employee associations, the authors drew a representative sample of 500, of whom 320 completed interviews.
44. Cohen and Hurd, 1998, 190. 39.4 percent gave this response.
45. Cohen and Hurd, 1998, 191.
46. Quoted in Phillips-Fein, 1998.
47. 1988 Gallup poll, reported in Dunlop Commission, *Fact Finding Report*, 72.
48. 1991 Fingerhut poll, reported in Dunlop Commission, *Fact Finding Report*, 72.
49. Dunlop Commission *Fact Finding Report*, 75 reports that over the period 1977–91, roughly 30 percent of nonunion workers stated that if an NLRB election were held at their workplace, they would vote "yes." The commission's own survey (Final Report, 39) found that 32 percent of unorganized workers would vote for a union. Cingranelli, 2004, 8, reports that a 2002 poll conducted for the AFL–CIO found that half of all nonmanagerial employees would vote for a union if they had the opportunity. Interestingly, Freeman and Rogers, 1999, 59, found that an even higher share of workers supported the substance of unionization if it was not called a "union." A majority of all workers they surveyed said they want an organization in which "either management or employees can raise problems for discussion as opposed to one in which management alone decides the problems that should be discussed"; "employees and management have to agree on decisions as opposed to one in which management makes the final decision about issues"; "conflicts are resolved by an outside arbitrator rather than by management"; and "employee representatives are elected or volunteer themselves rather than being chosen by management."
50. Comstock and Fox, 1994.
51. Ibid., 92.
52. Ibid., 98. Freeman and Rogers, 1999, 62, likewise found that among nonunion workers who wished they had one, 55 percent believed that "management opposition" was the central reason why they had been unable to organize.
53. Charles I. Cohen, *Statement of the U.S. Chamber of Commerce before the Senate Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations*, July 16, 2004. Published by the U.S. Chamber of Commerce at http://www.uschamber.org, accessed September 16, 2005.
54. Burke Group, 2005.
55. Jackson Lewis et al., 1997, 87. In 2005, the Jackson Lewis website advertised a seminar on "How To Stay Union-Free In the 21st Century," which included a session entitled "Pre-Petition: How to Lawfully and Effectively Shut Down Organizing Once It Starts." http://www.eeiconferences.com/unionagenda. Accessed July 7, 2005.
56. For instance, notorious New York attorney Alfred DeMaria insists that "employers should be prepared to nip union-card signing in the bud." ("From the Editor: Speech to Employees at the First Sign of Union Activity," *Management Report for Nonunion Organizations*, vol. 27, no. 3 (March 2004): 4.) The newsletter

edited by DeMaria regularly includes articles offering advice for how management can prevent a union collecting the 30 percent of cards necessary to trigger an election. (*Management Report for Nonunion Organizations*, various issues.) So too, Levine, chap. 8, 1 advises that "upon detection of union activity," employers' "immediate and primary thrust should be to mount a counter-campaign that focuses on convincing employees not to sign union cards—to keep the union from getting the 30% show of interest" required for an NLRB election.

57. Gene Levine Associates, *Complete Union Avoidance*, 2005, 2. Similarly, Kilgour, 3 notes that "the union organizing drive. . . . Is something to be prevented if at all possible," and on p. 289 jokes that "there is no ready-made prescription for the best day and time to conduct a representation election (except perhaps 'never')."
58. For example, the Burke Group (*Union Free Advantage*, 2005) boasts on its Web page that it has been "successful in helping business avoid union petitions more than 70 times by working a counter campaign before a petition is filed." As far back as 1984, antiunion consultants Human Resources and Profits Associates, Inc. boasted in its promotional materials of a "99% win rate." Of the firm's 900-plus election campaigns, more than half never actually got to an election, because the union was forced to withdraw its petition. The firm's flyer is cited in Smith, 2003, 105.
59. Kilgour, 1981, 124.
60. Lewis and Krupman, 89.
61. National Labor Relations Board: Hearings on S. 1958 before the Senate Committee on Education and Labor, 74th Congress, 1st Session 642 (1935), reprinted in NLRA Legislative History, 2028.
62. 79 Cong. Rec. 7565 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2321 (1949).
63. Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York, Free Press, 1995).
64. *Dana Corp*., 351 NLRB No. 28, September 29, 2007, 8.
65. Senate Report No. 1184, 73rd Congress, second session 4 (1934), reprinted in 1 NLRA Legislative History, 1103.
66. National Labor Relations Act, US 29 (7) (2) § 157.
67. The phrase was coined by Assistant Secretary of State for Near Eastern Affairs Edward Djerejian in an address titled "The U.S., Islam and the Middle East in a Changing World" at Meridien House International, Washington DC, June 1992 published in *U.S. Department of State Dispatch*, June 2, 1992, p. 3. Djerejian explained that "we are suspect of those who would use the democratic process to come to power, only to destroy the very process in order to retain power and political dominance. While we believer in the principle of one person, one vote, we do not support one person, one vote, one time." See also Edward P. Djerejian, "One Man, One Vote, One Time," *New Perspectives Quarterly* 10, no. 3 (Summer, 1993), p. 49.