

# Automatic Elections

Michael M. Oswalt\*

Introduction .....	802
I. Winning the Right to a Certified Bargaining Representative by “Showing Interest” Under the National Labor Relations Act .....	805
II. The Triggering Burden: The Historical Roots of a Once Reasonable Expectation .....	810
A. The Curious Context of Industrial Democracy .....	810
B. The More Compelling Context of Workplace Culture .....	811
1. Activism in the Early 1930s: A Visible Presence, a Fervor for Collective Bargaining, and a Short Fuse .....	813
2. Wagner’s Prediction: The Fuse Ignites, 1934 .....	814
C. Channeling the Existing Fervor for Collective Bargaining: The Wagner Act of 1935 .....	815
III. The Triggering Burden in Modern Context: The Loss of a Once Reasonable Expectation .....	816
A. Empirical Signs: Strikes, Petitions, Density, and Other Factors .....	816
B. Cultural Reverberations of Union Scarcity .....	818
C. Piling On: The Changing Nature of Community .....	823
IV. The Raised Costs of the Triggering Burden in Contemporary Times .....	825
A. The Costs of Cultural Reclamation in Modern U.S. Organizing—Resource Rich, Uncertain, and Weak .....	825
B. A Procedure Broken in Purpose and Practice .....	829
V. Beyond Coercion: The Case for Automatic Elections .....	833
A. The Case Against Coercion-Centric Revisions .....	833
B. The Case for Automatic Elections .....	833
1. Proposals and Precedents: Rebooting an Existing Dialogue .....	834
2. A New Approach .....	835

---

\* Assistant Professor of Law, Northern Illinois University College of Law. Special thanks to Benjamin Sachs, Noah Zatz, and Wilma Liebman for valuable insights during and after the “Reimagining Labor Law” symposium. I am especially grateful to Catherine Fisk, Matthew Dimick, and Eli Naduris-Weissman for thoughtful suggestions and edits on early drafts. Thanks also to Dean Jennifer Rosato Perea for her support of this project and to Marc Falkoff, Dan Reynolds, Alan Boudreau, and others for helpful feedback at the NIU Fall Faculty Development Workshop. Margaux Poueymiroou provided superb editorial assistance. All remaining errors are my own.

3. The Transformative Potential of a Regularized Election Regime—Cultural Shock Treatment.....	837
a. Legitimation, Adaptive Preferences, Cascades, and Practical Effects.....	837
VI. Implementation .....	841
A. Objections.....	846
1. Cost .....	846
2. Turnout.....	851
Conclusion.....	853

## INTRODUCTION

Anyone spending some time in labor or progressive circles during the summer of 2013 probably heard the echoes of a commentary that had just appeared in the quarterly journal *Democracy*.<sup>1</sup> Though its elegant and provocative account of the historical, political, and strategic factors involved in the labor movement's long sinking fortunes was itself notable,<sup>2</sup> attention really focused on the article's six proposed fixes that played off its title, "Fortress Unionism."<sup>3</sup> The first five involved a mix of ideas to shore up labor's geographic and industry strongholds while reaching out to allies and cultivating new leaders.<sup>4</sup> The sixth was the lynchpin of the plan and also, seemingly, the simplest: "*And then . . . wait*. Wait for workers to say they've had enough. When they demand in vast numbers collective solutions to their problems, seize upon that energy and institutionalize it."<sup>5</sup>

The notion that, over time, all roads lead to workers banding together and rising together is a theme often invoked by labor movement writers, activists, and reformers.<sup>6</sup> It is also an assumption found—and intentionally embedded—in labor

---

1. Rich Yeselson, *Fortress Unionism*, DEMOCRACY J. IDEAS, Summer 2013, at 68.

2. *Id.* at 68–79.

3. *Id.* at 79–81.

4. *Id.* at 79–80.

5. *Id.* at 81.

6. *Id.* While Yeselson ultimately relies on a movement strategy that in significant part involves "wait[ing]" for workers to erupt, he begins *Fortress Unionism* with the counter-assessment that "[a]n aggressive organizing strategy, of the sort labor attempted . . . [with] the AFL-CIO, just doesn't work because the smart union strategists can't compensate for a mostly (though not entirely) uninterested working class." *Id.* at 70. This particular sentence was largely overlooked by most commentaries on the piece, but tellingly, he immediately received criticism from within the labor movement (quickly disseminated to the broader public by the labor reporter for the New York Times) on that very point. See, e.g., John S. Ahlquist & Margaret Levi, *With Fortresses Like These . . .*, CROOKED TIMBER (July 9, 2013), <http://crookedtimber.org/2013/07/09/with-fortresses-like-these> (pointing to documentation of "extensive, deep, and persistent unfilled desire by workers for a greater voice on the job" to counter Yeselson's assumption that "workers are simply not yet pissed off enough to mobilize in the face of current repression, so union leaders should just wait until they are"); Streecheat, *Building Fortresses or Tearing Down Walls? Thoughts on "Fortress Unionism," IT'S ABOUT POWER STUPID!: THINKING STRATEGICALLY ABOUT LABOR'S SURVIVAL* (June 14, 2003, 1:31 PM),

law's basic statutory system for actually forming a union. To establish a certified bargaining representative under the National Labor Relations Act (Act or NLRA), a group of workers must first get together and petition the government for the right to vote for the union in a secret ballot election.<sup>7</sup> In this sense, the Act's unionization machinery is essentially passive; it sits and it waits, unless workers ask it to do something else.

That the law predicates elections on stirrings of collective agitation is, from a historical perspective, not all that surprising. The Act arose at a time of degraded employment conditions, dismal economic forecasts,<sup>8</sup> extreme worker unrest,<sup>9</sup> and when the so-called labor question was at the forefront of American consciousness.<sup>10</sup> In this volatile context, assuming the existence of a certain level of group agency to push labor law's core procedural process along its way made a lot of sense.

This Article makes the claim that the reasonableness of that expectation varies with history, and that in the current environment it is no longer reasonable

<http://itsaboutpowerstupid.blogspot.com/2013/06/building-fortresses-or-tearing-down.html> (“This is where we part ways. I have no idea what data Yeselson uses to back up this assertion that workers are ‘uninterested’ in joining unions.”); *see also* Steven Greenhouse, TWITTER (June 17, 2013, 8:20 PM), <https://twitter.com/greenhousenyt/status/346799502843338753> (tweeting the *It's About Power Stupid!* blog reaction to Fortress Unionism). The rest of the media largely praised Yeselson's piece overall. *See Fortress Unionism*, MUCK RACK (June 11, 2013), <http://muckrack.com/link/vdDJ/fortress-unionism> (collecting tweets from the mainstream media in response to *Fortress Unionism*, including repeated focus on Yeselson's statement that “[u]nion growth occurs when working-class activism overwhelms the quotidian strictures of civil society”). But more to the point, Yeselson's assumptions about the existence of an organic progression toward collective activism in today's workplace can be found in other labor writers' work. *See, e.g.*, DAN CLAWSON, *THE NEXT UPSURGE* 130 (2003) (“Labor has made big advances *only* in periods of upsurge . . . . And every such period of upsurge has been driven by rank-and-file activism.”); CAL WINSLOW, *LABOR'S CIVIL WAR IN CALIFORNIA* 41–42 (2010) (arguing that worker struggles are “infectious” and will naturally flourish); Mike Elk, *4 Recent Victories Signal Hard Truth About Rebuilding Labor Movement*, WORKING THESE TIMES BLOG (Feb. 13, 2012, 4:25 PM), [http://inthesetimes.com/working/entry/12719/4\\_recent\\_victories\\_point\\_to\\_way\\_to\\_rebuild\\_the\\_labor\\_movement](http://inthesetimes.com/working/entry/12719/4_recent_victories_point_to_way_to_rebuild_the_labor_movement) (“The truth is—and it's a tough one for labor leaders to accept—is that there is no real strategy to rebuild the labor movement other than to support workers to the max in their attempts to organize – however small or unsexy they are. If we are going to rebuild this labor movement, workers are going to have to do it themselves.”); *see also* Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313, 333, 323–24 (2006) (“In the United States, there have been a number of occasions in recent years in which those schooled in the history of industrial unionism felt, ‘This is it, this will uncork the bottled-up dynamic of protest.’ . . . Yet none of those events has connected to a movement that could energize labor resurgence.”); Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO's New Agenda*, DISSENT, Winter 2014, at 54, 57–58 (“The labor left's organizing theory holds that once American workers realize that exemplary militancy in one firm, industry, or sector can really pay off for them, it will spark a chain reaction that can mobilize millions.”).

7. *See* National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012).

8. ROBERT H. ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS, 1920–1985*, at 10–14 (1986).

9. *See infra* Part II.B–C.

10. *See* NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 4, 6, 9, 12 (2002).

to expect workers to invoke the Act's election procedures on any meaningful scale. Worker culture has changed, but labor law has not, and the costs posed by the law's background presumption that workers will naturally turn to collective bargaining as a way to improve wages and working conditions have swollen dramatically. Today, in activism's absence, the law is like a cage built for a lion that instead confines a lamb.<sup>11</sup>

The Article responds to this misfit by envisioning a labor law that does not wait for workers to call the collective bargaining question. It asserts that for the Act's electoral machinery to function adequately, it needs reform that will allow it to reflect the vast cultural transformations that have occurred inside and outside the workplace since the NLRA's enactment in the 1930s. Labor law, in other words, needs to become more proactive—because employees have steadily become less so.

The Article specifically proposes that the NLRA be amended so that employees are presented with the preemptive choice to unionize or not through automatically or annually scheduled elections, just as our political democracy allows citizens to vote for or against representatives on a regular basis.

While regularizing elections might seem like radical change, investigation into the Act's early history reveals that the law's theoretical foundations pointed in this direction. Moreover, calls for regular opportunities to select forms of workplace representation already exist, and specific legislative proposals to enact automatic elections at the state and federal level continue to emerge.

The Article proceeds as follows. Part I gives a bird's eye view of the steps workers must take to establish a certified bargaining representative under the National Labor Relations Act, focusing especially on the so-called showing of interest evidence that triggers the process. Part II places the showing of interest provision in historical context. While requiring workers to invoke elections is seemingly out of step with the democratic and political analogies that spurred the Act's enactment and animated its provisions, legislative history reveals that the startling presence of mass street and workplace uprisings persuaded the Act's supporters that a more assertive voting regime was just not necessary. The prevailing fervor for collective bargaining needed safe channeling. But the worker culture of the day, the framers presumed, paved its own path to the polls. They were right.

Part III depicts the disintegration of that culture. Strike, petition, density, and other descriptive data are used to paint a stark picture of union scarcity in modern America. The diminished presence of unions and union members in everyday life is shown to have deep cultural reverberations that stifle the possibility and prospects for collective workplace activism. The effect is magnified by broader sociological changes that have tarnished the perception of collective aims and led

---

11. This analogy is adapted from a friend's remark that with so few U.S. union members, labor law is "the cage without the animal."

to a much talked about uptick in individualism and weakened group values. The ultimate result is the loss of a once reasonable expectation that workers can be counted on to counteract labor law's reactive election provisions.

Part IV examines the new, heightened costs that attach to the electoral triggering burden in this revised culture. In earlier eras the process of petitioning the government to invoke an election might have amounted to coordinated busywork. Today it requires time-intensive, resource-rich, and ultimately uncertain strategies that try to resurrect the union consciousness of old, on the fly. Not only is this a poor reflection of the Act's purposes, it does not work well. Unions flee the Act's electoral regime in droves, and the organizing options that remain are both inadequate and more and more legally precarious.

Part V zeros in on the case for automatic elections. It begins by clearing some existing ground to assert that although issues of employer interference have soaked up most of the scholarly attention paid to the NLRA's electoral process, these are ultimately second-order concerns relative to labor law's failure to adapt to the historical changes that will continue to prevent the holding of representation elections on any relevant scale. The Part also examines how automatic voting picks up on an existing scholarly and political discourse. In recent years, union reform via periodic reelection has popped up in legal academia, conservative think tanks, and various state legislatures. The notion of regular authorization elections (as opposed to automatic *de*authorizations) has received much less attention, with the exception of portions of larger work by Professors Mark Barenberg and Samuel Estreicher. The proposal here, however, differs from all others based on its core intent: to aggressively reorient the law to better suit a changed environment. To that end, Part V closes by considering the culturally transformative potential of a regularized election regime based on its practical impact and the social psychological climate it might create.

Part VI then provides a regulatory sketch of how periodic elections might be implemented. The National Labor Relations Board's (Board or NLRB) existing rules and operations already offer a plausible introductory framework for the scheme, and election scheduling, ballot design, unit composition, voter challenges, bargaining nuances, cost, and democracy concerns are all briefly examined.

#### I. WINNING THE RIGHT TO A CERTIFIED BARGAINING REPRESENTATIVE BY "SHOWING INTEREST" UNDER THE NATIONAL LABOR RELATIONS ACT

An employer's legal duty to bargain with its employees<sup>12</sup> can arise in a number of ways,<sup>13</sup> all of which require evidence that, at some point, a majority of

---

12. The duty to bargain appears in section 8(a)(5) of the NLRA. 29 U.S.C. § 158(a)(5) (2012) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.").

13. Beyond the standard NLRB supervised secret ballot election described in section 9(c)(1), bargaining rights can also be secured where an employer voluntarily promises to recognize a representative "on proof of majority status, and the union's majority status has been demonstrated,"

workers supported the representative seeking to negotiate on their behalf.<sup>14</sup> The Act only allows that representative to be “certified,”<sup>15</sup> however—a distinction that confers a number of statutory<sup>16</sup> and political protections<sup>17</sup>—if a certain type of

---

Terracon, Inc., 339 N.L.R.B. 221, 223 (2003), usually through signatures on hand cards or on a standard petition; *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 575–76 (1969) (describing the validity of signature-based evidence). So, for example, although in general an employer is free to reject card evidence and instead insist that workers go through a Board election, *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 305–07 (1974), an employer may not agree to have a third party verify cards for majority support, *see the results*, and then demand an election, *see, e.g., Without Reservation*, 280 N.L.R.B. 1408, 1417 (1986). *But see* Georgetown Hotel v. NLRB, 835 F.2d 1467, 1472 (D.C. Cir. 1987) (stating that an agreement to have cards counted by a third party may be repudiated “so long as the employer makes this choice *prior* to actually verifying the Union’s majority status”). Another way a bargaining duty can arise is where the evidence of employer misconduct is so great that conducting a free election would be impossible. *Gissel*, 395 U.S. at 614–15. In such cases, the Board may simply impose a duty to bargain. *See, e.g., Long-Airdox Co.*, 277 N.L.R.B. 1157, 1157 (1985) (concluding that the employer’s “unfair labor practices have made the holding of a free and fair second election unlikely, if not impossible, and thus issuance of a *Gissel* bargaining order is warranted” (internal quotation marks omitted)).

14. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (“The majority-rule concept is today unquestionably at the center of our federal labor policy.” (quoting Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958)) (internal quotation marks omitted)); *Don Mendenhall, Inc.*, 194 N.L.R.B. 1109, 1110 (1972) (stating that the duty to bargain “requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees”); *see also* OFFICE OF THE GEN. COUNSEL, NLRB ADVICE MEMORANDUM, DICK’S SPORTING GOODS, CASE 6-CA-34821, at 1 (2006) (concluding that the duty to bargain arises only after prior establishment of majority support). An interesting counterpoint involves language in *NLRB v. Gissel Packing Co.* stating that the Board could impose a bargaining order “without need of inquiry into majority status on the basis of cards or otherwise, in ‘exceptional’ cases marked by ‘outrageous’ and ‘pervasive’ unfair labor practices.” *Gissel*, 395 U.S. at 613. However, in 1984 a divided Board declined to adopt the Court’s analysis, *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984), and it continues to refuse to issue bargaining orders absent proof of majority support for the representative at some previous point in time, *see First Legal Support Servs., LLC*, 342 N.L.R.B. 350, 351 (2004) (adhering to Board precedent refusing to issue “nonmajority bargaining orders”).

15. 29 U.S.C. § 159(c)(1)(B) (empowering the Board to “direct an election by secret ballot and . . . certify the results thereof”).

16. The statutory protections the Act provides to certified unions—as opposed to those recognized voluntarily—are highly technical. But, in general terms, the first protection is found in section 8(b)(4)(C), which bars a union from forcing an employer to recognize it “if another labor organization has been certified as the representative of such employees,” 29 U.S.C. § 158(b)(4)(C), thus giving some added security to incumbent unions that have successfully navigated an election. While section 8(b)(7)(A), enacted later, extended the same protection to entrenched unions “lawfully recognized” through an agreement, 29 U.S.C. § 158(b)(7)(A), the question of lawful recognition is itself open to unfair labor practice challenge in a number of circumstances (usually by way of a section 8(a)(2) violation relating to employer domination), all of which are mooted if the incumbent union is certified in the first instance. *See* Robert A. Gorman & Matthew W. Finkin, *BASIC TEXT ON LABOR LAW* 291, 302–03 (2d ed. 2004). Finally, section 9(c)(3) protects unions from facing decertification for the first twelve months following an election. 29 U.S.C. § 159(c)(3). This is a period the Board has extended to run from the date that the union is formally certified, not just the twelve months following the actual voting day (there is usually an administrative or judicial lag between election and certification). *See Brooks v. NLRB*, 348 U.S. 96, 103–04 (1954). In contrast, where a duty to bargain arises from a recognition agreement, the Act offers no respite from decertification, though as a policy matter the Board bars such filings for a “reasonable period” after the parties’ first bargaining session,

proof has been presented.<sup>18</sup> To become certified, a union must show majority support through a secret ballot election conducted by a regional office of the NLRB,<sup>19</sup> nearly always on the employer's home turf.<sup>20</sup>

The NLRB's election apparatus, though, lies dormant unless affirmatively activated by employees.<sup>21</sup> At a given workplace, workers must first bring to the Board the results of an initial, internal poll known as a "showing of interest"<sup>22</sup> that

---

a phase that can be as short as six months. *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at 14 (Aug. 26, 2011).

17. Voluntary union recognition agreements are a political hot potato in Congress. *See, e.g.*, The Secret Ballot Protection Act, H.R. 2346, 113th Cong. § 2 (2013) (prohibiting voluntary recognition agreements); The Employee Free Choice Act, H.R. 1409, 111th Cong. (2009) (permitting union certification absent a secret ballot election through methods currently used in voluntary recognition agreements). At the state level, *see, e.g.*, *NLRB v. Arizona*, No. CV 11-00913-PHX-FJM, 2012 WL 3848400 (D. Ariz. Sept. 5, 2012), concluding that an Arizona constitutional amendment prohibiting voluntary recognition agreements is not facially preempted by the NLRA; and *Save Our Secret Ballot!*, ECONOMIST: DEMOCRACY AM. BLOG (Dec. 30, 2008, 6:49 PM), <http://www.economist.com/node/20020814>, describing efforts in five states that attempt to prohibit voluntary recognition. At the Board level, *see Dana Corp.*, 351 N.L.R.B. 434, 438–40, 448–49 (2007), *overruled by Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), showcasing competing claims over the validity of recognition agreements as a reflection of employee sentiment and limiting a legal protection previously afforded to such agreements. As a result, the legal protections granted to voluntary recognition agreements are inherently less stable. *Compare Lamons Gasket Co.*, 357 N.L.R.B. No. 72, \*1–2 (Aug. 26, 2011) (overturning precedent to enhance a recognition agreement protection that had been limited by a 2004 decision that had itself overturned longstanding union recognition doctrine), *with Cynthia L. Estlund, The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1542–43 (2002) (depicting the NLRA as historically impervious to legislative change).

18. *See infra* note 19.

19. *See Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 596 (1993) ("Significantly, the Taft-Hartley Act changed the factual predicate for union certification from majority support for a union to majority selection of a union in an election."); *id.* at 512 ("Taft-Hartley formally deprived the Board of the power it had already yielded to certify a union without an election.").

20. *See 2 NAT'L LABOR RELATIONS BD., CASEHANDLING MANUAL: REPRESENTATION PROCEEDINGS* § 11302.2 (2007) ("The best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there.").

21. *See National Labor Relations Act* § 9(c)(1), 29 U.S.C. § 159(c)(1) ("Whenever a petition shall have been filed . . . by an employee or group of employees or . . . labor organization . . . alleging that a substantial number of employees . . . wish to be represented for collective bargaining . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing [and] . . . [i]f the Board finds upon the record of such hearing that such a question of representation exists . . . it shall direct an election by secret ballot . . ."); *see also* OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM GC 12-03: SUMMARY OF OPERATIONS FISCAL YEAR 2011, at 2 (2012) ("The NLRB's processes can be invoked only by the filing of . . . a representation petition by a member of the public. The Agency has no authority to initiate proceedings on its own.").

22. *See, e.g., Gaylord Bag Co.*, 313 N.L.R.B. 306, 307 (1993) ("The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election."); *see also* 29 C.F.R. § 101.17–18 (2014), *available at* [http://www.nlr.gov/sites/default/files/documents/254/manual-part\\_101\\_.pdf](http://www.nlr.gov/sites/default/files/documents/254/manual-part_101_.pdf) (providing an overview of the representation election initiation process).

proves through signatures on cards or a petition<sup>23</sup> that at least thirty percent<sup>24</sup> of the relevant slice of the workforce is already in favor of the union.<sup>25</sup> Only after the Board substantiates the showing of interest<sup>26</sup> can the date of the election be set, and only then after the Board conducts a hearing to look into matters like whether the “unit” or subset of workers seeking representation is legally “appropriate” and whether individual workers or groups of workers hold supervisory or other positions that are not protected by the NLRA and are therefore prohibited from voting.<sup>27</sup>

---

23. OFFICE OF THE GEN. COUNSEL, NAT’L LABOR RELATIONS BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES § 5-200, at 48 (2012) [hereinafter OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES] (“The most commonly submitted type of evidence of interest consists of cards on which employees apply for membership in the labor organization and/or authorize it to represent them.”).

24. The Act itself requires only that the petition show “that a substantial number of employees” desire representation, 29 U.S.C. § 159(c)(1)(A), but the agency’s rules interpret the phrase as requiring at least thirty percent support, 29 C.F.R. § 101.18(a) (2014); *see also* Martin-Marietta Corp., 139 N.L.R.B. 925, 926 n.2 (1962) (stating that showing of interest “requirements are based upon matters of public policy and cannot be waived”).

25. Though the cards are the entry key to the election, they are usually scripted to expressly authorize a particular union to represent the signer for purposes of collective bargaining. *See, e.g.*, Area Disposal, 200 N.L.R.B. 350, 353 (1972) (describing a card stating, “I hereby designate the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, through its authorized agents, as my representative for collective bargaining”). This is because where a card majority is reached the putative representative can, and often does, request to be recognized voluntarily by the employer, *see supra* text accompanying note 13, and the Board deems authorization language valid both for that purpose and to initiate the agency’s election procedures. *See* Levi Strauss & Co., 172 N.L.R.B. 732, 734 (1968) (“There is no conflict or contradiction in purpose between the use of cards to make a showing of interest in election cases and the use of the same cards to establish majority . . .”). Indeed, once rebuffed, the latter is the representative’s remaining option. *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 308–10 (1974). For an introductory discussion of how the Board deals with conflicts between what a card says and what workers are told the card means, *see* Cumberland Shoe Co., 144 N.L.R.B. 1268 (1963).

26. The standards for validating a submitted showing of interest are quite liberal. Signatures, for example, “are presumed to be genuine unless there is some indication to the contrary.” OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, *supra* note 23, at 50. In turn, the Board will not even look into allegations of fraud or other impropriety unless a party brings forth evidence. *Goldblatt Bros.*, 118 N.L.R.B. 643, 643 n.1 (1957). The issue itself is “nonlitigable,” and the “Board reserves to itself the function of investigating such claims.” *S.H. Kress & Co.*, 137 N.L.R.B. 1244, 1248–49 (1962). Moreover, while signatures must be dated and “current,” *A. Werman & Sons*, 114 N.L.R.B. 629, 629 (1955), even cards signed over a year prior to the submission of the showing of interest meet that standard, *Covenant Aviation Security, LLC*, 349 N.L.R.B. 699, 703 (2007). As for determining whether the thirty percent threshold has been met, after the petition is filed the Region normally contacts the employer and requests a “payroll list” of the workers employed in the unit seeking representation. 2 NAT’L LABOR RELATIONS BD., *supra* note 20, § 11025.1. The signatures are then compared to the list to see if the requisite percentage of workers support unionization. *Id.* at § 11030.1. If the employer refuses to provide a payroll list, the Board accepts the union’s own estimate of the size of the relevant workplace unit. *Id.* § 11030.2. The petition itself is not released to the employer. *S.H. Kress & Co.*, 137 N.L.R.B. at 1248–49.

27. *See* 29 U.S.C. § 159(b); *see also* NAT’L LABOR RELATIONS BD., 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, 15 (2012), available at [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr\\_2012\\_par.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr_2012_par.pdf) (providing an overview of this process in plain language); *see also infra* notes 264–269 and accompanying text.

The same type of poll is required to remove an existing union as a representative. Dissatisfied workers are similarly required to gather up the signatures of at least thirty percent of their colleagues, this time to express “that such authorization be rescinded,”<sup>28</sup> a move that again initiates the Board’s secret ballot election process, subject to some different procedural limits.<sup>29</sup>

From the perspective of seventy-five years of prior practice and sixty-seven years of statutory mandate, obligating employees to affirmatively initiate elections through a showing of interest feels like a rather obvious step.<sup>30</sup> Indeed, most states with public sector bargaining statutes have incorporated this burden,<sup>31</sup> and scholars have not focused much on its salience outside of its relationship to management coercion, noting chiefly that it serves management with formal notice that it is time to create an antiunion campaign blueprint.<sup>32</sup>

---

28. 29 U.S.C. § 159(e)(1).

29. Both initial representation and decertification petitions are subject to a statutory requirement that “[n]o election . . . be conducted . . . in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” 29 U.S.C. § 159(e)(2). Decertification petitions, however, must also overcome a Board-created “contract bar,” which prohibits attempts to oust an incumbent union while a collective bargaining agreement is still active, *see, e.g.*, Gen. Box Co., 82 N.L.R.B. 678, 686 (1949), up to a maximum of three consecutive years of the agreement, no matter its ultimate length, Gen. Cable Corp., 139 N.L.R.B. 1123, 1125 (1962); *see also* Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000, 1001 (1962) (providing a date-specific window to allow for decertification petitions in the days leading up to the end of the contract’s third-year). Petitions to rescind representation are also barred for a “reasonable period” following an employer’s voluntary agreement to recognize a union, a policy known as the “recognition bar.” Lamons Gasket Co., 357 N.L.R.B. No. 72, \*1–2 (Aug. 26, 2011). There are some other instances where elections can be held in the absence of a showing of interest. For instance, an employer may file for an “expedited election” (along with an unfair labor practice charge) where an unorganized workforce or union pickets to be recognized by the employer beyond a “reasonable period of time not to exceed thirty days” without filing for an election in the interim. Blinne Constr. Co., 135 N.L.R.B. 1153, 1154, 1158 (1962). The Act also allows employers to file for an election where workers have demanded recognition generally. 29 U.S.C. § 159(e)(1); *see also* Levitz Furniture Co., 333 N.L.R.B. 717 (2001) (describing the standard that must be met for an employer to file for an election to test whether an incumbent union maintains majority worker support). Finally, as an administrative matter the Board allows a third-party union to become fully involved in on-going representational proceedings with a ten percent showing of interest. *See* Corn Products Refining Co., 87 N.L.R.B. 187, 188 n.3 (1949). A third-party union can minimally appear on a ballot with the showing of interest of a single employee. Union Carbide & Carbon Corp., 89 N.L.R.B. 460, 460 n.2, 461 (1950).

30. The Board did not require the showing of interest plus secret ballot two-step until 1939, when in *Cudahy Packing Co.*, it announced that it would not certify representatives based solely on card or petition evidence, which was an allowable alternative to the secret ballot when the NLRA was first enacted in 1935. *See infra* note 44. However, between 1935 and 1939, the Board in fact conducted over one thousand certification elections, *see infra* note 70, so arguably the process has actually been in place for seventy-nine years. Regardless, whether through cards or a secret ballot, the burden placed on workers to initiate certification has always been present.

31. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-106(b) (West, Westlaw through 2014 Feb. Reg. Sess.); OHIO REV. CODE ANN. § 4117.07(A)(1) (West, Westlaw through Files 1–140 & Statewide Issue 1 of the 130th Gen. Assemb. (2013–2014)); OR. REV. STAT. ANN. § 663.025(1)–(2) (West 2013).

32. *See, e.g.*, Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 719 (2010) (“[U]nder current law, once employees file a

## II. THE TRIGGERING BURDEN: THE HISTORICAL ROOTS OF A ONCE REASONABLE EXPECTATION

### *A. The Curious Context of Industrial Democracy*

But from a certain vantage, it is actually somewhat curious that the NLRA directs regional offices to hold ballot machinery in abeyance until activism spills out into the open. That is because, as Craig Becker has eloquently detailed, “political analogies” formed the “conceptual framework” for the Act’s election provisions, including the notion that “voting to select a bargaining agent should be something similar to our system of electing public officers in the Government.”<sup>33</sup> There, of course, nearly all elections are set automatically based on terms of office.<sup>34</sup> In fact, during hearings on the Act’s early incarnations,<sup>35</sup> Senate witnesses expressly urged Congress to borrow from models of regularly scheduled elections present in U.S. politics, corporate governance, and other areas of law. Ernest T. Weir, chairman of the National Steel Corporation, for example, complained to the Committee on Education and Labor that

provisions of this bill permit the Labor Board to hold an election at any time that it finds a substantial number of employees who want an election. In political or corporate matters we are accustomed to thinking of an election as something coming at a scheduled time, the results of which determine the persons in power for a definite length of time, yet

---

petition for an election, the employer is given notice of the organizing campaign and thus has a statutorily guaranteed window of time to campaign against unionization.”).

33. Becker, *supra* note 19, at 518 (internal quotation marks omitted) (attributing the analogy to “a North Carolina statesman . . . during the first major reform effort in 1939”).

34. See, e.g., U.S. CONST. art. II, § 1 (stating that presidential and vice-presidential elections are to be held every four years); U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.”); U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.”).

35. As intricately told by Kenneth Casebeer, the version of the NLRA passed in 1935 (then known as the Wagner Act) was the final step in an evolution of legislative language that began in late 1933 when Senator Wagner asked his assistant Leon Keyserling to draft a bill creating a national entity to strengthen section 7(a) of the National Industrial Recovery Act (NIRA), the first federal statutory lever allowing workers to organize and collectively bargain. Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 73–74 (1989). Section 7(a) of the NIRA “provided no means of enforcement” through either of the adjudicatory bodies created pursuant to the NIRA, the Labor Advisory Board and then the National Labor Board. ZIEGER, *supra* note 8, at 35–36. The bill Keyserling drafted to fix this reality, Senate Bill 2926, Labor Disputes Act, S. 2926, 73rd Cong. 1934, was introduced on February 27, 1934, and after an initial rewrite included language to create a new federal body with the power to “prohibit employer interference” with organizing through actual remedies. Casebeer, *supra*, at 78–79; see also CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 119 (1985). While Senate Bill 2926 was eventually dropped due to opposition from President Roosevelt and Senate forces, TOMLINS, *supra*, at 126–27, Keyserling later used the final Labor Disputes Act draft as the foundation for the Wagner Act, which was introduced in February 1935 and was passed by Congress in June of that year, Casebeer, *supra*, at 75.

the industrialist is to be left in a situation where an election can be called at any time.<sup>36</sup>

And even an early sketch of “Substantive Principles” to be considered for inclusion into the Act’s election rules asked, “How frequently, and upon what occasion,” suggesting that some form of automatic balloting may have once been in the drafting mix.<sup>37</sup>

The roots of the Act’s political framing can in part be traced to widespread support for the progressive era concept of “industrial democracy,” which counseled “that workers’ right to participate in workplace governance is as compelling as their right to participate in political governance.”<sup>38</sup> By the end of World War I, the idea had so infiltrated popular consciousness that the nation’s largest corporations had more or less accepted the existence of a “moral duty to bargain,”<sup>39</sup> and by 1919, the American Federation of Labor (AFL), then a bastion of conservatism and caution, had pronounced achieving “Democracy in Industry” its primary aim (at least rhetorically).<sup>40</sup> Senator Robert Wagner, the Act’s original sponsor, was himself known to “frequently sound[] the industrial democracy theme in ringing notes,” and scholars find the concept’s influence woven throughout the statute that initially bore his name.<sup>41</sup>

### B. *The More Compelling Context of Workplace Culture*

The fervor for industrial democracy did not, however, lead to the

36. *Hearings on S. 2926 Before the S. Comm. on Education and Labor*, 73rd Cong. 763 (1934) (statement of Ernest T. Weir, chairman, National Steel Corporation), *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 801 (1949) [hereinafter *Hearings on S. 2926*]. In a slightly different vein, Robert T. Caldwell, an attorney for American Rolling Mill Company, feared the possibility that employees would trigger elections intermittently and urged Congress to schedule balloting only during pre-established or regularized periods:

[I]t is provided here that the board, whenever it considers an occasion justifies it, may order an election, but if that election is held by the board there is no provision for how long the thing determined by that election shall continue. Now, ordinarily when a law provides that something shall be done it says how long that status shall remain when it is done, and it seems, both as a lawyer and from the practical standpoint, that for the board’s protection and the men’s protection and the company’s protection, that when you have an election it ought to settle something and it ought to be provided that for some specified time that election shall remain in effect . . . .

*Id.* at 1832.

37. Casebeer, *supra* note 35, at 74 (“(4) Elections (a) How frequently, and upon what occasion” (cited in Becker, *supra* note 19, at 518 n.95)).

38. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 896 (1994).

39. JOSEPH A. MCCARTIN, *LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921*, at 214 (1997).

40. *Id.* at 205. For overviews on the enormous internal difficulties the conservative AFL faced in adapting to industrial unionism, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS* 115–17 (1979); and TOMLINS, *supra* note 35, at 69–71, 142–43.

41. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265, 284–86 (1978).

incorporation of the widely-accepted international democratic norm of regular elections.<sup>42</sup> Nor, even, did the prevailing belief that the nation's economic survival hinged on a "revival of purchasing power and consumer demand," for which "nothing could be more effective than innovations in public policy to encourage collective bargaining,"<sup>43</sup> such as, presumably, automatic union votes across the land.

Why not? The Act's legislative advocates understood that there was simply no need for that kind of bluntly proactive measure.<sup>44</sup> They also knew that if the law provided even a skeletal avenue for self-organization, workers would need no prodding to take the bait.<sup>45</sup>

42. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), at art. 21 (Dec. 10, 1948) ("The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections . . ."); EUROPEAN COMMISSION, COMPENDIUM OF INTERNATIONAL STANDARDS FOR ELECTIONS, (2d ed. 2007), available at [http://www.eucem.eu/files/dmfile/compendium-of-int-standards-for-elections\\_en.pdf](http://www.eucem.eu/files/dmfile/compendium-of-int-standards-for-elections_en.pdf) (citing "regular" elections as an international standard in numerous places and regions).

43. TOMLINS, *supra* note 35, at 99–101; see also Casebeer, *supra* note 35, at 77 ("[The Act's primary drafter] believed strengthening labor essential to a proto-Keynesian attack on underconsumption."); Casebeer, *supra* note 35, at 77 (stating that the "chief aim" of early NLRA drafts was "strengthening labor's power"). The "Findings and Policies" section of the Act make this link explicit:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (2012).

44. By the time the Wagner Act passed in 1935, secret ballot representation elections had been conducted for the previous two years by the National Labor Board, the "mediating body" created by President Roosevelt pursuant to the National Industrial Recovery Act and chaired by Senator Wagner. TOMLINS, *supra* note 35, at 109. The rules for those elections had been developed in a somewhat ad hoc way during an apparel worker dispute in Pennsylvania. *Id.* Known as the "Reading Formula," the procedures were invoked whenever management denied a union's right to serve as a bargaining representative and dictated that the Board would push workers to end the dispute (usually taking the form of an ongoing strike), in exchange for the employer's promise to accept the results of a secret ballot representation election. *Id.* The obvious drawback of the Formula—and the National Labor Board itself for that matter—was that it was only of use where management agreed to mediation in the first place. *Id.* at 114. This was similar to the mechanisms associated with section 7(a) of the NIRA, the strictures of which could not be legally enforced. See *supra* text accompanying note 35 and *infra* note 59. That fundamental weakness became a driving force behind ultimate passage of the enforcement-enhanced Wagner Act, ZIEGER, *supra* note 8, at 38–40, which for its part allowed majority bargaining representatives to be blessed by the newly formed NLRB through "a secret ballot of employees, or . . . any other suitable method." National Labor Relations Act, Pub. L. No. 74–198, § 9(c), 49 Stat. 449, 453 (1935). In practice, the early Board sometimes certified unions solely on the basis of signatures presented in a "trial-like" investigatory hearing. See Becker, *supra* note 19, at 505–08. In 1939, amidst a barrage of criticism from political, business, and even conservative labor circles, the Board announced in *Cudaly Packing Co.* that it would newly mandate that signature evidence of union support be confirmed in a later election, a change codified eight years later in the Taft-Hartley amendments and in effect today. *Id.* at 510–12; see also *supra* notes 19, 30.

45. See *infra* Part II.B–C.

1. *Activism in the Early 1930s: A Visible Presence, a Fervor for Collective Bargaining, and a Short Fuse*

As an initial matter, the Depression decade had begun with a startling degree of generalized activism.<sup>46</sup> Spasms of street uprisings, planned and unplanned, great and small, cropped up seemingly everywhere, from a quarter million unemployed workers rallying for jobs across major cities to an average of ten anti-eviction protests a week in Chicago.<sup>47</sup> In early 1932, thousands of hunger marchers surrounded the Ford Motor Company's River Rouge facility, prompting a violent police backlash of water jets, tear gas, and bullets that killed four and injured dozens.<sup>48</sup> That summer, President Hoover ordered General Douglas MacArthur, six tanks, and a full infantry into the nation's capital to clear out thousands of World War I veterans clamoring for an early bonus payment.<sup>49</sup>

In the workplace, the increasingly frequent and ominous predictions of coming labor-management volatility,<sup>50</sup> combined with Wagner's and his colleagues' firm belief that both "workers' objective interests and *subjective preferences* lay in collective bargaining through outside unions,"<sup>51</sup> cemented a conclusion that through their own volition, workers would have no difficulty activating any unionization provision the law might provide.

Indeed, there was a track record. In 1933, the National Industrial Recovery Act's section 7(a) had given workers a right to organize into independent unions, and although it was unenforced and ignored at will,<sup>52</sup> under the provision's banner workers streamed into unions at a staggering rate.<sup>53</sup>

46. This is not to imply a lack of activism in the workplace or otherwise in the preceding years. As emphasized by William Forbath, "the history of the workplace in industrializing America is a history of recurring militancy and class-based, as well as shop- and craft-based, collective action." WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 11 (1991).

47. See ZIEGER, *supra* note 8, at 14–15.

48. *Id.* at 15–17.

49. *Id.* at 15–18. By 1933, over thirty percent of the nation's workforce was unemployed. PIVEN & CLOWARD, *supra* note 40, at 108.

50. According to an AFL official, sporadic strikes in hosiery mills and the coal mines at the turn of the decade portended "the doors of revolt" about to be "thrown open." *Id.* at 109 (quoting IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 354 (1950)). In mid-1932, the Governor of North Carolina wrote that an "outburst" in his state that "was almost spontaneous and spread like the plague . . . only confirms my general feeling that the spirit of revolt is widespread." *Id.* (quoting BERNSTEIN, *supra*, at 421–22).

51. Barenberg, *supra* note 38, at 777 (emphasis added).

52. See *supra* text accompanying notes 35 and 44 and *infra* note 59.

53. See JEREMY BRECHER, *STRIKE!* 150 (1972); TOMLINS, *supra* note 35, at 10 ("[E]nactment of 7(a) was followed by a wave of union organizing throughout the economy."); ZIEGER, *supra* note 8, at 29 ("Despite the decidedly probusiness cast of the NIRA . . . its establishment gave hope to thousands of workers and stimulated the formation of unions under the promised protection of Section 7(a)."); Barenberg, *supra* note 38, at 863. With enactment of section 7(a), the United Mine Worker's adopted the famous organizing pitch: "The President wants *you* to unionize." PIVEN & CLOWARD, *supra* note 40, at 114.

## 2. *Wagner's Prediction: The Fuse Ignites, 1934*

If anything, Wagner feared deeply that if section 7(a) was not strengthened through some mechanism forcing employers to the bargaining table, workers' desire for union membership would boil over to catastrophic effect. Testifying before Congress on March 14, 1934, in support of the ill-fated Labor Disputes Act, which was primarily intended to give teeth to 7(a), Wagner warned:

[E]mployees are becoming impatient at the denial of their rights, and strikes and violence are appearing in various parts of the country. I am in a position to know this. The very events are occurring that Congress ought to prevent by Section 7(a). The question is not one of abstract justice; it affects us all.<sup>54</sup>

When later asked about the consequences of failing to pass the Act, Wagner predicted "tremendous difficulties . . . so much that we shall not be able to cope with them."<sup>55</sup> He concluded: "I am terribly concerned."<sup>56</sup>

Wagner, it turns out, was acutely attuned to the workplace culture of the era. The Labor Disputes bill was pulled for lack of support,<sup>57</sup> workers and unions grew resentful<sup>58</sup> of section 7(a)'s gross inadequacies,<sup>59</sup> and that year more than a million-and-a-half workers struck for labor rights over 1800 times, "convuls[ing] whole communities and industries" and spawning a "lethal bitterness rarely matched in American history."<sup>60</sup>

Two months after Wagner's testimony, workers upset by a capricious hiring system shut down two thousand miles of cargo entry points on the West Coast.<sup>61</sup> The National Guard was activated, and a 130,000-person general strike in San Francisco followed in July after police shot and killed two of the protestors.<sup>62</sup> Two more died on May 24 during a strike at the Toledo, Ohio, Auto-Lite factory as workers and their allies faced police and 900 soldiers with bayonets in "savage

54. *Hearings on S. 2926, supra* note 36, at 38.

55. *Id.* at 42.

56. *Id.*

57. *See supra* text accompanying note 35.

58. *See ZIEGER, supra* note 8, at 37–38.

59. As historian Robert H. Zieger explained:

A determined employer had many devices with which to thwart the apparent intent of Section 7(a). Even where a union won a representation election, neither the law nor any NRA regulation required that the employer deal only with the majority organization. He could, and many did, claim that those workers who voted against the union also deserved consideration, and many employers entered into talks with representatives of the "loyal" (i.e., anti-union) employees as well as with those of the pro-union faction. Playing one side against the other, employers could reward the "loyal" employees with minor concessions while protracting negotiations with the bona fide (or trade union) group.

*Id.* at 37. The labor movement's difficulty overcoming this variant of "company unionism" and others is described in Barenberg, *supra* note 38, at 810. And, of course, just as often employers would simply refuse to recognize any union, regardless of an election result to the contrary. TOMLINS, *supra* note 35, at 114.

60. ZIEGER, *supra* note 8, at 33.

61. BRECHER, *supra* note 53, at 120–21.

62. *Id.* at 153, 156; ZIEGER, *supra* note 8, at 33.

street fighting” throughout the night.<sup>63</sup> On July 20, a sprawling Minneapolis Teamsters local frustrated by employer refusals to bargain struck and positioned a car of picketers in front of a replacement delivery truck surrounded by fifty policemen who promptly fired shotgun rounds, killing two activists and wounding sixty-seven others rushing to the scene.<sup>64</sup> And in September, textile workers across New England and the South walked out of mills to demand union recognition,<sup>65</sup> having organized “flying squadrons” of roving pickets to progressively shut down production across New England and the South.<sup>66</sup> All told, 421,000 workers left work, 13 died, and scores more were wounded.<sup>67</sup>

*C. Channeling the Existing Fervor for Collective Bargaining: The Wagner Act of 1935*

The calamities of 1934, ever mounting labor frustration with section 7(a), and President Roosevelt’s fear of entirely “unregulated labor-management confrontation” after the Supreme Court deemed the NIRA unconstitutional in May 1935<sup>68</sup> prompted new momentum for legislation to strengthen organizing and bargaining protections, which arrived in the form of the “Wagner Act.” Borrowing heavily from language used in the previous year’s Labor Disputes Act,<sup>69</sup> Wagner’s bill became law on July 5, 1935.

And, as anticipated, workers flocked to labor law’s newly enforceable unionization rules from the start. Seizing on the law’s formal election procedures<sup>70</sup> while mixing in a heavy dose of old-fashioned militancy in the form of the sit-down strike,<sup>71</sup> labor swelled its ranks from 3.7 million to 6.5 million in the Wagner

63. BRECHER, *supra* note 53, at 160; ZIEGER, *supra* note 8, at 33.

64. ZIEGER, *supra* note 8, at 34.

65. *Id.*

66. BRECHER, *supra* note 53, at 168–69.

67. *Id.* at 176.

68. ZIEGER, *supra* note 8, at 37–40. In testifying in support of the draft Wagner Act, AFL President William Green reminded the committee of the recent “armed warfare” in San Francisco, Toledo, and Minneapolis, stating:

[T]here is only one way to avoid a recurrence of such violence that is by an assurance to the workers that their rights will be observed by employers. The working people of this country have during the past two years been very patient. . . . We cannot and will not continue to urge workers to have patience, unless the Wagner bill is made law, and unless it is enforced, once it becomes law.

*Hearings on S. 2926, supra* note 36, at 1497.

69. See *supra* text accompanying note 35.

70. In the Act’s first five years, the NLRB conducted over 1060 secret ballot elections and certified 272 unions through card or petition based evidence. Becker, *supra* note 19, at 507 n.45. For an explanation of these early Act procedures, see *supra* text accompanying note 44.

71. Persuaded that the Wagner Act would suffer the NIRA’s fate in a matter of time, many employers “continued to fight the unions without restraint,” prompting the use of such tactics. ZIEGER, *supra* note 8, at 40. Indeed, throughout this period the “number of strikes continued to rise: 2,014 in 1935; 2,172 in 1936, and 4,740 in 1937.” PIVEN & CLOWARD, *supra* note 40, at 133. Most famously, the Committee for Industrial Organizations or CIO—a network of breakaway AFL unions committed to organizing in heavy industry—used the sit-down strike tactic to almost fanciful success, parlaying a six-week occupation of a General Motors Corporation factory into a massive contract and riding the momentum to a victory at U.S. Steel. ZIEGER, *supra* note 8, at 40. At least 2.5 million

Act's first forty-eight months.<sup>72</sup> The fiery pace continued for the next twelve years<sup>73</sup> as “[a] fever of organization gripped working-class communities in a huge arc that spread from New England through New York, Pennsylvania, and the Midwest.”<sup>74</sup>

Thus, at its infancy, the NLRA's unionization regime served as intended: a legal depot or collection point for the rapidly expanding organizing aspirations of the nation's working classes. From Senator Wagner's perspective, these aspirations were durable enough to effectively serve as the Act's own enforcement mechanism going forward, via the strike tactic.<sup>75</sup>

### III. THE TRIGGERING BURDEN IN MODERN CONTEXT: THE LOSS OF A ONCE REASONABLE EXPECTATION

But they were not so durable. It is no longer reasonable to assume that the mere availability of a way for workers to apply for the right to be represented might lead to anything like meaningful union density. In today's workplace, there is no appreciable activist runoff to be processed and certified by the Board's bureaucratic processes, and workers do not take the bait.

#### *A. Empirical Signs: Strikes, Petitions, Density, and Other Factors*

To begin, there are the empirical signs of this phenomenon, starting with strike trends. The nation averaged 343 major work stoppages a year from 1947 to 1956, the first ten years of government numbers on the topic, but less than twenty annually in the past decade, representing a drop in average yearly strikers from over 1.7 million to 105,000.<sup>76</sup> When nongovernment data are considered, the post-

workers joined unions over a few months in 1937 alone. LICHTENSTEIN, *supra* note 10, at 52. As depicted by historian Robert Zieger, during this time the “very term ‘CIO’ carried a kind of magic” as “[w]hole communities seethed with fervor” for CIO organizers. ZIEGER, *supra* note 8, at 50. For a detailed description of the sit-down tactic and a fascinating look at life inside General Motors during the six-week showdown, see BRECHER, *supra* note 53, at 177–216.

72. TOMLINS, *supra* note 35, at 148. Just six years later the movement grew to over 14.3 million members. Yeselson, *supra* note 1, at 70.

73. LICHTENSTEIN, *supra* note 10, at 53.

74. *Id.* at 51. By 1945, the nation's labor unions boasted over 14.3 million members. Yeselson, *supra* note 1, at 70.

75. Casebeer, *supra* note 35, at 83 (stating that “Wagner and Keyserling felt the economic power of the strike would be the chief enforcement of the Act's provisions once organization was in place,” and noting the addition of section 303 to ensure that “nothing in the Act should be construed to impair the right to strike” for that reason).

76. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Major Work Stoppages in 2012, at 3 tbl.1 (Feb. 8, 2013), [http://www.bls.gov/news.release/archives/wkstp\\_02082013.pdf](http://www.bls.gov/news.release/archives/wkstp_02082013.pdf) [hereinafter News Release, Major Work Stoppages in 2012]; see also *Work Stoppages: Frequently Asked Questions (FAQ's)*, BUREAU LAB. STATS., U.S. DEPARTMENT LAB., <http://www.bls.gov/wsp/wspfaq.htm> (last modified Feb. 26, 2014) (question 5). The Bureau of Labor Statistics collects data only on work stoppages involving at least one thousand workers and defines stoppages to include both strikes and lock-outs. *Work Stoppages: Frequently Asked Questions (FAQ's)*, *supra*. As a result, these figures are approximate, though in previous decades lockouts were a “rarity.” Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. TIMES, Jan. 23, 2012, at A1. Since the 1990s, for

World War II strike wave of 1946 stands out as an astounding additional reference point. That year, 4.6 million workers walked off the job in 5000 strikes, a tenth of the national workforce.<sup>77</sup> A similar level of activism in 2013 would require the participation of 14 million strikers.<sup>78</sup> A more recent date range only reinforces this narrative, as newly uncovered data—which, for the first time, includes strikes of every size—concludes that strike frequency plummeted by nearly seventy percent between the early-eighties and the new millennium.<sup>79</sup>

While given these extreme swings<sup>80</sup> the numbers can serve as a blunt measure of worker agitation through the years, because the data sets include only strikes involving already unionized employees, the calculations arguably say little about nonunionized workers' propensity to turn to unionization. That stated, the limited information available on strikes for union recognition and strikes without union assistance suggests a similar pattern.<sup>81</sup>

Two other well-known facts add some additional support to the notion that union activism has declined over time, though both come with major caveats. One is the now decades-old pattern of progressively fewer showing of interest petitions filed at the Board each year, seemingly stark evidence that in absolute terms workers are less and less aware of, willing, or able to overcome the election initiation burden.<sup>82</sup> However, because unions are also increasingly seeking to bargain without the formal certification that comes with an election, those figures do not really reflect the true organizing landscape.<sup>83</sup>

The other is the drop in private sector unionization itself, from thirty-five

---

example, lockouts have made up only between four and nine percent of all work stoppages. Josh Eidelson, *Rise of the Lockout: Another Sign of Labor's Slide* (Sept. 28, 2012), [http://www.salon.com/2012/09/28/rise\\_of\\_lockouts\\_another\\_sign\\_of\\_labors\\_slide/](http://www.salon.com/2012/09/28/rise_of_lockouts_another_sign_of_labors_slide/). It should also be noted that including lock-outs, the number of work stoppages in 2005 to 2007 totaled twenty-two, twenty, and twenty-one, respectively, so with regard to the past decade the reported figure assumes at least three, one, and two lock-outs in those years. See News Release, Major Work Stoppages in 2012, *supra*.

77. Yeselson, *supra* note 1, at 72.

78. *Id.*

79. Jake Rosenfeld, *Desperate Measures: Strikes and Wages in Post-Accord America*, 85 SOC. FORCES 235, 235–36 (2006).

80. Rosenfeld calls the decline in strike activity since the 1980s “drastic.” *Id.* at 255.

81. *Id.* at 243 (“Evidence suggests that the frequency of these types of strikes has been on the decline for decades; in 1980 they made up only 13 percent of all strikes, down from nearly two-thirds of all work stoppages in the late 1930s.”). While recent comparators are unavailable, studies of worker culture in the 1940s suggest a workplace permeated with small, spontaneous work stoppages known as “quickie strikes,” as well as actions unsanctioned by the existing union, known as a “wildcat strike.” BRECHER, *supra* note 53, at 223–26; see also ZIEGER, *supra* note 8, at 51.

82. In 2011, only 2108 showing of interest petitions were filed at the Board, representing a more than fifty percent drop from just 2001. *Representation Petitions – RC*, NAT'L LAB. REL. BOARD., <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/rc-elections> (last visited Sept. 14, 2013). To put that in perspective, although only around sixty percent of petitions result in elections (with the rest generally pulled for a lack of support or other reasons), *id.*, in 1998, the Board conducted four thousand actual votes, which itself was a precipitous drop from the 1970s when it annually held an average of nine thousand, Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 1 U. CHI. LEGAL F. 147, 159 (2009).

83. See *infra* notes 176–179.

percent in the 1950s<sup>84</sup> to under seven percent today,<sup>85</sup> a slide that would seem to indicate that employee preferences have changed. That, in fact, is the conclusion of an oft-cited analysis from the early-nineties.<sup>86</sup> Caution, though, is again required, as there is near scholarly consensus that the dipping density curve is linked to a wide confluence of overlapping factors, so a sole reliance on worker attitudes is simplistic.<sup>87</sup>

### B. Cultural Reverberations of Union Scarcity

Nevertheless, the steep slide in union density is relevant for a different reason: the cultural reverberations left in its wake, which have dampened the prospects for union activism.

Setting the stage is Professor David Weil's observation that, "for many workers (particularly younger ones), unions simply do not register on the radar screen" anymore.<sup>88</sup> Weil's statement might be glib, but it is also difficult to refute. Because, to be frank, why would they register? In 1956, the Warren Court remarked that "self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,"<sup>89</sup> an observation that, at the time, labor probably accepted as having favorable implications for organizing. When every third worker was part of the movement, it could be assumed that the unorganized would bump into a union member every

84. Steven Greenhouse, *Share of the Workforce in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 24, 2013, at B1.

85. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2012, at 1–3 (Jan. 3, 2013), <http://www.bls.gov/news.release/pdf/union2.pdf>.

86. Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 105, 105–34 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

87. See, e.g., Kate Bronfenbrenner, et al., *Introduction to ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 1, 3 (Kate Bronfenbrenner et al. eds., 1998) ("Several explanations [of union decline] have been highlighted, including the changing economic and political climate, growing opposition to unions from employers, deficiencies in the law, and declining effort on the part of unions."); Melvyn Dubofsky, *Does Organized Labor Have a Future?*, 12 LOGOS J. 1 (2013), <http://logosjournal.com/2013/dubovsky/> (offering a compact overview of the causes of union decline through time); Samuel Estreicher, *Think Global, Act Local: Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81, 81–83 (2009) (noting the "enormous literature" attempting to explain the causes of union decline and organizing the various positions in four categories); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513–14, 516 (2011) (describing economic and political causes of decline).

88. David Weil, *"Broken Windows," Vulnerable Workers, and the Future of Worker Representation*, 10 THE FORUM 1, 4 (2012); see also Jake Rosenfeld & Meredith Kleykamp, *Hispanics and Organized Labor in the United States, 1973 to 2007*, 74 AM. SOC. REV. 916, 920 (2009) ("The decades-long decline in unionization in the United States has left many native born workers unaware of and unfamiliar with the potential benefits of union employment.").

89. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

so often. But today there are just not that many “others” around to meet<sup>90</sup> or spread the word about the benefits of collective bargaining.<sup>91</sup>

Nor are unions or union members likely to generate mass attention for striking<sup>92</sup> or be covered sympathetically or with any serious depth in the press.<sup>93</sup> And unlike federal employment statutes,<sup>94</sup> U.S. employers are not required to post workplace notices about NLRA protections,<sup>95</sup> leaving most workers in the dark about basic concerted rights,<sup>96</sup> a knowledge gap that is conspicuously not filled by the American educational system.<sup>97</sup> The cumulative result is that Weil’s sweeping point is not just accurate,<sup>98</sup> it’s predictable.<sup>99</sup>

90. See *supra* text accompanying notes 84–85.

91. Even if U.S. unions made a concerted effort to spread information about unionism and the relevance of union activism, the workforce is too big (about 144 million workers) and they are far too small (about 15 million members) and geographically clustered (nearly half reside in coastal states) to generate the types of personal encounters that existed in the 1950s and 1960s. See News Release, Bureau of Labor Statistics, U.S. Dept of Labor, The Employment Situation—May 2013, at 11 (May 3, 2013), [http://www.bls.gov/news.release/archives/empst\\_06072013.pdf](http://www.bls.gov/news.release/archives/empst_06072013.pdf). Indeed, it is perhaps not surprising that the public’s perception of unions was most positive in the 1950s when private sector union density was greatest. Jodie T. Allen, *A Century After Triangle, Unions Face Uncertain Future*, PEW RES. CENTER (Mar. 23, 2011), <http://www.pewresearch.org/2011/03/23/a-century-after-triangle-unions-face-uncertain-future/> (“Gallup polls found that overall attitudes toward labor unions were positive in the late Depression years [and] . . . re-climbed to a peak of 75% in a 1957 Gallup poll.”).

92. As noted, today unions rarely strike. See *supra* text accompanying notes 76–80. Arguably the last private sector strike with (positive) mass media coverage occurred in 1997. See Steven Greenhouse, *Yearlong Effort Key to Success for Teamsters*, N.Y. TIMES, Aug. 25, 1997, at A1.

93. See, e.g., Joshua L. Carreiro, *Newspaper Coverage of the U.S. Labor Movement: The Case of Anti-Union Firings*, 30 LAB. STUD. J. 1, 1–3 (2005) (analyzing reporting on antiunion firings and concluding that employer retaliation against union activists is usually ignored or “treated as individualized and isolated events, diminishing the potential impact of the coverage on the public’s understanding of U.S. labor movement struggles”); Mike Elk, *Wonk Bloggers and the Vanishing Voices of Workers*, WORKING THESE TIMES BLOG (Jan. 13, 2012, 10:36 AM), [http://inthesetimes.com/working/entry/12521/wonk\\_bloggers\\_and\\_the\\_vanishing\\_voices\\_of\\_workers/](http://inthesetimes.com/working/entry/12521/wonk_bloggers_and_the_vanishing_voices_of_workers/) (discussing the shift from traditional labor reporting to blogging and the resulting loss of workers’ voices in media coverage).

94. Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 431–32 (1995) (citing employee rights notice requirements in the Fair Labor Standards Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Employee Polygraph Protection Act, and Title VII of the 1964 Civil Rights Act).

95. See *infra* note 321.

96. See RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 198 (updated ed. 2006); see also *infra* note 98. Alan Hyde has also argued that labor law has evolved in ways that make it difficult to articulate to workers and nonlawyers. Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in THE IDEA OF LABOUR LAW 88 (Guy Davidov & Brian Langille eds., 2011).

97. See DeChiara, *supra* note 94, at 436–38 (citing studies and surveys of student knowledge of labor rights).

98. While the labor movement sometimes touts surveys concluding that a near majority of nonunion workers would vote for a union if given the opportunity, by their nature such surveys actively present workers with the union idea and therefore shed limited light on the extent to which workers are attuned to unionism generally and in the absence of a forced choice. See, e.g., Seymour Martin Lipset et al., THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS 94–95 (2005). Overall the evidence is clear that most workers know very little about the NLRA or the rights they are entitled to under labor law. See

While scrubbing unionism from workers' perceptual field is a problem, union scarcity's more insidious effect has to do with its role in weakening the vitality of workplace activism in three ways that make the probability of unionization increasingly remote.

First, the lack of unions and their members in the marketplace limits the potential for prounion action by unorganized workers.<sup>100</sup> In one sense this is self-evident, as fewer unions means fewer organizers available to assist workers and train activists.<sup>101</sup> Weil, however, links the causal chain differently, stating that it really goes back to labor's inability, because of its size, to act as a "collective agent"—a concept he likens to a neighborhood "cop-on-the-beat"—by policing and publicizing misconduct across labor markets and social networks.<sup>102</sup> He argues that in the absence of collective agents (state or federal enforcement

DeChiara, *supra* note 94, at 433–34 ("American workers are largely ignorant of their rights under the NLRA . . ."); see also Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 50 (1964) (stating that employees are rarely in contact with unions and gain little knowledge about them from personal or news sources); Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 224 (2005) (relating the story of a radio talk show host who was "clearly surprised that the law did not require employees to take whatever an employer offered" and believed "that employees who struck had quit their jobs and had no right to come back to work"); Charles Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675–76 (1989) (describing "mass unawareness" of the NLRA and its procedures).

99. Another consequence is that there is culturally very little to counter stereotypes that arose in the late 1950s portraying unions as mafia influenced and union members as thuggish. See LICHTENSTEIN, *supra* note 10, at 162–63 ("[T]he McClellan Committee hearings [on mob-connected criminality] of 1957 and 1958 had a devastating impact on the moral standing of the entire trade-union world . . ."); Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 67–69 (2008) (citing a poll where seventy-one percent of respondents believed that union members were endangered by corrupt union executives); cf. Mark Mix, *Court Exempts Union Bosses from Laws Against Identity Theft*, WASH. EXAMINER (Oct. 27, 2012, 2:50 PM), <http://washingtonexaminer.com/court-exempts-union-bosses-from-laws-against-identity-theft/article/2511839> (discussing exploitation by "[u]nion bosses" and a "baffling immunity that gives union thugs license to harass, intimidate and even attack independent-minded workers").

100. Weil, *supra* note 88, at 13 ("There is now over two decades of evidence that shows that workers are more likely to exercise rights given the presence of a collective workplace actor, particularly a labor union.").

101. See Marc Dixon et al., *Unions, Solidarity, and Striking*, 83 SOC. FORCES 3, 6 (2004) ("Workers in highly organized industries are more likely to engage in militant action, due in part to the organizational capacity of unions and the resources they provide.").

102. Weil, *supra* note 88, at 14 (stating that "[f]inding collective agents is therefore essential in encouraging workers to exercise their rights and voice in the workplace" and calling "labor unions" the "likely institution for solving this problem"). Here Weil uses the following analogy:

[Consider] a crowd standing around an outdoor swimming pool on a cool day: everyone has the incentive to wait and hope that someone else will be the first to jump in the water to see if it is warm enough for a swim. The collective action problem requires finding ways to induce people to dip their toes in the water. If even a few people can be convinced to do so, that may inspire others to further test the water—convincing someone to put their whole foot in, and, upon seeing that, to dangle their legs in the pool, and ultimately jump in. This represents a slower, but more tractable solution than trying to get one brave soul to cannonball into the center of the pool initially.

*Id.*

agencies could, but largely do not, pick up the slack), small but high-frequency workplace illegalities germinate and go unaddressed. While this is a reality long backed by empirics,<sup>103</sup> Weil's point is that it prompts workers to doubt the reality of their own protections, and they then react by staying silent as a "survival strategy."<sup>104</sup> Frightened workers unwilling to take action on, say, unpaid overtime are, he concludes, "particularly unlikely to take the much greater risk entailed in participating in a union organizing effort."<sup>105</sup>

Second, lower unionization appears to have corroded the subjective reasons for organizing that traditionally motivated workers to join up with the labor movement. In a much-cited piece from the *American Sociological Review*, Bruce Western and Jake Rosenfeld show that through mass visibility, political action, and the formation of market rules, unions "contribute to a moral economy that institutionalizes norms for fair pay, even for nonunion workers."<sup>106</sup> This moral economy, they argue, is the lever that historically pressured nonunion firms to keep pay and benefits in line with community norms and fairness principles<sup>107</sup> and that "inspire[d] condemnation and charges of injustice" when those tenets were violated.<sup>108</sup> But in recent decades union losses eroded the moral economy and cemented new norms of low pay, degraded working conditions, and "unchecked" manager salaries.<sup>109</sup> In this revised culture, workers are less likely to focus outrage on workplace concerns (which have been normalized) or view collective action (which is rarely seen and poorly understood) as a worthwhile remedy.<sup>110</sup>

Finally, as unions vanish, so does union consciousness. To make an obvious point, when there were a lot of union members around, for good or for ill, people thought a lot about unions.<sup>111</sup> As labor journalist Rich Yeselson has described, there was a time when "labor dominated the daily life of much of the nation and

---

103. See Alison Morantz, *Does Unionization Strengthen Regulatory Enforcement? An Empirical Study of the Mine Safety and Health Administration*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 697, 700–02 (2011) ("Scholars have identified a variety of mechanisms whereby unions can increase the quantity and intensity of regulatory enforcement.").

104. Weil, *supra* note 88, at 1, 13.

105. *Id.* at 10. Weil sees the overall phenomenon as the workplace analogue to the "broken windows" theory of crime reduction, first posited by James Q. Wilson and George Kelling in 1982. *Id.* at 1.

106. Western & Rosenfeld, *supra* note 87, at 514, 517–18.

107. Indeed, Western and Rosenfeld note that during the high density periods of the 1970s "nonunion companies . . . closely monitored union contracts even in lightly unionized industries where the threat of unionization was remote." *Id.* at 519.

108. *Id.* at 517.

109. *Id.* at 517–19.

110. Western and Rosenfeld write that this new climate "signaled the deterioration of the labor market as a political institution" as workers "became less connected to each other in their organizational lives, and less connected in their economic fortunes." *Id.* at 533.

111. See Yeselson, *supra* note 1, at 70 ("It is difficult for a reader today to grasp how big a deal the labor movement was in postwar America—how much people, in support or opposition to unions, deeply cared about them.").

drew the obsessive concern of politicians and the press,<sup>112</sup> and this reality, surely, impacted the thought processes of the average worker.

Some of the psychological mechanics here have been explored by Mark Barenberg in his richly detailed article investigating company unionism and employee attitudes. Barenberg emphasizes research showing that worker consciousness is generally “fluid and subject to adaptation to the opportunities and routines experienced” at work and in the broader community,<sup>113</sup> including the “local history of labor relations” in both arenas.<sup>114</sup> Accordingly, where the labor dominated reality changes, where work evolves such that that employees have little personal experience with collective relations and do not encounter union members or union institutional structures at work, at home, or anywhere else,<sup>115</sup> union consciousness is likely either to suffer or simply not develop.

A bit of quantitative context for this position is provided by a recent NLRB case that canvassed employee and customer reaction to eighty-nine large union banners with antiemployer messages placed only feet away from various restaurant, construction, and other corporate sites around the country for four to six consecutive weeks.<sup>116</sup> The banner messages ranged in relevant part from “State Farm Insurance: A Greedy Corporate Citizen,”<sup>117</sup> to “Don’t Eat ‘Ra’ Sushi,”<sup>118</sup> to “Shame on [the Employer].”<sup>119</sup> The public and employee response to labor’s messages was, to say the least, underwhelming. Every employee of a business targeted by a banner continued working, and only two customers refused to do business with the impacted companies—a union member and an actual union.<sup>120</sup>

Because the banners were not traditional picket signs that are thought to carry the enhanced element of confrontation (though, the dissent argued vigorously that the banners were indeed equivalently confrontational),<sup>121</sup> it is

---

112. *Id.* at 71.

113. *See* Barenberg, *supra* note 38, at 823. Barenberg’s point is well captured by a 2004 empirical analysis of 133 strike actions published in the journal *Social Forces*. Dixon et al., *supra* note 101, at 23. That study noted that “worker collective protest is dampened where there is no union organization and no legacy of collective action” and concluded that “[w]orkers without organizational leverage or any historical precedent for militancy are unlikely to pursue collective responses to the employment relationship.” *Id.*

114. Barenberg, *supra* note 38, at 825–26 (internal quotations omitted).

115. *See, e.g.*, Charley Richardson, *Working Alone: The Erosion of Solidarity in Today’s Workplace*, 17 *NEW LAB. F.* 69, 70 (2008) (“As a result of new technologies and the reorganization of work . . . workers are increasingly working alone, isolated from their co-workers . . . hinder[ing] the . . . basis for workplace-based collective action—what we would call organic solidarity. . .”).

116. Local Union No. 1827, *United Bhd. of Carpenters*, 357 N.L.R.B. No. 44, at 12–13 (Aug. 11, 2011).

117. *Id.* at 8.

118. *United Bhd. of Carpenters*, 355 N.L.R.B. No. 159, at 2 (Aug. 27, 2010).

119. *Id.*; *see also United Bhd. of Carpenters*, 357 N.L.R.B. No. 44, at 4 (listing the ten decisions that made up the Board’s survey).

120. *United Bhd. of Carpenters*, 355 N.L.R.B. No. 159, at 3; *see also United Bhd. of Carpenters*, 357 N.L.R.B. No. 44, at 4. (noting that one employer also threatened to stop doing business with the employer that was the object of the union’s dispute but did not actually follow through).

121. *United Bhd. of Carpenters*, 355 N.L.R.B. No. 159, at 6–7.

difficult to compare the reaction in these eighty-nine instances to much older cases where similar messaging on signs provoked substantial economic, even ruinous, damage to affected businesses.<sup>122</sup> Nevertheless, the overall contrast in consequences probably suggests that a deeper pool of union consciousness was once present historically.<sup>123</sup>

In attitudinal terms, this withering of collectivist consciousness through union scarcity means that unions have a tough time establishing credentials as institutions for the common good in the popular imagination.<sup>124</sup> Tellingly, the public's perception of unions hit its apex during the two periods of the movement's highest density, and just like union density, those perceptions have been sliding ever since.<sup>125</sup> In practical terms, this means that a worker's first response to things going wrong on the shop floor is probably not going to be a "Google" search to find an example of a showing of interest petition.<sup>126</sup>

### *C. Piling On: The Changing Nature of Community*

Nor might it be the worker's fifth response. For not helping matters are the sociological changes that have infused American communities in the meantime, making communal goals like unionization seem quaint or even undesirable.<sup>127</sup>

122. See, e.g., *Int'l Bhd. of Teamsters v. Vogt*, 354 U.S. 284, 285 (1957) (discussing how the posting of signs stating "the men on this job are not 100% affiliated with the A.F.L." caused "substantial damage" to the business when in response "several trucking companies refused to deliver and haul goods to and from" the company); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 493 (1949) ("[T]he picketing had an instantaneous adverse effect on Empire's business. It was reduced 85%.").

123. Cf. Ian Hayes, *The Unconstitutionality of Section 8(b)(4)(ii)(B) and the Supreme Court's Unique Treatment of Union Speech*, 28 A.B.A J. LAB. & EMP. L. 129, 139 (2012) ("[M]ost patrons of a business targeted by union pickets would think about the significance of the union's presence only for as long as it took them to walk past the protesters and enter the store.").

124. See, e.g., Rich Yeselson, *Not with a Bang, but a Whimper: The Long, Slow Death Spiral of America's Labor Movement*, NEW REPUBLIC PLANK BLOG (June 6, 2012), <http://www.newrepublic.com/blog/plank/103928/not-bang-whimper-the-long-slow-death-spiral-americas-labor-movement> (during times of great union density, "[p]eople, for better or worse, knew what unions did and understood them to be an almost ordinary part of the workings of democratic capitalism").

125. According to Pew, "Gallup polls found that overall attitudes toward labor unions were positive in the late Depression years [and] . . . re-climbed to a peak of 75% in a 1957 Gallup poll." Allen, *supra* note 91; see also *supra* Part II and *supra* note 84 (depicting the late Depression and 1950s as periods coinciding with peak union density). As union membership has progressively diminished, Pew has correspondingly "found union approval dropping to 48%, an all-time low." Allen, *supra* note 91. This phenomenon may also be attributable to a psychological phenomenon known as the "mere exposure" effect, which suggests that people develop preferences for those they encounter frequently. Robert Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. 1, 1 (1968).

126. In this vein, it is perhaps instructive that the 2011 social movement arising in response to skyrocketing unemployment and historic levels of income inequality perceived to be caused by recklessness in the corporate sector was based in parks and called "Occupy Wall Street," not based in the workplace and called "Occupy Jobs." See generally Mattathias Schwartz, *Pre-Occupied*, THE NEW YORKER (Nov. 28, 2011), [http://www.newyorker.com/reporting/2011/11/28/111128fa\\_fact\\_schwartz](http://www.newyorker.com/reporting/2011/11/28/111128fa_fact_schwartz) (discussing the origins of the Occupy Wall Street movement).

127. See, e.g., Estlund, *supra* note 17, 1535–36 ("[T]he collectivist premises of the NLRA have acquired the patina of a historic relic.").

Here historian Jefferson Cowie marks the 1970s as the relevant turning point, a decade that opened with substantial worker militancy gradually ground down by offshoring, stagflation, the Vietnam War, racial divisions, and ascendant hostility to employee rights.<sup>128</sup> Any optimism that remnants of a “unified notion of a ‘working class’”<sup>129</sup> nonetheless remained as the ’70s faded into the ’80s died with the 1981 firing of more than 11,000 air traffic controllers on strike across every state and territory,<sup>130</sup> a move broadly supported by the public and even by a great deal of union members in the private sector.<sup>131</sup>

The weakening of class consciousness during this period eventually combined<sup>132</sup> with an apparent retreat in the nation’s overall level of civic engagement<sup>133</sup> and a reported rise in American insularity and individualism.<sup>134</sup> Though the source of such trends is debatable, the consequence—depressed

128. JEFFERSON COWIE, *STAYIN’ ALIVE* 18, 256–57, 362 (2010); *see also* Jefferson Cowie, *That ‘70s Feeling*, N.Y. TIMES, Sept. 6, 2010, at A19 (“The ’70s began on a remarkably hopeful—and militant—note. Working class discontent was epidemic: 2.4 million people engaged in major strikes in 1970 alone, all struggling with what Fortune magazine called an ‘angry, aggressive and acquisitive’ mood in the shops.”).

129. COWIE, *supra* note 128, at 18.

130. *See id.* at 362–63; JOSEPH A. MCCARTIN, *COLLISION COURSE* 300–01 (2011).

131. MCCARTIN, *supra* note 130, at 293, 306, 317.

132. I do not mean to claim that changes in class consciousness during the 1970s *caused* the weakening of social capital and collectivism that Putnam, Bellah, and others detected in the mid-1980s and beyond. *See infra* notes 133–134. I simply point out that all three phenomena have been reported over the past thirty to forty years.

133. The story of departure from communal life was told most famously in ROBERT D. PUTNAM, *BOWLING ALONE* (2000); *see also* JEFFREY STOUT, *DEMOCRACY AND TRADITION* 23–24 (2004) (echoing Putnam’s concerns and grounding his results in political theory analysis).

134. Sharon Rabin Margalioth has investigated this shift and grounds it in research described in Robert Bellah’s famous work, *Habits of the Heart*, which concluded that “individualism lies at the very core of contemporary American culture.” Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 139 (1998). Margalioth herself “argues that shifts in general social attitudes respecting individualism have altered the predisposition of workers to consider collective solutions to workplace problems.” *Id.* at 134; *see also* LICHTENSTEIN, *supra* note 10, at 191–207 (depicting the rise of individual “rights consciousness” and concluding that “[w]e live in a world in which the model of collective work rights embodied in the Wagner Act has been eclipsed, if not actually replaced, by a different set of work rights based on race, gender, or other attribute of the individual involved”); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 58 (1999) (describing how through gradual shifts in policymaking visions “[c]ourts became more concerned with the rights of individuals, supporting these rights even if they conflicted with the best interests of larger groups”); David Brooks, *Yanks in Crisis*, N.Y. TIMES, Apr. 24, 2009, at A27 (contrasting “national consciousness” after the “Great Recession” and the “Great Depression” and noting that in recent decades “Americans stand out from others in their belief that their own individual actions determine how they fare” and that in “times like these” Americans turn to “themselves”); William Galston et al., *Is the Common Good Good?*, AM. PROSPECT, July–Aug. 2006, at 38, 41–42 (“[T]he last 40 years of progress in diversity and personal autonomy didn’t just distract progressives from solidarity, they eroded our ability to invoke it convincingly. The inconvenient fact is that Americans are more willing to spend money to support people they see as like themselves than to support strangers—or worse.”).

desire for collective action—seems less so.<sup>135</sup> Two *New York Times* headlines bookending the last decade appear to speak to the current reality: “Ads Now Seek Recruits for ‘An Army of One,’” describing the U.S. Army’s 2001 attempt to revamp its messaging to “appeal to the individualism and independence of today’s youth,”<sup>136</sup> and “In America, Labor Has an Unusually Long Fuse,” a piece from 2009 puzzling over why, “[u]nlike their European counterparts, American workers have largely stayed off the streets, even as unemployment soars and companies cut wages and benefits.”<sup>137</sup>

#### IV. THE RAISED COSTS OF THE TRIGGERING BURDEN IN CONTEMPORARY TIMES

The breakdown of union culture inside the workplace, and the collective culture outside of it, could be cited as a cause of any number of things that ail the American labor movement. In the specific context of U.S. labor law, it has drastically upped the costs posed by the National Labor Relations Act’s longstanding and basic rule that elections follow activism.

##### *A. The Costs of Cultural Reclamation in Modern U.S. Organizing—Resource Rich, Uncertain, and Weak*

The increased costs are portrayed most vividly by the ways that unions have had to alter basic strategies to satisfy the election trigger in an organizing environment that has degraded over time. In eras of significant union density, organizing techniques were “designed for groups of people who already know they want to be unionized,”<sup>138</sup> for the simple reason that substantial clusters of those people, in fact, existed.<sup>139</sup> Such campaigns could attract signatures and ultimately votes by keeping a narrow focus on bread and butter issues like raises,

135. An interesting data point regarding the willingness of Americans to engage in workplace collective action comes from Richard B. Freeman’s and Joel Rogers’s initial and follow-up studies published in the book *What Workers Want*. FREEMAN & ROGERS, *supra* note 96. Though the authors report that in recent times surveys tend to show that “43 percent to 56 percent of workers favor[] collective activity over individual efforts to deal with workplace problems,” *id.* at 13, they also actively avoid collective efforts perceived as adversarial, *id.* at 1. Notably, workers include unionization in that category. *Id.* at 16 (“[W]orkers are cognizant of management hostility to collective action through unions, and . . . this weighs heavily in their consideration of unionizing.”).

136. James Dao, *Ads Now Seek Recruits for ‘An Army of One,’* N.Y. TIMES Jan. 10, 2001, at A1, available at <http://www.nytimes.com/2001/01/10/us/ads-now-seek-recruits-for-an-army-of-one.html?pagewanted=all&src=pm>. A commercial accompanying the new campaign contained this boast from an Army Corporal: “And I’ll be the first to tell you, the might of the U.S. Army doesn’t lie in numbers . . . It lies in me. I am an Army of one.” *Id.*

137. Steven Greenhouse, *In America, Labor Has an Unusually Long Fuse*, N.Y. TIMES, Apr. 5, 2009, at WK3.

138. James Green & Chris Tilly, *Service Unionism: Directions for Organizing*, 38 LAB. L.J. 486, 486–87 (Aug. 1987), discussed in Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 348–49 (2012).

139. Rogers, *supra* note 138, at 349 (stating that because of low union density, less accessible workers, and a lack of shared union experience, “such strategies simply no longer work”).

while providing minimal information about the nature of unionism and ignoring deeper questions about, say, an employee's inner sense of self.<sup>140</sup> But that climate is gone, and as Brishen Rogers has recently detailed, the lynchpin of current NLRB organizing is "developing a collective identity" within the workforce<sup>141</sup> so that "solidarity becomes emotional and conceptual common sense."<sup>142</sup>

Which is to say, the new strategies jump back to square one and try to reconstruct the worker culture of old, from scratch. This is a profoundly difficult task. Studies have shown that doing so successfully requires "worker involvement in all stages of the campaign,"<sup>143</sup> and sparking an adequate level of participation requires unions to nurture five prounion dynamics using "emotionally- and politically-charged appeals" over five progressive campaign phases.<sup>144</sup> Researchers have compared this to creating a fully functional miniorganization<sup>145</sup> weeks and sometimes months before a Board election is even scheduled to occur,<sup>146</sup> a process that encompasses researching and settling on an employer target,<sup>147</sup> canvassing employees' homes, building trust after initial contacts, identifying and training workers to lead, agitating others who are more reserved, forming committees, doing media outreach, planning rallies, and pulling off small-scale management confrontations<sup>148</sup> while also developing bylaws, mission statements,

140. Green & Tilly, *supra* note 138, at 487.

141. Brishen Rogers, "Acting Like a Union": *Protecting Workers' Free Choice by Promoting Workers' Collective Action*, 123 HARV. L. REV. F. 38, 43 (2010); *see also* Rogers, *supra* note 138, at 354 ("[A] salient collective identity . . . must be constructed."); *id.* at 361 ("Ultimately, employees will be free to choose unionization . . . only if workers can build collective power, which requires enabling organizers and worker leaders to build collective identity.").

142. Rogers, *supra* note 141, at 47 (internal quotation marks and ellipses omitted) (citing Karen Brodtkin & Cynthia Strathmann, *The Struggle for Hearts and Minds: Organizing, Ideology, and Emotion*, LAB. STUD. J., Fall 2004, at 1, 3).

143. Rogers, *supra* note 138, at 352 (referencing studies); *see also* Teresa Sharpe, *Union Democracy and Successful Campaigns*, in REBUILDING LABOR 62, 63 (Ruth Milkman & Kim Voss eds., 2004) ("[U]nions are more likely to win certification elections when they use a comprehensive strategy built on 'rank-and-file intensive' tactics, and involve workers in the organizing of their own workplaces.").

144. Rogers, *supra* note 138, at 348–49.

145. *Id.* at 349; *see also* Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in ORGANIZING TO WIN 19, 35 (Kate Bronfenbrenner et al. eds., 1998) ("To win takes nothing short of truly exceptional effort, including an exceptional organization committed to building a union from the bottom up.").

146. *See infra* note 268.

147. As Rogers notes, "[s]ometimes unions will begin drives because they have been contacted by workers in a particular company," but more often "targeting decisions rely heavily upon front-end research to determine industry economics, key financial and political relationships, lists of worksites and estimates of the number of workers at each, and the like." Rogers, *supra* note 138, at 349.

148. Rogers, *supra* note 141, at 46–49; Rogers, *supra* note 138, at 349–55. Researchers have also found that the more comprehensive and active the organization the better. *See* Bronfenbrenner & Juravich, *supra* note 145, at 33 ("The more union-building strategies used during the organizing campaign, the greater the likelihood that the union will win the election . . ."). For a complete listing of the commonly used organization-building techniques utilized during campaigns, *see* Kate Bronfenbrenner & Robert Hickey, *Changing to Organize*, in REBUILDING LABOR 17, 56–57 app. 1.1 (Ruth Milkman & Kim Voss eds., 2004).

branding, vocal community support, and a social media presence.<sup>149</sup> That social scientists have further found that NLRB election-win rates rise when unions additionally “construct[] a mobilizing issue that rank-and-file workers and community allies perceive as a social justice issue rather than a union issue”<sup>150</sup> is a testament to the crackup of Western’s and Rosenfeld’s “moral economy”<sup>151</sup> and the challenge unions face to somehow resurrect it in miniature.

In dollar terms, the price of fashioning microcultures of solidarity, workplace-by-workplace, merely to invoke the Board’s balloting procedures is not just expensive but, on any significant scale, prohibitively so. About ten years ago, Richard Freeman and Joel Rogers reported that in the current environment organizing one new member through a traditional campaign cost at least one thousand dollars in union outlays, meaning that theoretically a billion dollars was minimally needed to shore up national density by a single percentage point.<sup>152</sup> At that time, the labor movement was larger than it is today and the figure represented a fifth of its combined annual revenue,<sup>153</sup> a share that, given difficulties finding employer targets that are large, geographically confined, and winnable,<sup>154</sup> the researchers conceded could not be spent effectively.<sup>155</sup> Today it

149. Many of these organization-building components can be viewed on the website of Workers Aligned for a Sustainable and Healthy New York (“WASH”), which conducts NLRB organizing campaigns in the car wash industry. *About WASH New York: Workers Aligned for a Sustainable and Healthy New York*, WASH NEW YORK, <http://www.washnewyork.org/pagedetail.php?id=5> (last visited June 3, 2013); see also Julie Turkewitz, *Carwash Workers in Queens Strike in Solidarity with Fired Colleague*, N.Y. TIMES (June 1, 2013), [http://www.nytimes.com/2013/06/02/nyregion/queens-carwash-workers-strike-in-solidarity-with-fired-colleague.html?\\_r=0](http://www.nytimes.com/2013/06/02/nyregion/queens-carwash-workers-strike-in-solidarity-with-fired-colleague.html?_r=0) (discussing six New York City carwashes where workers have voted to unionize through NLRB elections).

150. STEVEN HENRY LOPEZ, *REORGANIZING THE RUST BELT: AN INSIDE STUDY OF THE AMERICAN LABOR MOVEMENT* 153 (2004).

151. See *supra* notes 106–110 and accompanying text.

152. Richard Freeman & Joel Rogers, *Open Source Unionism: Beyond Exclusive Collective Bargaining*, 5 WORKINGUSA 8, 10 (2002). Stated slightly differently, around that same time Henry S. Farber and Bruce Western calculated that stabilizing the labor movement’s losses would require five hundred percent more funds than were already being spent on organizing, a total greater than the movement’s combined yearly outlays. Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector: 1973–1998*, 22 J. LAB. RES. 459, 465 (2001).

153. Freeman & Rogers, *supra* note 152, at 10.

154. Freeman and Rogers note that “even where . . . unions have made the commitment to increase organizing and have amassed huge budgets for it, they seem to have trouble finding campaigns where large expenditures will pay off.” *Id.* The authors themselves reference a historical evolution in this regard, stating that “no one has organized on this scale since the 1930s, when plant size and industry concentration, among other conditions, were radically more favorable to big growth than they are now.” *Id.* at 9–10. Indeed, as David Weil has written, over time, “like rocks split by elements, employment has been *fissured* away from [large businesses] and transferred to a complicated network of smaller business units.” David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. REL. REV. 33, 36 (2012). Because Board law prefers elections among workers at a single worksite, it is difficult to combat this splintering by combining workers from multiple sites into a single voting unit. See, e.g., Specialty Healthcare and Rehab. Ctr., 357 N.L.R.B. No. 83, at 7 nn.16–17 (Aug. 26, 2011) (noting employer-wide and single-facility election presumptions, which promote narrow and compartmentalized voting units); Howard Wial, *The Emerging*

would represent an even bigger share, and observations about the shallow pool of big and organizable employers are a continued refrain.<sup>156</sup> To cite a specific example, in 1940 GM and Ford employed nearly one percent of U.S. workers at around 160 factories, primarily in the nation's midsection, including 60,000 workers clustered at the famous River Rouge facility<sup>157</sup> that was eventually organized through the largest NLRB election in history.<sup>158</sup> A modern comparator would be Wal-Mart,<sup>159</sup> which employs a similar percentage of the workforce<sup>160</sup> but with over 4700 different locations dispersed across every state.<sup>161</sup> While Wal-Mart once lost an NLRB election, a contest among a small group of Texas meat cutters, the company ensured that the result did not become a trend: Wal-Mart's first and last domestic unionists promptly lost their jobs when management immediately transitioned to prepackaged meats nationwide.<sup>162</sup>

It is also the case that nurturing an ethos of solidarity in nonunion workplaces comes with serious practical uncertainties. For one, it may not work, the showing of interest requirement turning out to be an insurmountable hurdle despite significant resource expenditures.<sup>163</sup> But even where the threshold can be

*Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 681 (1993) (“Worksite unionism is the form of union structure encouraged by the case law of the NLRB . . .”); Moreover, unions tend to win elections at higher rates when fewer voters are involved. Henry S. Farber, *Union Success in Representation Elections: Why Does Unit Size Matter?*, 54 INDUS. & LAB. REL. REV. 329, 330 (2001) (showing higher union win rates in smaller units).

155. See Freeman & Rogers, *supra* note 152, at 9–10 (“[T]he amount of money needed to recruit [new members] by conventional means, is daunting . . . the amount needed is within labor’s means, but practically beyond its grasp.”).

156. See, e.g., Elk, *supra* note 6 (extolling the virtues of small scale NLRB organizing campaigns and promoting the analysis of a union organizing director, who criticizes strategies “characterized by great ideas, fancy power points, one-year investment and then moving on to a grand scheme” because “it doesn’t work for actually organizing workers”); Selmi, *supra* note 82, at 162 (arguing that “it is difficult to see how” even legal reform designed to assist labor organizing would “increase unionization rates among low wage workers, who are typically the most difficult to organize since they are frequently transient employees with the lowest amount of bargaining power”).

157. Yeselson, *supra* note 1, at 77.

158. NAT’L LABOR RELATIONS BD., NLRB, *THE FIRST FIFTY YEARS* 66 (1986).

159. See Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First-Century Capitalism*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 3, 3 (Nelson Lichtenstein ed., 2006) (stating that Wal-Mart is “the largest corporation in the world”).

160. Yeselson, *supra* note 1, at 78.

161. *Our Locations: United States*, WALMART, <http://corporate.walmart.com/our-story/locations#/united-states> (last visited Sept. 14, 2013).

162. TIM NOAH, *THE GREAT DIVERGENCE* 125 (2012).

163. See, e.g., Tech Serv. Solutions, 332 N.L.R.B. 1096, 1113 (2000) (“[T]he case is no different from any of the thousands of representation cases, which have been dismissed because of the petitioner’s failure to support the petition with an adequate showing of interest.” (quoting Administrative Law Judge)); Valley Hosp., Ltd., 221 N.L.R.B. 1239, 1239 (1975) (concluding that the union “has failed to make an adequate showing of interest in the unit of registered nurses”); Robert Hall Gentilly Road Corp., 207 N.L.R.B. 692, 695–97 (1972) (describing “Local 548’s abortive efforts to get a Board election in which it failed to produce the requisite thirty percent showing of interest in the unit found appropriate by the Regional Director and . . . its assertion of a continuing interest despite that failure”).

overcome, over a third of the time the foundational cultural change work is wasted when fierce (and often unlawful) employer opposition combines with inadequate employee retaliation protections to destabilize the early activism and disintegrate the petition.<sup>164</sup> In turn, only about 1400 Board elections are actually conducted each year.<sup>165</sup> Because those contests average only around sixty workers,<sup>166</sup> they could potentially net, at best, about 84,000 new members.<sup>167</sup> In a nation of 144 million employees,<sup>168</sup> that is a hardly a blip.<sup>169</sup>

### B. *A Procedure Broken in Purpose and Practice*

Ultimately, in its modern context the election trigger's costs have led to a legal regime broken in some basic ways. For starters, as the political pendulum swings, debate simmers over whether the Act's core aim should be viewed from the perspective of the unabashedly pronoun Wagner Act's intent to facilitate collective bargaining, or from the vantage of Taft-Hartley, which amended Wagner's bill to restrict unions and prioritized the freedom to choose or not choose unionization.<sup>170</sup> But in a world where group action is a foreign concept, where group bargaining is not a salient construct, and a robust public understanding of both is a precondition for triggering elections on any mass scale, neither purpose is fulfilled; collective bargaining shrivels and the union "choice" never arises.<sup>171</sup>

---

164. JOHN LOGAN ET AL., UNIV. OF CAL., BERKELEY CTR. FOR LABOR RESEARCH & EDUC., NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE 6 (2011), available at [http://laborcenter.berkeley.edu/laborlaw/NLRB\\_Process\\_June2011.pdf](http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf) (“[A] 2008 analysis by John-Paul Ferguson of Stanford Business School found that the 14,615 NLRB representation elections held between 1999 and 2004 represented only two-thirds of all petitions filed—a full 35 percent of petitions were withdrawn before the election was held.”).

165. *Representation Petitions – RC*, *supra* note 82.

166. This number is calculated for 2009, the most recent year with available data. NAT'L LABOR RELATIONS BD., SEVENTY FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009, at 11 (2009), available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1677/nlr2009.pdf>; see also *Annual Reports*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/reports-guidance/reports/annual-reports> (last visited Sept. 14, 2013) (stating that in 2009 the Board “discontinued production of its Annual Report”).

167. In reality unions win representation elections only around sixty percent of the time. See NAT'L LABOR RELATIONS BD., 2012 NLRB ELECTION REPORT FOR CASES CLOSED, 74 NLRB ANN. REP. 11 (2009).

168. News Release, Bureau of Labor Statistics, Emp't Situation Summary (May 3, 2013), <http://www.bls.gov/news.release/empst.a.htm>.

169. Michael Selmi made this point previously, with older statistics. Selmi, *supra* note 82, at 158.

170. See, e.g., Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2041–43 (2009) (describing the modern conflict between the two values as exhibited by the dueling Congressional testimony of Board Members on opposite sides of the political spectrum).

171. Cf. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLR Act*, 96 HARV. L. REV. 1769, 1770 (1983) (“[L]abor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose.”).

Beyond questions of purpose, placing the election initiation burden on employees just does not work very well. This is true broadly in the sense that although the law allows it,<sup>172</sup> employees almost never file showing of interest petitions on their own behalf.<sup>173</sup>

The truth is also rooted in the conspicuous reality that the exhausting, frequently futile<sup>174</sup> work of building solidarity strong enough to withstand the “crucible”<sup>175</sup> of employer resistance unleashed once the showing of interest is met has caused nearly all unions to flee the Act’s electoral machinery altogether.<sup>176</sup> The majority of present-day organizing is not done by submitting a showing of interest and acceding to the Act’s campaign rules in the lead up to an election.<sup>177</sup> Rather, most new unions get their start through contractual arrangements where employers agree in advance to curtail antiunion tactics and bargain with proof of majority support on cards or sometimes through a privately arranged election,<sup>178</sup> lessening the probability that the union’s attempts to spur collective activity will be prematurely snuffed out.<sup>179</sup>

These types of agreements, however, are poor substitutes for a well-functioning statutory scheme. It takes years and a substantial war chest to consummate<sup>180</sup> an organizing contract.<sup>181</sup> Worse, the legal risks associated with

---

172. National Labor Relations Act, 29 U.S.C. § 159 (c)(1)(A) (2012) (allowing petitions to be filed “by an employee or group of employees” as well as by labor unions).

173. See 74 NLRB ANN. REP. 93 (2009) (showing a ratio of petitions filed by unions to petitions filed by employees of 2605 to 5 during the fiscal year 2009 docket).

174. “A 2005 study by researchers at the University of Illinois at Chicago found that in 91 percent of petitions filed with the NLRB, a majority of workers signed cards indicating they wanted a union before the petition was filed.” LOGAN ET AL., *supra* note 164, at 5–6. However, employer pushback in the gap period between the petition and the lead-up to the election causes over a third of all petitions to be withdrawn. See *id.* at 6. And where the petition is not pulled, unions still lose the election over forty percent of the time. See *supra* text accompanying note 167. The universe of academic work touching on the difficulties faced by unions and workers to win a workplace representative under the NLRA regime is voluminous. See, e.g., Becker, *supra* note 19; Estlund, *supra* note 17, 1533–38; Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59 (1993); Weiler, *supra* note 171, at 1774–1893.

175. NLRB v. Gissel Packing Co., 395 U.S. 575, 599 (1969).

176. See, e.g., Kris Maher, *Card Check Grows in Union Organizing*, WALL ST. J., Oct. 12, 2009, at A4 (citing an estimate that eighty percent of new organizing is pursued outside the National Labor Relations Act).

177. See, e.g., James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824 (2005) (“As a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation.”); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 377–82 (2007) (showing how increasingly “unions and employers are opting out of the NLRA and relying on varied systems of self-regulation”).

178. See Brudney, *supra* note 177, at 821–40; Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1169–73 (2011).

179. See, e.g., Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 383 (2001) (“Union organizing success improves quite dramatically when a neutrality agreement . . . combines with a provision for card-check recognition.”).

180. For good examples of how this works, see RUTH MILKMAN, L.A. STORY 155–62 (2006);

contracting around the Act's procedures continue to rise, as employers and business groups increasingly leverage federal laws to argue that unions employ extortionary or corrupt tactics to try to force acceptance of the agreements<sup>182</sup> (with some ominous recent success).<sup>183</sup> Even if unsuccessful, these lawsuits are incredibly costly and for that reason alone can halt organizing in its tracks.<sup>184</sup>

Most importantly, though skirting the traditional Board election emerged as an innovation well over twenty years ago<sup>185</sup> and achieved widespread academic and media acclaim in the early 2000s,<sup>186</sup> the labor movement has continued to shed members, and density has continued to slide in the interim.<sup>187</sup> This is true

Kate Bronfenbrenner & Tom Juravich, *The Evolution of Strategic and Coordinated Bargaining in the 1990s*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 218, 229, 234 (Lowell Turner et al. eds., 2001); and James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 737–44 (2010).

181. See Yeselson, *supra* note 1, at 78.

182. Such challenges generally fall into two camps. First are civil lawsuits using the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2012), which assert that the union “wrong[fully]” threatened to continue pressuring or protesting a company until an agreement to let workers organize outside of the Act’s strictures was signed. See, e.g., *Cintas Corp. v. UNITE HERE*, 355 F. App’x. 508 (2d Cir. 2009); Brudney, *supra* note 177, at 757. Second are claims alleging that the agreements constitute payment of an illegal “thing of value” under section 302 of the Labor Management Relations Act (LMRDA), a federal bribery provision. 29 U.S.C. § 186(a)(2) (2012); see also *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008).

183. The Eleventh Circuit recently became the first to conclude that an employer’s promises contained in an agreement to allow workers to organize outside of the Act could constitute an illegal bribe. See *Mulhall v. UNITE HERE, Local 355*, 667 F.3d 1211, 1215 (11th Cir. 2012), cert. granted, 133 S. Ct. 2849 (June 24, 2013), dismissed as improvidently granted, 134 S. Ct. 594 (Dec. 10, 2013). The Supreme Court accepted certiorari in the case for its fall 2013 Term, but later dismissed it on procedural grounds, leaving the Eleventh Circuit’s opinion intact. *Id.* RICO lawsuits often end quests for organizing agreements. See Brudney, *supra* note 180, at 755 (“There is ample evidence that RICO actions can have a chilling effect on unions.”); Kris Maher, *SEIU to End Sodexo Campaign*, WALL ST. J. (Sept. 15, 2011), <http://online.wsj.com/article/SB10001424053111904491704576573074162700598.html> (stating that RICO suits “have a chilling effect on corporate campaigns” for bilateral agreements).

184. See Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2631 (2011) (stating that treble damages and attorneys’ fees “deter unions” from pursuing organizing agreements).

185. See RICK FANTASIA & KIM VOSS, *HARD WORK* 134 (2004) (noting that the strategy was “initiated in the mid-1980s”).

186. In 2001, Catholic University Law Professor Roger Hartley called the strategy the “newest civil rights movement.” Hartley, *supra* note 179, at 369. In 2000, the strategy debuted on the big screen in the movie *Bread and Roses*, which starred Adrien Brody as a labor organizer for the Service Employees International Union’s “Justice for Janitors” campaign to reach an agreement with Los Angeles high-rise cleaning contractors to allow janitors to organize into a union outside of the NLR. *BREAD AND ROSES* (Alta Films S.A. 2000); see also *infra* note 188.

187. Bruce Western & Jake Rosenfeld, *Workers of the World Divide: The Decline of Labor and the Future of the Middle Class*, FOREIGN AFF., May/June 2012, at 88, 88 (“Since the middle of the last century, the American labor movement has been in steady decline.”); see also Selmi, *supra* note 82, at 159 (“[T]he problem is not that the unions lose too many elections under the current procedures; instead, it is that they are seeking to organize too few workers, both within and outside the NLRB process.”); Yeselson, *supra* note 1, at 79 (arguing that organizing “even 50,000 workers . . . in two to four years doesn’t result in meaningful union growth. . . . within a workforce of more than 140 million

even in the narrowest of occupational areas where the strategy is assumed to have been most successful—janitors<sup>188</sup>—and even among the janitor subgroup thought by sociologists (and organizers) to be the most receptive to collective action and the strategy itself,<sup>189</sup> recent immigrants.<sup>190</sup> Rich Yeselson, the author of “Fortress Unionism,” couched the reality this way:

people . . . unless the number is replicated dozens of times . . . . But this is economically and logistically impossible for unions to do.”)

188. The Service Employee’s International Union’s (SEIU) Justice for Janitor’s campaign, launched in the mid-to-late 1980s to unionize high-rise office cleaners, is generally viewed as the seminal and the most successful attempt to organize large numbers of workers outside of the Act’s election processes. *See, e.g.*, FANTASIA & VOSS, *supra* note 185, at 129, 134–35 (“If there is one set of organizing campaigns that best demonstrates the promise of social movement unionism, [i.e., non-N.L.R.B. organizing], it is the Justice for Janitors (J for J) campaign.”); Scott Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 188 (citing the Justice for Janitors campaign as one of the “most prominent examples” of “victories organizing low-wage service sector workers”); Estlund, *supra* note 17, at 1605–06 (discussing the Justice for Janitors campaign as “widely-touted” and “celebrated not only for its tactics and targets but also for its strategic circumvention of the traditional NLR representation process”); *see also* Daisy Rooks, *Worker Activism After Successful Union Organizing*, 55 INDUS. & LAB. REL. REV. 352, 353 (2002) (book review) (discussing unions that “have used non-NLRB strategies with spectacular results . . . [i]n particular, the SEIU’s Justice for Janitors campaigns”).

189. Writing in the American Sociological Review, Jake Rosenfeld and Meredith Kleykamp recently surveyed this literature and identified the frequent observation that “[m]any immigrants come from countries with a robust and vibrant labor movements or have past experiences with other forms of collective mobilization.” Rosenfeld & Kleykamp, *supra* note 88, at 920. They also highlight Ruth Milkman’s research contending “that the ‘shared experience of stigmatization’ helps foster group consciousness in employment settings dominated by Hispanic immigrants; enterprising organizers may capitalize on this consciousness.” *Id.* (citing MILKMAN, *supra* note 180). Indeed, as the authors underscore, “innovative factions within the battered U.S. labor movement have identified Hispanics—especially Hispanic immigrants—as potential sources for revitalization, given the rapid growth of the Hispanic population and its perceived capacity for collective action.” *Id.* at 917; *see also* Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102, 117 (Kate Bronfenbrenner et al., eds. 1998) (describing a “high level of class consciousness, apparently rooted in the societies from which the immigrants came” among immigrant janitors, including a “positive view of unions” and “a background in left-wing or union activity back home”).

190. In 2000, Catherine L. Fisk, Daniel J.B. Mitchell, and Christopher L. Erickson wrote that the early Justice for Janitor campaigns are “often hailed—and deservedly so—as one of the major success stories of immigrant unionization.” Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199, 199 (Ruth Milkman ed., 2000). Others would say that Justice for Janitors is a major success for the labor movement generally. *See supra* text accompanying note 188. But Fisk, Mitchell, and Erickson concluded by noting that the strategy nevertheless “faces a variety of significant challenges,” and they were right. Fisk et al., *supra*, at 223. As Jake Rosenfeld reported in 2010, “[d]espite the highly publicized organizing drives of the ‘Justice for Janitors’ campaign, the percentage of Hispanic janitors in labor unions has actually declined since 1990, as has the fraction of all janitors who claim union membership.” Jake Rosenfeld, *Little Labor: How Union Decline Is Changing the American Landscape*, PATHWAYS, Summer 2010, at 3, 5, available at [http://www.stanford.edu/group/scspi/\\_media/pdf/pathways/summer\\_2010/Rosenfeld.pdf](http://www.stanford.edu/group/scspi/_media/pdf/pathways/summer_2010/Rosenfeld.pdf); *see also* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 158 (2014) (“Today, only one in seven Hispanic janitors in the United States belongs to a union, down from one in five back in 1988, when Justice for Janitors began.”).

Unions are, and were, desperate to stem decline, and the [private agreement] campaigning strategy responded creatively to the problem, with some substantial victories to its credit. . . . But we're 30 years into them now, and they haven't worked on a scale sufficient to reverse the trend. Unions have undertaken a natural experiment in whether large, multiyear, comprehensive campaigns can significantly increase union density. They can't.<sup>191</sup>

## V. BEYOND COERCION: THE CASE FOR AUTOMATIC ELECTIONS

### A. *The Case Against Coercion-Centric Revisions*

What, then, is to be done? With respect to selecting bargaining agents, the literature already overflows with NLRA improvement proposals. From enhancing organizing interference penalties;<sup>192</sup> to allowing workers to vote by mail,<sup>193</sup> phone, or internet; to letting workers vote over multiple days at in-person but neutral locations instead of all at once on the employer's property;<sup>194</sup> to restricting the amount of time between the showing of interest and balloting;<sup>195</sup> to enacting state bans on mandatory antiunion meetings,<sup>196</sup> much of this discussion has centered on insulating free choice by reducing voter coercion.

That debate, however, mostly presupposes a quorum of workers agitating for a union in the first place, with showing of interest evidence in tow. Yet if that situation has become exceedingly rare, or if it arises only after intensive efforts by a depleted labor movement, the fact that the Board's election processes are closed for business until that point presents an even more basic problem. The coercion concerns present in most critiques of the Act will not, in the usual case, be all that relevant to vast swathes of working America.

### B. *The Case for Automatic Elections*

To be truly effective, labor law needs amending—one might say reimagining—in a way that honors the background factors that transformed the once reasonable expectation that workers initiate elections for representatives into an anachronism. Given vast cultural change, what once served as a conduit to channel rushes of unstable, even dangerous energy into a controlled setting now just guards against elections. And for the Act to really work again, that guard must be removed so that labor law becomes proactive in the way that most U.S. workers are not. The result would be regularly scheduled, automatic elections

---

191. Yeselson, *supra* note 1, at 79.

192. See Dannin, *supra* note 98, at 231–36.

193. William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 14–17 (2009).

194. See Sachs, *supra* note 32, at 720–27.

195. See *id.* at 667–68 (describing “rapid elections”).

196. Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 240–45 (2008).

available to nearly every worker, from the rights-oblivious, deferential professional to the third-generation shop floor activist. Each would have the right to choose or not choose a collective agent on an annualized basis, with the additional power to reject or affirm that representation going forward, just as our political democracy allows citizens to place and replace officeholders, like clockwork.

### *1. Proposals and Precedents: Rebooting an Existing Dialogue*

While a regularized voting regime might initially seem radical, it actually picks up on an existing conversation about the barriers to removing an incumbent representative and the alleged need for reform through continuing cycles of reelections.<sup>197</sup> Professor Matthew Bodie, for example, has argued that a Board election “is, at root, a decision to purchase group representation services,”<sup>198</sup> and from that perspective has questioned the logic of allowing even unpopular bargaining agents to serve “indefinitely” absent a complicated and protracted decertification process.<sup>199</sup> Samuel Estreicher has similarly criticized this so-called hard out model for its inflexibility,<sup>200</sup> and as part of a bigger project pushing alternative forms of workplace representation has endorsed automatic decertification elections<sup>201</sup> as “low cost opportunities to keep . . . bargaining agents in check.”<sup>202</sup>

Outside of the academy, this idea has picked up steam. In 2012, the conservative Heritage Foundation (Heritage) issued a report promoting union “[r]e-election votes every two to four years”<sup>203</sup> to combat what it called “inherited unions,” the phenomenon that over ninety percent of private sector union members did not participate in the election that certified their representative because it occurred before they were hired.<sup>204</sup> Relying heavily on political analogies, Heritage concludes that this strips unions of accountability.<sup>205</sup>

The Heritage report builds on a number of like-minded legislative efforts,

---

197. See Bodie, *supra* note 99, at 63–65 (explaining the decertification process, laying out its practical and legal barriers, and stating that it is “not easy” for employees to “vote out the union through a decertification election”).

198. *Id.* at 35.

199. *Id.* at 63–65; see also Samuel Estreicher, *Deregulating Union Democracy*, COLUM. BUS. L. REV. 501, 505–07 (2000) (detailing the difficulties involved in “exit[ing]” the collective bargaining relationship).

200. See Estreicher, *supra* note 87, at 93; Estreicher, *supra* note 199, at 505.

201. See Estreicher, *supra* note 199, at 523 (“Under my proposal, the exit option is significantly bolstered because bargaining agencies will be subject to periodic secret-ballot reauthorization votes, without requiring a prior showing of interest in decertification.”).

202. *Id.* at 503–04; see also Estreicher, *supra* note 87, at 93.

203. James Sherk, The Heritage Found., *Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives*, BACKGROUND, Aug. 27, 2012, at 1, 9.

204. *Id.* at 1.

205. *Id.* at 9. On this point, Heritage gives short-shrift to the fact that union leaders are required to stand for election on a regular basis and may therefore face candidates pledging more responsive leadership. See 29 U.S.C. § 481(b) (2012) (requiring the election of local union officers at least every three years).

including the purported “Employee Rights Act,” which would amend the NLRA to require union decertification elections every three years.<sup>206</sup> Similar proposals are being floated for public sector unions at the state level,<sup>207</sup> and in 2011 Wisconsin became the first state to enact a recertification requirement for public employee representatives.<sup>208</sup>

## 2. *A New Approach*

The proposal advanced here differs significantly from these efforts in both scope and intent. To begin, regular authorization votes for unorganized workers (as opposed to automatic *de*authorization votes for already organized workers) has, with two exceptions, not really been considered in scholarly circles or politically.

The first exception is Professor Mark Barenberg’s response to the early-nineties agitations for labor law reform that would free up the possibilities for, and afford new protections to, employee-management cooperation schemes.<sup>209</sup> Barenberg promotes the creation of “government-facilitated deliberative conferences” to provide workers, in consultation with management, a sheltered forum to discuss various forms of workplace governance—from nonunion, to union,<sup>210</sup> to a number of novel intermediate options in between—before picking the particular version to be implemented on the job.<sup>211</sup> A procedural variant of the idea is what Barenberg calls the “mandatory” model, where the law would automatically “require workers from designated enterprises or networks to convene, deliberate, and cast workplace governance ballots,” and would then direct that the conference be reconvened every fifth year to recertify, reject, or alter the initial choice,<sup>212</sup> again by secret ballot.<sup>213</sup>

A second exception is Professor Samuel Estreicher’s work on “deregulating

---

206. See Employee Rights Act, H.R. 2810, 112th Cong. § 2(b)(3) (2011); see also Sen. Orrin Hatch, *Putting Workers Over Union Bosses*, WASH. TIMES (Dec. 1, 2011), <http://www.washingtontimes.com/news/2011/dec/1/putting-workers-over-union-bosses> (describing and promoting the Employee Rights Act).

207. See, e.g., Chad Livengood, *Michigan GOP Explores Further Limits on Unions*, DETROIT NEWS, Apr. 1, 2013 (“Another issue some lawmakers are exploring is requiring workers to recertify their union each time a contract is up for renewal.”).

208. WIS. STAT. ANN. § 111.70(4)(d) (West, Westlaw through 2013 Act 380, published Apr. 25, 2014); see *id.* § 111.83(3)(b) (mandating annual recertification elections and affirming certification only if existing unions receive votes from a majority of all members, not simply a majority of votes cast); see also Josh Brandau, *Majority of State Unions Vote to Seek Recertification*, BADGER HERALD (Feb. 23, 2012), <http://badgerherald.com/news/2012/02/23/majority-of-state-un> (“The recent law favors a new format, which not only calls for unions to recertify annually but also to receive a majority from the entire bargaining unit and not just from individuals that attend the voting session.”).

209. See Barenberg, *supra* note 38, at 760–61.

210. In this context, Barenberg would allow “minority unions” that bargained only on behalf of their voluntary members,” but notes that “if a majority selects exclusive union representation . . . the larger exclusive union representative would displace the minority representative.” *Id.* at 980.

211. *Id.* at 962.

212. *Id.* at 966.

213. *Id.* at 980.

union democracy,” which calls for an expanded universe of legally acceptable bargaining agents, including, for example, for-profit groups and “oligarchies.”<sup>214</sup> A part of the plan would be the legal right to influence these new types of agents through votes on topics such as the level of fees assessed by an agent, whether to accept a contract offer, and notably, “authorization of the exclusive bargaining agent” by nonunion workers.<sup>215</sup> While Estreicher’s primary article on the idea appears to envision these initial authorization elections occurring only after a showing of interest,<sup>216</sup> in a later recapitulation of the concept he seems to indeed favor automatic votes on the front end.<sup>217</sup>

But setting aside questions of scope, the truly salient difference between the automatic elections regime proposed in this Article and all others has to do with its core ambition. Here, conducting elections regularly is not supposed to establish a closer fit with employee preferences,<sup>218</sup> to open a “competitive marketplace for representational services,”<sup>219</sup> to reshape power dynamics of workplace governance,<sup>220</sup> or to make unions more accountable to members.<sup>221</sup> Its intent is to reorient a law written to reflect a workplace culture that no longer exists by realigning its procedures to fit the culture that does, reversing the historically unanticipated costs of a no-election default. It also makes the ambitious assertion

---

214. Estreicher, *supra* note 199, at 503–04.

215. *Id.*

216. In *Deregulating Union Democracy*, Professor Estreicher refers to voting at “periodic intervals” only with regard to the “reauthorization” of bargaining agents, *id.* at 504, and at one point refers to “the petitioning organization” in the context of an initial certification election, strongly implying a showing of interest requirement, *id.* at 523; *see also id.* (“Under my proposal, the exit option is significantly bolstered because bargaining agencies will be subject to periodic secret-ballot reauthorization votes without requiring a prior showing of interest in decertification.”).

217. *See* Estreicher, *supra* note 87, at 93 (“[T]he way to ensure responsiveness is to require periodic secret ballot votes by a majority of all affected workers over critical economic decisions, including whether they wish to be represented by a labor union.”). As this Article went to print, Professor Estreicher published a paper from an October 2013 symposium proposing to amend the Act so that “representation elections . . . would, over time, become automatic” and analogous to political elections. Samuel Estreicher, “*Easy In, Easy Out: A Future for U.S. Workplace Representation*,” 98 MINN. L. REV. 1615, 1615 (2014). In this context, Estreicher envisions an “automatic right, once every two years . . . to cast a secret-ballot vote” on unionization, though he does include a “limited showing of interest” provision. *Id.* at 1631. That requirement alone distinguishes the proposal from the automatic voting regime envisioned here, but the more significant difference goes to aims. Estreicher seeks to reshape the law to better account for diverse market interests, including “U.S. institutional arrangements, our legal culture, and the likely perspectives of companies (and their managers), unions, and the employment plaintiffs’ bar.” *Id.* at 1616. This Article seeks to reorient the law in response to changed cultural conditions, ultimately reforming those conditions in the process. *See infra* Part V.B.3.

218. *Cf.* Bodie, *supra* note 99, at 62–65 (describing the difficulties of “exit” in the “market for union representation” where workers become dissatisfied with an existing bargaining agent).

219. Estreicher, *supra* note 199, at 526.

220. *Cf.* Barenberg, *supra* note 38, at 768 (describing how “collaborative enterprises tend to be more productive, and are less likely to embody instrumental and ideological domination, when they implement comprehensive participation at both shopfloor and strategic levels”).

221. Sherk, *supra* notes 203–205 and accompanying text.

that its framework of automatic elections could impact society in ways that might effectively turn back the cultural clock.

### 3. *The Transformative Potential of a Regularized Election Regime—Cultural Shock Treatment*

In terms of membership and density, the consequences of a shift to automatic representation elections are difficult to predict. Obviously there would be many more opportunities for workers to establish certified majority support. Given commonly cited statistics noting that around thirty-two percent of workers would vote for a union if they had the chance, an uptick in unionization might naturally result,<sup>222</sup> though any increase might also be offset by current members voting instead to decertify. One could also imagine unions adjusting organizing strategies with the knowledge that election day is a certainty, perhaps, for instance, by laying low and monitoring a broad cross section of employers with a plan to spring into action only where worker unrest reaches a fever pitch and coincides with the approach of decision day.

In any event, on their own, periodic elections would not fix, and this Article does not seek to address, the immense and continuing problem of management intervention into workers' choices. For that reason, in isolation the proposal is unlikely to result in anything close to mass movement growth in the short or even medium term.

Rather, automatic elections would be cultural shock treatment.<sup>223</sup> If workers cannot learn about, understand, build consciousness, or become primed to act collectively by actually meeting union members, then the law can fill in. Beyond simply rallying to the changed background factors that turned labor law's no-election default into an albatross, a regularized election regime could energize workplace culture by bringing union consciousness back into style.

There is, of course, a voluminous literature examining law's impact on culture<sup>224</sup> that could be extensively surveyed to spin this hypothetical out, but the basic evidence can be built with a few main points.

#### *a. Legitimation, Adaptive Preferences, Cascades, and Practical Effects*

Foremost, imposing the election process pushes the notion of unionism into

---

222. FREEMAN & ROGERS, *supra* note 96, at 96. Indeed, the corporate playbook dictates that a core union avoidance strategy is simply to avoid elections in the first place. GORDON LAFER, AM. RIGHTS AT WORK, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS 1 (2007), available at <http://pages.uoregon.edu/lerc/public/pdfs/neitherfreenor.pdf>.

223. I borrow this term in part from Mark Barenberg's discussion on the "encouragement" function of labor law" and his use of the phrase, "legal shock-effect." Barenberg, *supra* note 38, at 946.

224. See generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 6 (1991) (examining "the legal construction of a particular form of labor consciousness"); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936 (1991).

the workplace in ways that start to legitimize it, even if employers and many workers are at first opposed or lack accurate information about it.<sup>225</sup> The idea here is that setting a date by which a choice about representation must be made disrupts an existing stasis that may be not just non- or antiunion but a complete vacuum, all collectivist concepts unarticulated.<sup>226</sup> Election day therefore becomes a foundation or “common forum” for discourse about unionism,<sup>227</sup> individual workplace by individual workplace.

No matter the rudimentary or ill-informed basis from which such discussions proceed, a decisional norm or expectation would then begin to take hold. At that point, workplace culture would slowly shift, creating an atmosphere where workers would feel internal pressure to, at the very least, *think about* the ramifications of selecting or not selecting a bargaining agent.<sup>228</sup> Even if the odds of winning majority support are remote, just introducing the possibility of bargaining through a mandated election greases the skids for collective ideologies to develop sometime later.<sup>229</sup>

Good analogies for this process are historical accounts of industrialists who counterintuitively opposed and even “feared” employer-dominated “company-unions” because their very existence was thought to buttress the “legitimacy of worker entitlements” in ways that could not necessarily be predicted or controlled, even if the bodies failed to offer workers any real power.<sup>230</sup> Indeed, some managers who instituted sham unions later realized to their chagrin that they had also raised “norms of democracy and community [and] often found it difficult to resist workers’ escalating demands . . . [around] those very norms.”<sup>231</sup> A prominent example is the Endicott Johnson footwear factory, where “workers internalized management’s assiduously-promoted, perceptual maps of the company as a ‘family’ and participatory ‘community,’” leading them to successfully “press for expanded rights and benefits under the banner of those newly legitimated (but vaguely defined) perceptions and norms.”<sup>232</sup>

Automatic elections might also tilt workplace preferences in the direction of

225. In building this argument, I rely heavily on Mark Barenberg’s consideration of “Tocqueville Effects,” four sociological principles he uses to show how company unions can counterintuitively be seen to “serve as stepping stones to independent unionism.” See Barenberg, *supra* note 38, at 831–35. These effects include, “Whetting the Appetite,” “Group Articulation,” “Runaway Legitimation,” and “Aiding Collective Action.” *Id.*

226. See *id.* at 832–33 (discussing the phenomenon of “Group Articulation”).

227. See *id.* at 832.

228. Barenberg has written about this idea with reference to the “Pandora’s Box Principle” of negotiations, where “if a bargainer invokes a certain social norm, it stays on the table forever.” *Id.* at 833.

229. Surveying research on the psychological principle of “runaway legitimation,” Barenberg concludes that when a new, nondominant norm is introduced, “escalated demands cast in the same norms . . . [are] more difficult to resist.” *Id.*

230. See *id.* at 833–34 (discussing “runaway legitimation”).

231. *Id.* at 854.

232. *Id.*

collective action. The psychological literature of adaptive preferences teaches that “what people want is sometimes a product of what they can get,” and correspondingly that the “absence of opportunities” generates disinterest in whatever is perceived to be unavailable.<sup>233</sup> To take an illustration used by Cass Sunstein, the “belief that self-government in the workplace is unavailable” leads employees to devalue the importance of self-government in employment generally.<sup>234</sup> However, “[w]ere the option to be one that workers conventionally thought available, the option might be highly valued.”<sup>235</sup>

An implication of the theory is that the perceived inaccessibility of group action in the workplace—its failure to be viewed as a viable, realistic, or productive response to employer conduct—relegates it to the status of a bad idea. But a federally stamped solicitation that arrives year-after-year, that invites employees to act as a group, and that raises the specter of collective bargaining begs them to reconsider. The fact that it is the government sanctioning the concerted activity in a sense endorses it as an acceptable, if alternative, form of workplace relations,<sup>236</sup> and slowly the assumption that collective agitation is out of reach or useless may transform. In time, workers’ preferred avenues for workplace change might, indeed, adapt.

That the proposal envisions annual votes is especially important to this evolution of perceptions and preferences. For although, as Cynthia Estlund has rightly argued, unlawful employer resistance to unionization and fair dealing itself leads to preference adaptations against unions,<sup>237</sup> those adaptations could change if effective remedies are available. And, in fact, while labor law is much maligned for its remedial inadequacies, the penalties for employer misconduct do jump if the employer is a serial offender.<sup>238</sup> Usually the bigger penalties are an

---

233. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1146–47 (1986).

234. *Id.* at 1148.

235. *Id.*

236. *Cf.* Barenberg, *supra* note 38, at 968 (stating that the “highly visible commitment of the federal government” to workplace cooperation schemes, which involve voting for a particular form of employee-management relations, leads to “direct legitimation of participatory and empowering governance norms”).

237. Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 13–14 (2010) (“Rational employee preferences regarding unionization will reflect expectations about both employers’ future bargaining behavior and what the law will or will not do about it.”).

238. *See generally* Fieldcrest Cannon Inc., 318 N.L.R.B. 470, 473–74 (1995) (imposing special remedies in the case of a serial offender, including allowing the union to access employees on the job to make speeches, solicit, and post propaganda); Monfort of Colo., Inc., 298 N.L.R.B. 73, 86–89 (1990). The Board is also empowered to consolidate employer misconduct that occurs at multiple work locations around the country and consider it as a whole. 29 C.F.R. § 102.33(a) (2014) (“Whenever the General Counsel deems it necessary in order to effectuate the purposes of the Act . . . he may . . . order that such charge and any proceeding which may have been initiated with respect thereto: [b]e transferred to and continued in any other region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region.”).

afterthought because unions prefer to cut their losses and move on to fresh targets rather than take already scarce resources to press the illegalities and forge ahead amongst a chastened workforce.<sup>239</sup> But in the context of regular voting, every past incident of employer misconduct is prologue for the next election. In turn, the tougher remedial scheme might truly become relevant as the rap sheet lengthens and the cost of voter coercion intensifies to include, for example, imposition of a “Gissel bargaining order” conferring majority status on a representative in the absence of an election.<sup>240</sup> To the extent these heightened costs lead to less voter interference, the result could be wider acceptance of collective activity as an available good and brightened preferences for collective bargaining.

Moreover, newly evolved perceptions can spread on the job and build on each other rather quickly. Research on phenomena like “social cascades” shows how conformance pressures lead low-information or impressionable workers to “harmonize their acts and expressions with those of the group” relatively easily.<sup>241</sup> Preferences can be enhanced further if more in-depth deliberation takes place,<sup>242</sup> especially if a discussant can share about positive union experiences at a former job,<sup>243</sup> a scenario that becomes more likely with every net increase in union membership.

Finally, just the practical realities of a regular voting regime could revive workplace representation as a culturally salient concept. A simple measure of labor’s present marginalization is the conspicuous lack of mainstream news coverage it receives. Today only a few major newspapers have a dedicated labor reporter on staff,<sup>244</sup> and industry insiders have commented that many editors consider labor content “second-rate” and easily pushed aside in favor of business or political reporting.<sup>245</sup> *The New York Times*, one of the few major papers that retains a labor specific journalist, published over 220 union stories a year in the

---

239. In 2009, for example, unions lost 586 NLRB elections and opted to rerun only eighteen. NAT’L LABOR RELATIONS BD., SEVENTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009, at 123, 125 (2009) (comparing Table 13 (number of elections where no representative chosen) to Table 11E (total rerun elections)).

240. See *supra* text accompanying note 13; see also National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (2012).

241. Rogers, *supra* note 138, at 345–46.

242. *Id.* at 346–47 (discussing “group polarization” effects).

243. See ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 217–22, 230–33 (2d ed. 1986) (detailing the power of “persuasive arguments” to shift group preferences and decisions, especially where the argument is based in first-hand, personal experience).

244. See, e.g., Jo-Ann Mort, *The Vanishing Labor Beat*, THE NATION, Nov. 21, 1987, at 588, 588–89 (“Reporters who cover the national labor movement have become an endangered species.”); Stephen Franklin, *Where Have All the Labor Writers Gone?*, WORKING THESE TIMES BLOG (Dec. 10, 2009, 8:01 AM), <http://inthesetimes.com/working/entry/5288/> (“Consider the fate of the labor reporter. A long vanishing breed, there are only a few of them left in the country.”).

245. Interview by Talking Biz News with William Serrin, Professor, N.Y. Univ., *The Demise of Labor Reporting*, TALKING BIZ NEWS (Jan. 14, 2011), <http://www.talkingbiznews.com/1/the-demise-of-labor-reporting-2/>.

1940s but fewer than thirty annually in the mid-1980s.<sup>246</sup> This lack of labor engagement is mirrored in the legal academic community, where law schools appear increasingly reticent to hire labor law specialists,<sup>247</sup> and scholarly articles frequently depict the NLRA as “irrelevant” or even moribund.<sup>248</sup>

Regular representation elections might reverse all of this. Thousands of secret ballot contests held all over the country could not be ignored or dismissed as insignificant by the public, press, or academics.<sup>249</sup> One could imagine, for example, weekly Board election results published in newspapers like baseball box scores or television coverage of ballot counts at Microsoft or Google. One could also imagine the representation process taking on some direct characteristics of the political process, including the broad use of opinion polling, sophisticated mass advertising, and near perpetual campaigning. Admittedly, not all of these things would necessarily be desirable. But they would represent a momentous change: American life reinfused with the talk—and even the expectation—of collective workplace activism.

## VI. IMPLEMENTATION

Providing a truly comprehensive regulatory map for actually carrying out automatic elections on a national scale would be a complex undertaking beyond the central aims of this Article.<sup>250</sup> But thinking in broad terms about how this

---

246. Diane Schmidt, *Unions in the Press: New York Times Coverage of Labor Activities 1946–1985* (1996) (unpublished paper presented at the American Journalism Historians Association), cited in Jon Bekken, *The Invisible Enemy: Representing Labour in a Corporate Media Order*, 12 JAVNOST – PUBLIC 71, 74 (2005), available at <http://javnost-thepublic.org/article/pdf/2005/1/5/>. Similarly, a study of labor coverage in the Chicago Tribune found that the paper averaged under thirty-nine articles a year throughout the 1990s. Robert Bruno, *Evidence of Class Anxiety in the Chicago Tribune Coverage of Organized Labor* (2003) (unpublished research report), cited in Bekken, *supra*, at 74.

247. Carlyn Kolker, *Law Schools Give Labor and Employment Short Shrift, Law Professor Says*, THOMSON REUTERS NEWS & INSIGHT (Apr. 11, 2013), available at <http://workplacechoice.org/2013/04/11/law-schools-give-labor-and-employment-short-shrift-professor-says/> (calling the field “overlooked at many schools”); see also Geoffrey Rapp, *Mismatch Between Expressed Subject Matter Interest and Actual Appointments in Law Faculty Hiring*, PRAWFSBLAWG BLOG (Apr. 8, 2013, 9:39 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/04/mismatch-between-expressed-subject-matter-interest-and-actual-appointments-in-law-faculty-hiring.html> (reporting that zero American law schools expressed an interest in hiring an entry-level labor academic during the 2012–2013 hiring year).

248. See Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570–71 (2007) (“Various commenters describe the National Labor Relations Act . . . as dead, dying, or at least ‘largely irrelevant to the contemporary workplace’—a doomed legal dinosaur.”).

249. If nothing else, in a representative democracy people recognize instinctively that secret balloting is a serious thing. A frequent critique of a labor-backed NLRA amendment that would have allowed for union certification without an election was that secret ballot “[v]oting is an immense privilege” and eliminating it from the representation process would “deny this freedom to many Americans.” George McGovern, Op-Ed., *My Party Should Respect Secret Union Ballots*, WALL ST. J., Aug. 8, 2008, at A13; see also Estlund, *supra* note 237, at 19–20 (“Organized labor needs the public, and the public has come to virtually equate secret ballot elections with democracy.”).

250. For a broad overview of the Board’s existing representation election procedures, see 2 NAT’L LABOR RELATIONS BD., *supra* note 20.

might hypothetically be accomplished would start with the following principles: (1) every nonunion worker should have the chance to vote for or against representation every year; and (2) union workers should have the chance to affirm, reject, or choose different representation each year as well. From there, the Board's existing operations provide a plausible framework to imagine how some of the more basic procedural gaps might be filled in.<sup>251</sup>

To begin, the NLRB's thirty-two regional offices<sup>252</sup> might be charged with assigning a staggered election date<sup>253</sup> to every company under the Board's jurisdiction<sup>254</sup> in their geographies. On the appointed day, workers would have the option to cast a representation ballot at an agency-monitored neutral voting site.<sup>255</sup> As under current law, an agent would have to receive a majority of the votes cast to become certified.<sup>256</sup>

Ballot design presents some tricky issues in a periodic election regime because voting does not rely on the existence of a preannounced candidate to serve as a potential representative.<sup>257</sup> This problem could be solved, however, by

---

251. *Id.*

252. For a listing of the Board's Regional offices and their assigned geographies, see *Find Your Regional Office*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/regional-offices> (last visited Aug. 30, 2013).

253. Under current rules, the Regions are instructed to schedule elections between twenty-five and thirty days after completion of the preelection hearing. 29 C.F.R. § 101.21(d) (2014). Under this proposal, the Regions would be empowered to set the first round of regular elections for all affected employers unilaterally based on a schedule designed to be most feasible for the agency. This would likely result in staggered election dates. All future elections would occur in one-year increments based on the date of the original election.

254. The Board's jurisdiction over private employers is extremely broad, matching Congress's authority to regulate commerce under the constitution. *NLRB v. Fainblatt*, 306 U.S. 601, 606–07 (1939). In practice, however, the Board limits its own authority by exercising jurisdiction only over entities with minimum levels of gross revenue, which vary by industry. *See, e.g., Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 635 (1950). Because it would be difficult for each Region to survey the revenue numbers for every firm existing in a region, the elections would presumptively apply to every company operating in the area, and those asserting that the Board lacked jurisdiction over them could submit evidence to establish that fact during a set period each year.

255. The Board currently leaves selection of the time and place of elections up to the discretion of the directors of the Board's Regional offices. 2 *Sisters Food Grp., Inc.*, 357 N.L.R.B. No. 168, at 9 (Dec. 29, 2011). However, in practice nearly all elections are held on the employer's private property. 2 NAT'L LABOR RELATIONS BD., *supra* note 20, § 11302.2, at 125B11302. This discretion, however, means that the Board has already developed protocols for voting at neutral site locations, such as city hall, libraries, elementary schools, and even motels. *Id.*

256. *See* 2 NAT'L LABOR RELATIONS BD., *supra* note 20, § 11340.4, at 126B11304 (“A majority of valid votes cast will decide the election. A tie vote will mean the union has not won, because it has not achieved a majority.”); *see also* 29 U.S.C. § 159(a) (2012) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . .”).

257. Under the current rules, showing of interest evidence is preceded by a formal “Petition,” which lists the persons or entity seeking representative status and guides the voting options listed on the ballot. *See* NAT'L LABOR RELATIONS BD., NLRB FORM 502, at Box 13, *available at* <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3040/nlrform502.pdf>; *see also* 2 NAT'L LAB. REL. BD., *supra* note 20, § 11003.1(a), at 16B1104 (“[T]he petition should be accompanied by the petitioner's showing of interest or be supplied within 48 hours after filing.”).

allowing employees to submit a list (or multiple lists)<sup>258</sup> of workers willing to serve and be named on the ballot as an exclusive bargaining “team,” so long as the interested teams contacted the Region at some point prior to voting, say forty-five days.<sup>259</sup> Likewise, the scheme might give existing unions the freedom to be included on the ballot by getting in touch with the Region by the same deadline. And if no party contacted the Region before the cutoff, a generic “exclusive bargaining representative” could appear, and if necessary workers would designate a bargaining team to function as that representative at some later date. This extra step would probably occur through a second election, this time with the ballot limited to in-house employee groups, under the theory that outside entities have effectively “waived” their right to be involved in that year’s voting cycle by opting not to participate in the first stage of balloting.<sup>260</sup>

While this setup raises the possibility of elections involving multiple unions and employee teams competing on the same ballot, it is already the case that any number of unions can “intervene” in ongoing election procedures and appear as a voting day choice with scant evidence of preexisting employee support.<sup>261</sup> Indeed, the Act itself speaks to the need for occasional “runoff” elections,<sup>262</sup> and the Board has established elaborate guidelines for how complex, multiple vote totals should be counted, including which parties should proceed to a runoff and which should drop off the ballot under a myriad of hypothetical voting outcomes.<sup>263</sup> Wholesale incorporation of these rules into the automatic election procedures makes sense.

---

258. In situations where multiple parties vie for the right to serve as the exclusive representative of employees, and none of the choices receive a majority, the Board may conduct a run-off election. *See* 2 NAT’L LABOR RELATIONS BD., *supra* note 20, § 11350, at 150B11350 (describing procedures and examples of runoff elections).

259. The possibility of employee “teams” or “committees” vying for the right to represent workers in front of management raises the specter of section 8(a)(2) of the Act, which prevents employers from dominating or interfering with employee labor organizations such as the teams envisioned here. *See* *Electromation, Inc.*, 309 N.L.R.B. 990, 992 (1992). Indeed, it is possible that the employer will prefer to deal with one team over another, and it will thereby have an incentive to try to impact the results of the election. For this reason, the Board will likely need to step up its vigilance and enforcement of section 8(a)(2) violations. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2). As noted in Part VI.A.1, *infra*, the proposal advanced here assumes a massive increase in federal funding for the Board to investigate unfair labor practices, including those involving employer domination of labor groups.

260. A primary reason for limiting the ballot to employee teams in this context is efficiency. At this stage workers have voted for a generic representative and the question to be decided is what agent will fill that role, but outside unions have already bypassed an opportunity to do so by failing to participate in the first election. Allowing unions a second chance to appear on the ballot in the same cycle would create unnecessary administrative burdens, given that they can just as easily arrange to participate in the next round of voting the following year.

261. 2 NAT’L LABOR RELATIONS BD., *supra* note 20, § 11023.4, at 33B11023.4 (“A union may intervene on a showing of less than 10 percent . . . [and] should be accorded a place on the ballot under the terms agreed on by the other parties.”); *see also supra* note 29.

262. 29 U.S.C. § 159(c)(3).

263. 2 NAT’L LABOR RELATIONS BD., *supra* note 20, § 11350, at 150B11350 (“Runoff Elections”).

A complex and time-consuming question that plagues elections under current law is how the universe of voters should be defined.<sup>264</sup> Currently, the Board reviews the “unit appropriate for collective bargaining”<sup>265</sup> through a fact-intensive, multipronged test<sup>266</sup> that plays out in a pre-election hearing<sup>267</sup> famously open to manipulation and delaying tactics.<sup>268</sup> The Board, however, has also created a host of presumptively appropriate units,<sup>269</sup> which could be relied upon to simplify the process. Making every separate worksite the default voting unit would be appropriate in this context because in the usual case employees are most likely to interact regularly with colleagues who share the same basic geographic setting.<sup>270</sup> Setting a worksite default would also efficiently clarify the process of creating the list of eligible voters, which could be based on a roll submitted by the employer to the Region forty-five days prior to the election.<sup>271</sup>

---

264. See Specialty Healthcare, 357 N.L.R.B. No. 83, at 8–10 (Aug. 26, 2011) (describing the evidentiary burden shifts that the Board uses to determine the appropriate universe of voters).

265. See 29 U.S.C. § 159(b).

266. See Bartlett Collins Co., 334 N.L.R.B. 484, 484 (2001) (listing the traditional factors).

267. Representation-Case Procedures, 76 Fed. Reg. 36,812, 36,818 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03) (“In cases in which parties are unable to reach agreement, a Board agent conducts a hearing at which the parties may introduce evidence on issues including: (1) [w]hether the Board has jurisdiction to conduct an election; (2) whether there are any bars to an election in the form of existing contracts or prior elections; (3) whether the election is sought in an appropriate unit of employees; and (4) the eligibility of particular employees in the unit to vote.”).

268. While the existence of a pre-election hearing is mandated by statute, National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1), Board precedent provides a variety of idiosyncratic hooks that allow employers to draw issues out beyond reason. In certain circumstances, for example, the employer can refuse to offer a position on the appropriateness of the proposed unit while simultaneously requiring the Board to accept testimony on the issue. See Health Acquisition Corp., 332 N.L.R.B. 1308 (2000). What often results is massive delay between the union’s showing of interest filing and the eventual ballot count. Where hearings occur, the average elapsed time between the petition and voting is 124 days. See LOGAN ET AL., *supra* note 164, at 2; see also *id.* (stating that the average delay increases to 198 days where “an election case involves a decision by the” Board’s Washington, D.C. headquarters). Among unions, the fear of electoral delay is so great that many opt to stipulate to all of the employers’ factual demands, allowing management to select not just things like the dates and times of the election, but also the voters. See *id.* (“[T]he mere fact that the NLRB allows parties the ability to delay cases for an extended period simply by forcing a hearing skews the process in employers’ favor . . . . [I]n order to avoid a hearing and the resulting delay, workers often agree to employers’ demands to change the description of the bargaining unit. Influencing the size and composition of the bargaining unit can advantage one party to the detriment of the other (e.g., excluding known union supporters).”).

269. Hegin Corp., 255 N.L.R.B. 1236, 1236 (1981) (noting the “presumptive appropriateness of a single-location unit”); see also Specialty Healthcare, 357 N.L.R.B. No. 83, at nn.16–17 (Aug. 26, 2011) (noting the “employer-wide” and “single-facility” unit presumptions).

270. See NLRB v. Living & Learning Ctrs., 652 F.2d 209, 213 (1st Cir. 1981) (stating that a worksite unit “immediately seems to be an appropriate unit because there is apt to be a bond of interest among all the persons employed by the same employer in connection with the same enterprise at the same locus”).

271. Currently, employers must submit to the Region (and ultimately the candidate for representative) a list of employees eligible to vote in the election, Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1242 (1966), seven days after the balloting date is set, N. Macon Health Care Facility, 315 N.L.R.B. 359, 360 (1994).

At that point, any candidate on the ballot might have the opportunity to challenge the exclusion or inclusion of any voter on the list<sup>272</sup> or even to enlarge the voting unit to include additional worksites.<sup>273</sup> Again, under current law such hearings risk massive delays,<sup>274</sup> but in this setting evidence presentation could be limited to a maximum of one day with decisions rendered orally from the bench.<sup>275</sup> The Region would be required to resolve all issues raised in the hearing prior to election day, which could not be moved to a later date.

The bargaining process also presents some special issues where regularly scheduled votes are concerned because under current law years can (and often do) pass before an initial contract is finalized.<sup>276</sup> As a result, where a representative is certified, the next election to reaffirm or reject the bargaining agent should be forestalled for up to two years.<sup>277</sup> Holding balloting in abeyance at this stage serves two purposes. First, it gives the parties some space to negotiate without the looming specter of decertification. Second, it acknowledges that workers may eventually lose faith in the newly elected agent's ability to secure a favorable agreement, and it responds by providing a chance for them either to try again with a different agent or to give up and reject representation entirely.<sup>278</sup> Contracts

---

272. Commonly, for example, a party may use the preelection hearing to argue that someone listed on the voting roll is a "supervisor" and thus prohibited from voting. *See Barre-Nat'l, Inc.*, 316 N.L.R.B. 877, 878 (1995) (stating that the Board's rules "entitle parties at [preelection] hearings to present witnesses and documentary evidence in support of their positions," in this case concerning the eligibility of twenty-four employees to vote in an upcoming election); *see also* 19 U.S.C. § 152(3) (2012); *DirecTV U.S. DirecTV Holdings, LLC*, 357 N.L.R.B. No. 149, 1 (Dec. 22, 2011) (finding that cable television "field supervisors" were not statutory supervisors); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687–88 (2006) (defining supervisory attributes).

273. *See, e.g., Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575–76 (1st Cir. 1983) (listing the factors relevant to determining if a single-site voting unit should be enlarged to include additional locations).

274. *See supra* text accompanying note 268.

275. Limiting hearings to a single day or even to a single hour would not raise due process concerns. While the Act requires a preelection "hearing," National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (2012), there is no due process right to any hearing prior to the election, "so long as the requisite hearing is held before" the Board enforces an unfair labor practice charge against the employer for refusing to bargain after the election, *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 708 (D.C. Cir. 1965) (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950)). Moreover, there is not necessarily a requirement that the Board take oral evidence in such hearings. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240–42 (1973).

276. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 47, 54–55 (2009) (describing a "well-known recent example" of first contract bargaining difficulties and noting that "[a]bout half of all newly certified or recognized unions are not able to persuade the employer to agree to a collective bargaining agreement"). A big part of the problem is that the Board has no power to force parties to agree to any contractual term and cannot impose financial penalties for a failure to the abide by the statutory requirement to bargain in "good faith." *Id.* at 56 (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)).

277. Because of the proposal's requirement that incumbent representative be reaffirmed by voters every year, the Act's current allowance for decertification through the employee petition process could be eliminated. *See* 29 U.S.C. § 159(e)(1).

278. Current law holds that prior to a first contract workers may file for an election to decertify the representative so long as one year has elapsed from the date that the union was initially

reached within this two-year window<sup>279</sup> would retrigger the election cycle with votes scheduled to begin again one year after the effective date of the agreement.<sup>280</sup>

### A. Objections

#### 1. Cost

At least two objections are likely to be raised in response to automatic elections. The most obvious is cost. In fiscal year 2013, the Board asked Congress for a \$292.8 million appropriation to pay 1665 full-time employees<sup>281</sup> to investigate over 22,000 unfair labor practice charges and handle an estimated 2834 election petitions.<sup>282</sup> There are just under 28 million businesses in the United States,<sup>283</sup> and if the Board had to conduct voting at every one every year, then the proposal advanced here would indeed be fiscally unworkable.<sup>284</sup>

The true number, however, is considerably less. As an initial matter, nearly

---

certified. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954). By prohibiting decertification elections for two years the automatic voting proposal imports this “election bar” concept, but extends it for an additional year. *See id.* This is because regularizing elections raises turnout concerns, *see infra* Part VI.A.2, heightening the probability that newly elected representatives will have low absolute support among the workforce. Not only would such unions have weak leverage in first contract negotiations, they would probably need to expend resources gathering employee support in the meantime. Both realities could lengthen the time needed to secure a favorable agreement.

279. While federal law does not require it, most unions internally mandate that contracts preliminarily accepted by a negotiating team be ratified by the membership before becoming effective. *See, e.g., Ackley v. W. Conf. of Teamsters*, 958 F.2d 1463, 1466 (9th Cir. 1992). Under this proposal some unions might decide to rethink this practice given that the membership will already have yearly opportunities to reject representation if they are dissatisfied with the results of a contract negotiation. On the other hand, allowing the membership to express its view of a proposal through ratification would provide the union with good evidence regarding its standing among the electorate in upcoming votes.

280. Holding annual elections to affirm or decertify an existing agent effectively abolishes the Board’s “contract-bar” doctrine, which prohibits the filing of showing of interest petitions (and thus elections) during the term of a contract. *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962). Parties would still be free to make contracts that are effective for multiple years (three-year termed agreements are a current norm, *see id.* at 1127), and if a new agent is selected before an existing agreement has expired existing rules regarding the employer’s duty to honor the terms of the previous contract until a new pact is reached would apply, *see, e.g., More Truck Lines, Inc.*, 336 N.L.R.B. 772, 773 (2001).

281. NAT’L LABOR RELATIONS BD., JUSTIFICATION OF PERFORMANCE BUDGET FOR COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 2013, at 3 (2013), *available at* <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1706/just2013.pdf>.

282. *Id.* at 19.

283. SBA OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS 1 (2012), *available at* [http://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf).

284. For what it’s worth, scaling the Board’s current total budget up to a level that could handle petitions from twenty-eight million companies could cost the agency as much as \$2.9 trillion—that is, the entirety of the nation’s 2013 revenue. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2013, at 23 tbl.1.1 (2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/hist.pdf>. For an exploration of the assumptions underlying this calculation, *see infra* notes 299–300.

eighty percent of the companies included in the 28 million total lack employees, bringing the universe down to about 5.6 million firms.<sup>285</sup> Moreover, the proposal is limited to employers subject to the Board's jurisdiction,<sup>286</sup> and while the Board's reach is broad, it is not unlimited.<sup>287</sup> In practice, and as a matter of discretion, the agency asserts jurisdiction only over businesses with minimum levels of gross revenue.<sup>288</sup> Hotels,<sup>289</sup> restaurants,<sup>290</sup> and retailers,<sup>291</sup> for example, must do at least \$500,000 per year in business to fall under the Act. Day care centers, in contrast, are covered only if they generate at least \$250,000 in gross receipts,<sup>292</sup> while nonretail companies with just \$50,000 in yearly income are subject to NLRB authority.<sup>293</sup>

Because Board jurisdiction ultimately requires a case-by-case financial analysis,<sup>294</sup> and because corporate revenue data is not broken down into the jurisdictional categories used by the Board,<sup>295</sup> there is no precise way to calculate the number of businesses subject to yearly elections under the regime envisioned

---

285. SBA OFFICE OF ADVOCACY, *supra* note 283, at 1 (citing data from Table 1 and Figure 1).

286. *See supra* note 254 and accompanying text.

287. *Id.*; *see also* National Labor Relations Act, 29 U.S.C. § 164(c)(1) (2012) (granting the Board the power to decline jurisdiction in certain cases).

288. *See NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951) (“Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.”); *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 635 (1950) (“The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.”).

289. *Floridian Hotel*, 124 N.L.R.B. 261, 265–66 (1959).

290. *City Line Open Hearth*, 141 N.L.R.B. 799, 801 (1963).

291. *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88, 90 (1959).

292. *Salt & Pepper Nursery Sch.*, 222 N.L.R.B. 1295, 1296 (1976).

293. *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 84 (1958).

294. Indeed, when a petition for representation is filed, “[a]mong the earliest determinations to be made is whether the employer . . . meets the appropriate Board jurisdictional standard.” 2 NAT'L LAB. REL. BD., *supra* note 20, § 11702, at 210B11700. “Normally, commerce information is furnished by the employer involved,” *id.* § 11702.1, at 210B11700, but if not, the Board is free to subpoena the relevant data and determine whether jurisdiction has been met during a hearing conducted by the Regional Office, *id.* § 11704.1, at 212B11704; *see also Tropicana Products*, 122 N.L.R.B. 121, 123 (1958) (“The Board has determined that it best effectuates the policies of the Act, and promotes the prompt handling of cases, to assert jurisdiction in any case in which an employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional determinations, where the record developed at a hearing, duly noticed, scheduled and held, demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the Employer's operations satisfy the Board's jurisdictional standards.”).

295. For example, while the Census Bureau breaks down the number of firms with various levels of annual sales by industry, it does not separate out the Board's categories of “non-retail” or “childcare” businesses. U.S. CENSUS BUREAU, 2007 SURVEY OF BUSINESS OWNERS: STATISTICS FOR ALL U.S. FIRMS BY INDUSTRY, GENDER, AND RECEIPTS (2007), available at [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2007\\_00CSA05&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSA05&prodType=table).

here.<sup>296</sup> Nevertheless, it is possible to tabulate a ballpark figure and then create a multiple to apply to the agency's current budget to come up with a rough cost estimate for the automatic elections proposal.

Most obviously, nearly 660,000 U.S. businesses are excluded from the Act under even the lowest, nonretail revenue standard because they generate less than \$50,000 in annual revenue.<sup>297</sup> That means that the absolute upper bound of companies subject to elections under the regularized format is around five million.<sup>298</sup> Though the true number could be less than that given the higher revenue standards at play in other industries, with the Board's current budget as a foundation, this extreme end of the continuum allows for a calculation at the far edge of the cost spectrum as well.<sup>299</sup>

---

296. Indeed, even "the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction." Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,043 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) [hereinafter Notification of Employee Rights]. In 2002, the United States General Accounting Office (GAO) used U.S. Census data to estimate that almost five percent of all private sector workers are excluded from the Act's coverage because they work for businesses that do not meet the Board's gross sales volume threshold. U.S. GEN. ACCOUNTING OFFICE, GA-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS (2002) (report to congressional requesters at the U.S. Senate). In that report, the GAO set forth the percentage of workers excluded from the Act due to volume sales by industry, but did not attempt to count the number of *businesses* employing those employees, likely because the government's industry categories do not map onto the NLRB's jurisdictional categories. *See id.* at 27–28.

297. U.S. CENSUS BUREAU, *supra* note 295 (aggregating the number of businesses generating less than \$50,000 a year).

298. That is, the number of U.S. companies with at least \$50,000 in yearly sales is about five million. *See id.* Using inflated numbers from 2007 and failing to exclude businesses without at least \$50,000 in annual revenue, in 2011 the Board estimated that less than six million U.S. companies fall under its jurisdiction. *See* Notification of Employee Rights, *supra* note 296.

299. In other words, the calculation takes the agency's current outlays on everything—from paying staff and rent, to investigating unfair labor practices, to handling 2834 showing of interest petitions, to anything else—and assumes that what the agency might spend on holding elections at five million companies is this current budget times 1764, the multiple needed to scale 2834 up to five million. *See infra* note 300. Admittedly, there are some conceptual problems with this rather blunt approach. For instance, a massive increase in the Board's representation caseload might not require the same degree of additional funding for the rest of the agency's duties and infrastructure; perhaps there are efficiencies of scale that could work to the NLRB's advantage. More importantly, large companies often operate at many separate locations, and since the proposal envisions each worksite as the default electoral unit, *see supra* text accompanying note 270, there will undoubtedly be many more than five million annual elections. *See, e.g., infra* note 302 (distinguishing the number of U.S. "Firms" from the number of firm locations, categorized as "Establishments"). On one hand, this may mean that 1764 is an insufficiently large multiple, and the total cost of automatic elections might be much greater. On the other hand, under current law a single showing of interest petition can lead to multiple election locations, *see supra* text accompanying note 273, so the baseline budget—which accounts for 2834 petitions—likely encompasses balloting costs at well over 2834 sites. Moreover, the automatic elections proposal's vastly streamlined hearing procedures would certainly result in savings, as would a number of other electoral innovations that the Board could easily adopt to lessen the costs and difficulties of facilitating millions more balloting opportunities each year. *See infra* notes 308–311 and accompanying text. Ultimately, the cost estimate offered here is no more than a "back-of-the-

Scaling up the Board's current workload and funding to match this figure—including what the agency now spends on both representation and, because more elections will surely mean more management campaigning, unfair labor practice filings—results in a projected National Labor Relations Board budget of around \$516 billion.<sup>300</sup> While this gigantic number is actually less than the amount of money authorized to be doled out in 2013 to the Department of Treasury (\$531 billion) and for national defense (\$620 billion),<sup>301</sup> in its most expansive form regularizing the NLRB election process would admittedly raise serious and legitimate cost concerns.

However, the regime can be drastically scaled back without sacrificing much of its original intent. That is because in reality the five million businesses cited above encompass millions of entities with very few employees. Indeed, counting only employers with at least ten workers cuts the overall universe of companies down to 1,268,303,<sup>302</sup> meaning that the vast majority of firms included in the upper bound of the Board's jurisdiction are extremely small.

This suggests that the periodic elections proposal might be made fiscally palatable simply by reserving elections for employers with a minimum level of employees instead of a minimum level of revenue.<sup>303</sup> In fact, spinning the data out even further reveals that focusing on entities with twenty or more workers reduces

---

envelope” attempt to situate the idea of regularizing the Board's election processes within the budgetary frameworks of a few other federal agencies.

300. That is to say, multiplying the Board's 2013 total budget request by 1764, the multiple needed to scale the projected number of election petitions for the year 2013—2834—to around five million.

301. 2012 OFFICE OF MGMT. & BUDGET, Table 5.2—Budget Authority by Agency: 1976–2018, <http://www.whitehouse.gov/omb/budget/Historicals>.

302. 2009 U.S. CENSUS BUREAU, TABLE 2A, EMPLOYMENT SIZE OF EMPLOYER AND NONEMPLOYER FIRMS (2008), <http://www.census.gov/econ/smallbus.html> (citing statistics from 2008).

303. This is the limiting principle incorporated into a variety of existing federal laws that seek to exempt small businesses from certain legal requirements. The Affordable Care Act, known colloquially as “Obamacare,” for example, mandates that employers provide employees with a certain level of health care coverage (or pay a tax), but limits that requirement to businesses with at least fifty full-time workers. JACKIE CALMES & ROBERT PEAR, *Crucial Mandate Delayed a Year for Health Law*, N.Y. TIMES, Jul. 3, 2013, at A1. *See also* 29 U.S.C. § 2601(4)(a)(i) (2012) (limiting the “Family and Medical Leave Act” to employers with over fifty employees). It has been widely reported that some businesses are considering transitioning some full-time employees to part-time to avoid this mandate. *See Sarah Kliff, Will Obamacare Lead to Millions More Part-Time Workers? Companies Are Still Deciding*, WASH. POST WONKBLOG (May 6, 2013, 2:47 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/will-obamacare-lead-to-millions-more-part-time-workers-companies-are-still-deciding>. *But see* Glenn Kessler, *The White House Claim that Obamacare Is Not Reducing Full-Time Employment*, WASH. POST FACT CHECKER BLOG (July 22, 2013, 6:00 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/the-white-house-claim-that-obamacare-is-not-reducing-full-time-employment/2013/07/21/e67a4254-f240-11e2-8505-bf6f231e77b4\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/the-white-house-claim-that-obamacare-is-not-reducing-full-time-employment/2013/07/21/e67a4254-f240-11e2-8505-bf6f231e77b4_blog.html) (stating that overall it is “difficult to discern how much the health care law is responsible for a greater reliance on part-time workers”). However, under the NLRA, this problem would be minimized as both full and part-time workers participate in representation elections. *See, e.g.,* Hardy Herpolsheimer's, 227 N.L.R.B. 652, 652 (1976).

the total to 635,162,<sup>304</sup> and including only employers with one hundred or more employees would leave the Board to deal with just 108,855 employers.<sup>305</sup> Scaling up the Board's current workload to again match each of those figures is a much cheaper proposition, resulting in projected National Labor Relations Board budgets of around \$131 billion, \$65 billion, and \$11 billion, respectively.<sup>306</sup>

While infusing the NLRB with even these lower levels would represent an absolutely massive new commitment to the nation's labor-relations infrastructure, all three calculations fit comfortably within the funding landscape for existing federal agencies. A remarkably similar budgetary range, for example, is found by comparison to the authorized spending at a number of other federal entities, including the Department of Veteran's Affairs (\$135 billion), the Department of Education (\$63.5 billion), and the Department of the Interior (\$12.4 billion).<sup>307</sup>

But most crucially, in addition to saving billions, the press and community energy generated by yearly balloting at a million, 600,000, or even 100,000 of the country's biggest companies might be sizable enough that much of the "cultural shock treatment" that is a central goal of the fully-implemented proposal would probably be preserved.

Of course, other options exist to cabin the costs associated with an automatic elections model. Another idea would be to establish parallel jurisdictional standards relevant only to determine whether automatic elections should apply to an employer's workforce. The new standards could be set at levels higher than the Board's usual jurisdictional thresholds, thus limiting the absolute number of annual elections while preserving the universe of firms subject to the Act's authority generally.

Finally, all the budget estimates described above include no efficiencies of scale, take no account of the reduced administrative costs associated with the suggested streamlined preelection hearings,<sup>308</sup> and assume no changes to the Board's standard in-person electoral machinery. In fact, as recently as 2010, the Board was exploring the feasibility of electronic voting for "remote . . . elections."<sup>309</sup> Allowing workers to vote by internet, phone, text, or even Twitter would drastically reduce the logistical costs of elections through decreased

---

304. 2009 U.S. CENSUS BUREAU, *supra* note 302. These numbers suffer from the same conceptual limitations discussed in *supra* note 299.

305. *Id.*

306. That is to say, multiplying the Board's 2013 budget request by 447.5, 224, and 38.4, the multiples needed to scale the projected 2013 number of election petitions—2834—up to cover all employers with at least 10, 20, and 100 employees. (2834 FY 2013 election petitions x 447.5 = 1,268,303 elections; 2834 FY 2013 election petitions x 224.12 = 635,156 elections; 2834 FY 2013 election petitions x 38.4 = 108,825 elections).

307. 2012 OFFICE OF MGMT. & BUDGET, *supra* note 301.

308. *See supra* Part VI.

309. *See* Kris Maher, *National Labor Relations Board Explores Electronic Voting*, WALL ST. J. (June 15, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703685404575306992906763792>.

staffing, instant ballot tabulations, and maybe, because workers could vote on their own time, fewer postelection administrative objections.<sup>310</sup> The savings associated with electronic balloting would be particularly pronounced in less densely populated regions where Board agents would be spared the time and expense of long distance travel and overnight stays.<sup>311</sup>

## 2. Turnout

A second objection to the proposal relates to turnout. Because balloting will sometimes not be the culmination of an intense and protracted campaign period, voter participation in regularized elections may be quite low, at least in the regime's early years. As the NLRB certifies unions receiving a majority of votes cast, no matter the portion of workers in the workplace unit who actually cast ballots,<sup>312</sup> the possibility exists that a union or employee team could gain exclusive representative status with, as a percentage of the total unit, minuscule support. It is not overly speculative, for example, to imagine a union being certified after garnering the support of under ten percent of the workforce where total turnout reaches only fifteen percent.

Two concerns flow from this reality. One is practical: a bargaining agent's negotiating posture is only as strong as the circle of workers willing to support a contract position through strikes, picketing, and other forms of collective pressure, so what good is collective bargaining if—as the employer knows full well—ninety-two percent of the workforce did not vote for the agent?

The answer relates to the nature of automatic voting in a culture that lacks union consciousness. Those without any experience with unionism may only recognize its benefits (or dangers) once the possibility of wage increases (or cuts) are literally “on the table,” not amidst a short, uninspiring, or even nonexistent campaign window before an externally mandated certification vote. For this reason, workers who are initially unmotivated to vote for the union—or vote at all—may develop an interest in supporting the bargaining team during the contract negotiation phase.

But even if not, out of anger or frustration a bad contract result might spark

---

310. For some specifics on electronic voting, including its potential to increase Board efficiency while limiting management intervention into worker free choice, see Sachs, *supra* note 32, at 719–27.

311. See, e.g., GPS Terminal Servs., 326 N.L.R.B. 839, 841 (1998) (noting the “substantial costs in Board agent time and travel expenses” associated with elections that require “overnight stay[s]” due to distance).

312. See OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, *supra* note 23, at 342–43 (stating that absent an “extraordinary event, e.g., severe weather . . . the number of voters voting in a Board election will not . . . affect the validity of a Board election”); see also Lemco Constr. Inc., 283 N.L.R.B. 459, 460 (1987) (“[E]lection results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation.”); *What We Do: Conduct Elections*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/what-we-do/conduct-elections> (last visited May 31, 2014) (“Representation and decertification elections are decided by a majority of votes cast.”).

greater voter participation in subsequent balloting. Moreover, for many workers, even a weak contract, which, at utter minimum, is sure to include just cause protection,<sup>313</sup> is arguably better than the alternative: at-will, take-it-or-leave-it work.

The second concern is democratic: is it desirable to allow the votes of a few to govern the lives of the many? As a threshold matter, given the Act's rootedness in American democracy, it is worth noting that while low turnout in political elections provokes consternation among pundits and social scientists,<sup>314</sup> the fundamentally democratic nature of such contests is usually questioned only in cases where there are suggestions that voters have been deterred or impeded from voting.<sup>315</sup> This has traditionally been the Board's take on the issue as well:

In political elections, voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an 'adequate opportunity to participate in the balloting' will the Board decline to issue a certification and direct a second election.<sup>316</sup>

Not only should this reasoning apply with the same force to automatic elections, it is more persuasive in that context because unhappy nonvoters are freed from the procedurally cumbersome decertification process and guaranteed an opportunity to put the exclusive agent's meager support to the test in the next election. In this way—regardless of initial turnout—democracy concerns are minimized with regular elections, not magnified. It is additionally important to acknowledge again that no matter one's views on the legitimacy of a workplace agent elected by a mere sliver of the overall workforce, the alternative—governance by management pronouncement—is not a democratic improvement.

That stated, apprehensions over the democratic repercussions of low turnout in a periodic election regime could also be easily remedied by establishing a

---

313. Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594–95 (1985) (stating that the just cause "requirement is so well accepted that often it is found to be implicit in the collective agreement, even when there is no stated limitation on the employer's power to discipline").

314. See, e.g., G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AMERICAN POL. SCI. REV. 17, 17–19 (1986); *Voter Turnout*, FAIRVOTE, <http://www.fairvote.org/voter-turnout#.UjXXaRb3NUQ> (last visited Nov. 25, 2013, 2:14 PM).

315. See, e.g., Editorial, *The Republican Threat to Voting*, N.Y. TIMES, Apr. 27, 2011, at A26 (criticizing alleged voter suppression laws and urging "voters who care about democracy in their states to speak out against lawmakers who do not"); Jonathan Easley, *Top Dem: Colorado Losses Due to 'Voter Suppression, Pure and Simple'*, HILL BALLOT BOX BLOG (Sept. 11, 2013, 1:04pm), <http://thehill.com/blogs/ballot-box/other-races/321567-top-dem-blames-colorado-defeats-on-voter-suppression-pure-and-simple>.

316. *Lemco Constr.*, 283 N.L.R.B. at 460.

minimum turnout requirement, something that the Heritage Foundation has argued should be applied even to the current election rules.<sup>317</sup> This, however, would be unwise. The NLRA protects workers' right to vote and not to vote.<sup>318</sup> In this way, the law assumes that employee agency is present in the choice to act and also present in the choice to abstain; those in the latter camp have in effect delegated the form of workplace governance to those who opt to participate in the election. But a turnout minimum belittles that delegation by presuming that the choice to abstain is in many cases actually a choice to vote "no." Where elections are automatically set and workers are freely afforded regularly scheduled opportunities to change course, that presumption is unwarranted.

#### CONCLUSION

Shifting to a regularization of the Board's election regime would obviously be a gargantuan political lift.<sup>319</sup> But then again, so is any statutory change to labor law,<sup>320</sup> to say nothing of comparatively milquetoast administrative proposals that nibble around the edges, like requiring employers to post a notice informing people of their rights.<sup>321</sup>

If nothing else, a hoped-for consequence of considering regular NLRB elections in the frame provided by this Article is that expectations about collective worker agency embedded in the law can be more comfortably examined.<sup>322</sup> This is

---

317. See Sherk, *supra* 203, at 10.

318. 29 U.S.C. § 157 (2012).

319. See, e.g., Estlund, *supra* note 17, at 1540 (describing how "labor law has stood still in the face of decades of social, economic, and legal change" amidst a series of failed legislative attempts to reform it).

320. *Id.* at 1542.

321. Amidst fierce opposition from business groups, in 2011 the Board tried, and failed, to enact a rule requiring that employers post a workplace notice informing workers of their NLRB rights. See *Chamber of Commerce v. NLRB*, 721 F.3d 152, 157 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 953 (D.C. Cir. 2013); *Notification of Employee Rights*, *supra* note 296.

322. Some notable legal scholarship has touched on this a bit. A particularly good example is Mark Barenberg's *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, which examines reform of the section of the Act designed to prevent companies from co-opting or too heavily influencing the operations of labor unions. Barenberg, *supra* note 38, at 764–65. Barenberg examined how such company-dominated unions actually impacted groups of workers and determined that many administrative and judicial assumptions about the insidious effects of such relationships are, in fact, inaccurate. *Id.* at 766, 827; see also Rogers, *supra* note 141, at 39, 47 (describing, in the context of proposed NLRA reforms, the importance of card solicitation in union organizing because of its impact on worker solidarity). As a general matter, it should also be noted that "[i]n spite of the constraints it faces, the Board has successfully put forward some innovative doctrines aimed at addressing contemporary workplace realities." Estlund, *supra* note 17, at 15. Former Board Chairman Wilma Liebman has been a leader in this regard. See Fisk & Malamud, *supra* note 170, at 2043 ("An important part of the rhetoric of Member Liebman's testimony is that Board reversals of precedent can be justified by changes in conditions on the ground . . ."). Though it is a dissent, an excellent example comes from a case involving the right of employees to use company e-mail to discuss union matters. There Liebman urges the Board to respond to the cultural reality that "e-mail has revolutionized communication both within and outside the workplace" and cannot be "treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." *Guard Publ'n*

especially important in areas where labor law predicts—from this Article’s vantage, wrongly—that workers are apt to be drawn together. Reconsidering the presumed magnetic (and thus confrontational) impact of a travelling sign on a stick, what the law calls “picketing,”<sup>323</sup> would be a good place to start.<sup>324</sup> Like the election trigger, the costs of this assumption are real.<sup>325</sup>

In such instances, mismatches between assumptions and realities can usually be blamed on the evolving nature of community through the course of history, and the remedy, like regular voting, will require statutory change.<sup>326</sup> But there are other areas where something less could allow labor law to adapt to group agency expectations. For example, the law presumes that the “best place to hold an

Co., 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, Members, dissenting); *see also* Liebman, *supra* note 248, at 576 (“American labor law . . . increasingly appears out of sync with changing workplace realities.”). Interestingly, other areas of law are sometimes more attuned to questions of workplace culture than labor law. Reforms and proposed reforms of U.S. tax law relating to pensions and retirement, for instance, are frequently crafted with an eye towards savings norms prevalent in American culture. *See, e.g.*, Steven Greenhouse, *How They Do It Elsewhere*, N.Y. TIMES, May 15, 2013, at F7 (examining savings norms across a variety of cultures and reflecting on the remarks of a retirement policy expert who states that “some foreign features might not fit American culture, like mandated participation in the pension system as in Australia and Chile”). The Pension Protection Act of 2006 is a good example. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.). Reflecting research finding that many workers fail to opt-in to 401(k) retirement plans when they are offered, the legislation gave companies the option of automatically enrolling employees at a default contribution level to try to correct or push against this trend. *See* Steven Greenhouse, *401(?) Should the Employer-Sponsored Nest Eggs Be Fine-Tuned? Or Killed? The Debate Is On*, N.Y. TIMES, Sept. 12, 2012, at F2.

323. *United Bhd. of Carpenters*, 355 N.L.R.B. No. 159, at 6 (Aug. 27, 2010) (“The core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is not simply the holding of signs . . . but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.”).

324. The law views labor picketing as “qualitatively different from other modes of communication,” *Babbit v. United Farm Workers Nat’l Union*, 442 U.S. 289, 311 n.17 (1979), because it is seen as “more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated,” *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–77 (1942)). Whether labor picketing in today’s culture does, in fact, “induce action” from the public and other employees in ways that are *actually* coercive is a question surely worth considering. *See supra* notes 113–123 and accompanying text.

325. *See, e.g.*, 29 U.S.C. § 160(*l*) (2012) (mandating that the Board, upon “reasonable cause,” seek federal injunctive relief for violations of the Act’s antipicketing provisions); OFFICE OF THE GEN. COUNSEL, NLRB ADVICE MEMORANDUM, UNITED FOODS & COMMERCIAL WORKERS INTERNATIONAL UNION (WAL-MART STORES, INC.) (Apr. 10, 2013) (settling a union’s violation of an antipicketing provision by requiring it to disavow any interest in organizing Wal-Mart workers, to cease its primary campaign operations for two months, and to agree to not contest imposition of a federal injunction in the event of similar unlawful picketing in the future); Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES, Feb. 1, 2013, at B1 (quoting a Wal-Mart executive as stating that with the settlement, “[o]ur associates can now move forward knowing that the [union] must stop its illegal and disruptive activities”).

326. The governing text of the NLRA has not been altered in over forty years. Estlund, *supra* note 17, at 1532–33.

election, from the standpoint of accessibility to voters,” is on the employer’s private property.<sup>327</sup> In an earlier industrialized era, when the workday was nine-to-five and workplaces were generally consolidated, it might have made sense to expect workers to easily congregate at the shop.<sup>328</sup> But today, part-time work has exploded,<sup>329</sup> so many workers are not on the job on a given day, and so has the service sector, where scattered, patchwork employment is the norm.<sup>330</sup> In this modern context, presuming that workplace voting is “accessible” requires the belief that off-duty employees, who might be at a second job or home with kids, will nevertheless flock to work and vote.<sup>331</sup> Is faith that workers will prioritize collectivist opportunities over individualized needs in this way reasonable?<sup>332</sup> If

327. 2 NAT’L LABOR RELATIONS BD., *supra* note 20, § 11302.2, at 125B11302.

328. *See supra* notes 154–161 and accompanying text. And as Cynthia Estlund as explained, [M]uch has happened since [the NLRA’s enactment] . . . The economy has changed as manufacturing has shrunk relative to the service sector and the new “information” sector, and as the technology of transportation and communication has increasingly eroded geographic constraints on product markets and on the location of production. The organization of work has changed, as mass production and stable workplace hierarchies have given way to more flexible, customer-centered production methods and semiautonomous team-based organizations. And the surrounding legal landscape has changed, as laws regulating substantive terms of employment and granting individual employee rights have proliferated. In the meantime, the collectivist premises of the NLRA have acquired the patina of a historic relic.

Estlund, *supra* note 17, at 1535–36.

329. *See* Benjamin Landy, *Graph: America Has a Part-Time Employment Problem*, CENTURY FOUND.: BLOG CENTURY (Jan. 11, 2013), <http://tcf.org/blog/detail/graph-america-has-a-part-time-employment-problem> (“By the end of 2009, the number of Americans working part-time for ‘economic reasons’ had doubled to over 9 million—the single largest spike since the Bureau of Labor Statistics began tracking part-time employment in 1955.”); Catherine Rampell, *The Rise of Part-Time Work*, N.Y. TIMES ECONOMIX BLOG (Mar. 8, 2013, 10:51 AM), <http://economix.blogs.nytimes.com/2013/03/08/the-rise-of-part-time-work/> (depicting the rising share of part-time work as a percentage of all jobs).

330. Catherine Rampell, *Part-Time Work in Full-Time Wait for Better Job*, N.Y. TIMES, Apr. 20, 2013, at B6 (stating that service sector jobs “disproportionately rely on part-time work”); Alana Semuels, *Rise of Services Jobs May Not Be Bad Trend*, L.A. TIMES, Mar. 9, 2013, at B4 (“[T]he United States has long been shifting to a service economy as manufacturing jobs are automated and go overseas, and mining becomes less labor intensive.”).

331. *Cf.* Estlund, *supra* note 17, at 1593 (noting that “employees have become increasingly dispersed, mobile, and hard to reach outside of the workplace”).

332. In fact, the Board occasionally considers things like second jobs and child care responsibilities in deciding whether to conduct an election in the workplace. *See, e.g.*, London’s Farm Dairy, Inc., 323 N.L.R.B. 1057, 1057 (1997) (“[M]ail ballots would avoid inconveniencing the need to impose work schedule changes on a significant number of employees, who may well have family responsibilities or other plans for what would normally be their off-work time . . . .”); Shepard Convention Servs., 314 N.L.R.B. 689, 689–90 (1994) (“[N]oting that a number of the employees may have other employment which may restrict their ability to reach the polls, the Board finds that the Regional Director abused his discretion by denying the Petitioner’s request for a mail ballot.”). A separate and lingering question is whether it is fair to allow an interested party to host the ballot box. *See, e.g.*, Mental Health Ass’n Inc., 356 N.L.R.B. No. 151, at 1 n.4 (Apr. 29, 2011) (overturning an employer-site election where on election day management “hired security, erected a fence around part of its parking lot . . . posted private property signs,” and “without advance notice changed the route and method by which employees would enter the facility by limiting access to the employee entrance and by giving control over that entrance to openly antiunion employees”); *see also* 2 Sisters Food Grp.,

not, then moving to a more accessible regime, like mail balloting, would require only a modification to Board precedent.<sup>333</sup>

Of course, agency assumptions also affect the viability of purely movement-centric reform. As noted at the start,<sup>334</sup> advocates sometimes bundle such ideas with the expectation that a drive to group action is an enduring worker characteristic or even inherent to the workplace. In extreme form, these arguments imply that with the proper mix of conditions or the right strategy, the dynamics of 1934 can be tapped and resurrected. This Article is skeptical. But going forward, a key question in any movement proposal, and a key question in any legal proposal, is how right, or how wrong, that expectation really is.

---

Inc., 357 N.L.R.B. No. 168, at 6 (Dec. 29, 2011) (describing the employer's power to control the voting facility and voters when elections are held on property it controls); *cf.* CAL. ELEC. CODE § 12287 (West 2003) (prohibiting placement of a voting site in a candidate's home); 25 PA. STAT. ANN. § 2729.1 (West, Westlaw through 2014 Reg. Sess. Acts 1–130) (prohibiting placement of a voting site in any building owned by any elected official, a political party, or a candidate); TEX. ELEC. CODE ANN. § 43.031(e) (West 2010) (same as California).

333. *See* San Diego Gas & Elec., 325 N.L.R.B. 1143, 1145 (1998) (stating the Board's current standard for ordering a mail ballot representation election); *see also* Gould IV, *supra* note 193, at 14–17 (discussing the Board's mail ballot process and procedures).

334. *See supra* notes 1–6 and accompanying text.