

# Passion and Reason in Labor Law

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## ABSTRACT

*The central debate within domestic labor law today revolves around whether existing union certification procedures promote or inhibit autonomous employee choice. Within that debate, both judges and commentators tend to embrace a model of the self and of the optimal conditions for autonomous choice that draws from both liberal political theory and rational choice theory. Most judges and commentators assume that individual workers' preferences are exogenous and relatively static; that workers decide whether to support unionization by weighing its costs and benefits in light of their individual self-interest; that union organizing is basically a process of aggregating individual workers' expressed preferences; and that workers' autonomy is threatened not only by coercion, but also by strong communal attachments to coworkers. This Article criticizes that model on both empirical and normative grounds. Workers' preferences toward unionization are not wholly exogenous, it argues, but rather are pervasively shaped by the law and by workers' group identities. Similarly, organizing is less a process of aggregating preferences as it is a process of building collective identity and solidarity—and therefore shaping workers' preferences—often through disruptive and emotionally-charged collective action. Finally, such identity shaping does not inevitably threaten individual workers' autonomy. On the contrary, ideals of autonomy actually provide normative justification for preference-shaping efforts that aim to equalize power between workers and management. This argument has implications both for ongoing debates over labor law reform and for accounts of the relationship among law, identity, and social movements more generally.*

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#### INTRODUCTION

Before law school, I spent several years helping low-wage janitors organize. Soon after beginning, I was struck by how organizing drives affected workers’ self-understanding. Workers’ decisions to strike, to confront managers about working conditions, or even to sign authorization cards—common activities during drives—were almost never taken lightly. With no savings and few other job prospects, openly supporting unionization meant stepping into an abyss. If others did not follow suit, a worker’s relationships on the job could become quite tense, and she could even be fired. But if others did step out, victory was often possible. Later, many would describe the organizing drive as life altering, as an experience that radically changed their understanding of their place in the economy and society and even of their own character. Indeed, for many workers, the process of organizing and the personal and collective transformations involved seemed as important as the success or failure of the drive. Part of the explanation seemed to be that workers who confronted their employers and won concessions often wielded substantial power for the first time in their lives.<sup>1</sup>

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<sup>1</sup> An anecdote may help illustrate the point: A senior colleague within the labor movement often recounts that when he was organizing a particular hospital, he found out that one of the nurses was married to a leader in the local United Auto Workers’ Union (“U.A.W.”). That

While these aspects of workers' collective action are central to union organizing practice, they remain marginal in legal and policy debates regarding union certification procedures. The National Labor Relations Act ("the Act"), as amended, protects employees' freedom to unionize or refrain from unionization and makes it unlawful for employers and unions alike "to interfere with, restrain, or coerce employees" in the exercise of their rights to organize.<sup>2</sup> In interpreting that prohibition, courts and scholars have generally embraced a set of interrelated assumptions regarding the organizing process, workers' roles within that process, and the ideal conditions for autonomous employee choice. In particular, judges and commentators often assume (i) that individual workers' preferences are exogenous and relatively static; (ii) that union organizing is basically a process of aggregating individual workers' expressed preferences, and is best understood as a contest between unions and management in which workers' roles are limited to receiving information and making a decision; (iii) that workers decide whether to support unionization—or at least *should* make that decision—by weighing its costs and benefits in light of their individual self-interest; and (iv) that workers' autonomy is threatened not only by coercion but also by strong communal attachments and powerful emotional appeals from organizers and coworkers.

At least three areas of labor law doctrine reflect such assumptions. First, under the "laboratory conditions" doctrine, employer and union campaign tactics that are not "directed at employees' reasoning faculties" may constitute grounds for overturning election results.<sup>3</sup> This doctrine understands workers' preferences as a fact to be uncovered, and has at times led the National Labor Relations Board ("the Board") to prohibit union tactics that have the effect of building solidarity among workers.<sup>4</sup> Second, Congress and the Supreme Court have prohibited certain classes of strikes and boycotts on the grounds that they may "coerce" non-supportive workers, either physically or psychologically.<sup>5</sup> But they have prohibited those strikes outright rather than, for example, asking whether particular cases involved any violent or even remotely coercive behavior. The assumption seems to be that, due to strong interpersonal commitments, workers are psychologically incapable of crossing picket lines.<sup>6</sup> Third, the rule that employers typically must bargain only with unions that have won a secret-ballot election means employers may lawfully *refuse* to bargain with workers who present unambiguous evidence of majority support, such as signed authorization

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nurse, nevertheless, refused to meet with or talk to organizers. Eventually, my colleague tracked down the U.A.W. leader to ask for his help, but he refused. "If she starts standing up for herself at work," he said, "who knows what will happen at home."

<sup>2</sup> 29 U.S.C. § 158(a)(1) (2006) (employer prohibition); *see also* 29 U.S.C. § 158(b)(1) (2006) (unlawful for unions to "restrain or coerce" workers in exercise of rights to organize).

<sup>3</sup> *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

<sup>4</sup> *See* discussion *infra* Section I.A.i.

<sup>5</sup> *See* discussion *infra* Section I.A.ii.

<sup>6</sup> *See* discussion *infra* Section I.A.ii.

cards or a unanimously-supported strike. The Board and courts have reasoned, in part, that an election is required even in such circumstances, because workers may sign cards or strike based on social pressure, herd behavior, or incomplete analysis of unionization's costs and benefits.<sup>7</sup>

This view of the worker as a rationally choosing subject also informs prominent legal academic proposals to amend union certification laws, particularly in more recent treatments of these issues.<sup>8</sup> For example, scholars often treat organizing as a process of uncovering and aggregating workers' preferences toward unionization, and tend not to consider in detail workers' own roles in organizing campaigns.<sup>9</sup> Scholars across the ideological spectrum also view employer and union campaign tactics as problematic insofar as they disrupt workers' abilities to assess rationally the costs and benefits of unionizing. For example, progressive scholars have tended to argue that the law should accord employers no rights to communicate their views on unionization, arguing that employers' power over workers makes it impossible for workers and courts to reliably distinguish expressions of opinion or fact from veiled threats.<sup>10</sup> In contrast, scholars and commentators with closer connections to management have argued that such proposals would undermine employee free choice by restricting the information available to workers.<sup>11</sup> Both positions, in other words, assume that decisions are optimal when made after rational consideration of options with full information.

This case law and scholarship reflects, in part, the view—often attributed to liberal political theory, though more accurately attributed to the com-

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<sup>7</sup> See discussion *infra* Section I.A.iii.

<sup>8</sup> Most prominent law review articles on labor law reform embrace these assumptions to some extent, though this is especially true in the work of Benjamin I. Sachs and Matthew T. Bodie. See, e.g., Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 76–77 (2008); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 666 (2010). It is also apparent—with some important caveats noted *infra* Section I.B.—in the work of Craig Becker and Paul C. Weiler. See, e.g., Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 531 (1993); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983); see also James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828 (2005). Mark Barenberg's work is a notable exception to this trend. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 797 (1994).

<sup>9</sup> See discussion *infra* Section I.B.

<sup>10</sup> See discussion *infra* Section I.B.

<sup>11</sup> See, e.g., NLRB Implements Extraordinary Regulatory Overhaul to Election Procedures, MORGAN LEWIS (Dec. 21, 2011), <http://www.morganlewis.com/index.cfm/fuseaction/publication.print/publicationID/8e6685e8-04da-40c0-8ec2-c89736dd1cd0/> (minimizing employer involvement and reducing length of representation campaigns will “reduce the time available for employees to make an informed choice”); see also James Sherk, *Secret Ballot Protection Act*, HERITAGE FOUND. (Feb. 22, 2011), <http://www.heritage.org/research/reports/2011/02/secret-ballot-protection-act> (“Requiring a secret ballot election gives workers time to hear and reflect on the arguments made by both sides and then cast an informed vote.”).

munitarian critique of liberalism<sup>12</sup>—that individual selves are autonomous only when unencumbered by communal attachments, and that selfish pursuit of individual desire is normatively optimal.<sup>13</sup> As Michael Walzer recounts, the communitarian critique views liberalism as “founded on the idea of a presocial self, a solitary and sometimes heroic individual confronting society, who is fully formed before the confrontation begins.”<sup>14</sup> The case law and scholarship also reflect, in part, the rational actor model of behavior familiar from the contemporary social sciences. That model assumes that our preferences are stable, and that, in the aggregate, individuals can “perfectly process available information about alternative courses of action, and can rank possible outcomes in order of expected utility.”<sup>15</sup> It also tends not to inquire into the origins of our preferences—either remaining agnostic or assuming that preferences reflect interests that are self-evident to a rational actor<sup>16</sup>—and it accepts satisfaction of subjective individual preferences, “measured by willingness to pay,” as the proper basis for social and political decisions.<sup>17</sup> As Cass Sunstein argues, such a view of the individual subject and of collective choice processes informs various branches of contemporary political theory, including social choice theory and other “conceptions of

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<sup>12</sup> See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 7 (1990) (arguing that communitarian critique of liberal subjectivity is only “partly right”); *id.* at 6 (arguing that communitarian critique is not so much a refutation of liberalism as “a consistently intermittent feature of liberal politics and social organization”).

<sup>13</sup> See, e.g., MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 11–13 (2d ed. 1998) (stating that a “sociological objection” to liberalism holds that “the vaunted independence of the deontological subject is a liberal illusion”). *But see id.* at ix (expressing “unease” with application of the communitarian label to that book).

<sup>14</sup> Walzer, *supra* note 12, at 6, 20; *see also id.* at 9 (“We liberals are free to choose, and we have a right to choose, but we have no criteria to govern our choices except our own wayward understanding of our wayward interests and desires.”).

<sup>15</sup> Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989); *see also* Yoichai Benkler, *Law, Policy, and Cooperation*, in *GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION* 299, 299 (Edward J. Balleisen & David A. Moss eds., 2009) (examining various deviations from the model’s assumption of individual selfishness); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 322 (1977) (critiquing the classical model and exploring the role of commitments to social groups in individual behavior).

<sup>16</sup> See Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 4 (1987) (arguing that under the rational actor model, “[i]ndividuals, presumably, size up the situation, distinguish opposing interests, separate the interests of others from self-interest, and choose (or choose not to choose) the self”). Contrary to some critics’ beliefs, the model does not fail on its own terms simply because individuals in real world scenarios lack perfect information or may process it mistakenly, because “as a result of chance variation and market-based and related forms of social selection,” such impairments “can be expected to cancel each other out.” Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1074 (2006) (book review).

<sup>17</sup> Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 7 (1991).

politics that see the democratic process as an effort to aggregate individual preferences.”<sup>18</sup>

For ease of exposition, this Article uses the term “standard model of union organizing” (or “standard model”) to denote such interrelated assumptions about the union organizing process and about the proper preconditions for autonomous employee choice. It uses that term subject to two caveats. First, by no means do all scholars and judges embrace all such assumptions at all times. Second, by treating the (admittedly caricatured) liberal conception of the self together with the “rational actor model” from the social sciences, the “standard model” elides major differences between liberal, utilitarian, and libertarian theories. However, this elision should not undermine the overall argument, because this Article does not assert that the standard model of union organizing is normatively and empirically flawed *per se*. It asserts, more modestly, that the model is incomplete.

Drawing on sociology, unions’ organizing manuals, cognitive and social psychology, and personal experience, this Article outlines a different view of organizing campaigns and a different account of the relationship between law, organizing, identity, and preferences. It views organizing as a “struggle for hearts and minds,”<sup>19</sup> in which unions, worker leaders, and employers all seek to shape workers’ preferences by shaping their very identities. Organizers do much more than discuss unionization with workers and ask for their votes. They identify workers’ concerns; they link those concerns to particular management practices or to individual managers; they recruit pro-union workers to run the campaign within the workplace; and they press these and other workers to take collective action confronting management.<sup>20</sup> Often, if not always, this involves powerful emotional appeals. When successful, the result is a worker-led organization that actively represents workers’ interests well before certification. Organizers call this “acting like a union.”<sup>21</sup>

Organizers and pro-union workers utilize such tactics to overcome workers’ pre-existing preferences against or fears about unionization. Prior to a campaign, workers may oppose or favor unionization for various reasons.<sup>22</sup> Some of these reasons will not trigger concerns about autonomy, as where workers are ideologically or morally opposed to unionization or

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<sup>18</sup> *Id.* at 7; see also Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 144, 144 (Robert E. Goodin ed., 2006) (explaining that social choice theory and aggregative theories of democracy view politics as a means to the enactment of private interests).

<sup>19</sup> See Karen Brodtkin & Cynthia Strathmann, *The Struggle for Hearts and Minds: Organization, Ideology, and Emotion*, 29 LAB. STUD. J. 1, 3 (2004).

<sup>20</sup> See discussion *infra* Section II.B.

<sup>21</sup> See Gordon Lafer, *What’s More Democratic Than a Secret Ballot? The Case for Majority Sign-Up*, 11 WORKING USA: J. LAB. & SOC. 71, 85 (2008) (“It is common for union organizers to talk about the need for workers to ‘act like a union’ long before any election takes place.”).

<sup>22</sup> See discussion *infra* Section II.A (cataloging various reasons expressed preferences may not be autonomous).

where they favor unionization in general but decline to organize based on an accurate assessment of the risks entailed. But other reasons *will* raise concerns about autonomy. For example, workers may overestimate the risks entailed in unionizing, or their preferences may be adaptive to existing law. They may, for example, oppose unionization simply because they perceive it as unavailable. Workers may also come to believe certain facts or arguments simply because others in their social group do, or may come to embrace overly cautious or risky courses of action after deliberation with like-minded individuals. These phenomena—known as social cascades and deliberative polarization, respectively—are quite common within tightly knit social groups and likely play a key role in shaping workers' views both before and during organizing drives. By shaping workers' perceptions of their social group memberships and identities, the organizing tactics outlined above may in fact constitute efforts to trigger pro-union cascades and polarization and thereby alter workers' analyses of the risks and benefits of organizing.<sup>23</sup>

This account of the relationship between law, preferences, and organizing complicates the standard model of union organizing, particularly its association between dispassionate decision making and individual autonomy. This Article therefore argues that a realistic account of the preconditions for autonomous employee choice needs to grasp the degree to which background legal rules, social practices, and collective identity shape preferences. A legal regime dedicated to protecting free choice must enable employees to build collective power, even if that involves disruptive or emotionally charged collective action. In fact, a commitment to autonomous choice supports this conclusion, because choices cannot be autonomous when made under circumstances of severe substantive inequality, and workers' collective action places them on a more equal footing with management.<sup>24</sup> This is not, however, an argument that the law should prevent calm, rational individual consideration. Tensions between individual autonomy and collective empowerment are written into the basic fabric of labor law and probably cannot be definitively resolved.<sup>25</sup> To promote autonomous employee choice, the law should tilt back toward promoting collective empowerment, while also protecting individuals against collective action's attendant pressures by building time for individual reflection into the certification process.

Part I first outlines the law governing union certification. It traces how Congress, the Board, and the courts have embraced the assumptions outlined

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<sup>23</sup> Employers, of course, may do the same by seeking to portray unionization as futile or to treat the firm as an integrated community rather than an entity divided between workers and management.

<sup>24</sup> See discussion *infra* Section III.

<sup>25</sup> See 29 U.S.C. § 157 (2006) (protecting workers' rights to engage in concerted action); see also Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 *BUFF. L. REV.* 883, 887 (2005) (explaining that U.S. labor law forces workers to subordinate their individual voices in order to gain a collective voice in managerial decision making).

above and how they have shaped the law to promote dispassionate decision making and to effectively disempower workers and unions. It then summarizes academic and policy debate over labor law reform, which often reflect the same assumptions. Part II then discusses the relationship between preferences and organizing. It argues that workers' preferences are pervasively shaped by law and social practices—including organizing—and it recharacterizes union organizing as a process of building collective power through disruption. Part III brings these various threads together, questioning what remains of the assumptions underlying the standard model. It traces out unions' and employers' preference-shaping strategies in more detail, and argues that strong communal ties and emotional appeals are in part constitutive of employee autonomy. Finally, it sketches several potential labor law reforms—some mild, others utopian—that could better promote employees' collective action while also protecting employees' autonomy.

#### PART I. EMPLOYEES AS RATIONAL ACTORS IN LAW AND SCHOLARSHIP

The National Labor Relations Act of 1935, as amended, did not mandate unionization or any form of workplace representation.<sup>26</sup> Rather, the Act maintained the common law default rule of individual bargaining and established a process through which workers within particular worksites could choose to unionize.<sup>27</sup> The Act's passage followed decades of organizing efforts by industrial workers, as well as frequent disruptive, sometimes violent strikes, which were themselves exacerbated by frequent broad injunctions against workers' collective action.<sup>28</sup> In protecting employees' ability to unionize, the Act's drafters sought to promote several substantive goals. These goals included stabilizing capitalism by increasing workers' purchasing power and boosting aggregate demand, as well as "achieving industrial peace without undue sacrifice of personal and economic freedom."<sup>29</sup>

Accordingly, the Act protected workers' rights "to self-organization, to form, join, or assist labor organizations," and "to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or

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<sup>26</sup> Cf. Council Directive 94/45, art. 1, 1994 O.J. (L 254) 64, 66 (EC) (mandating workplace representation at certain large enterprises).

<sup>27</sup> See Sachs, *supra* note 8, at 664.

<sup>28</sup> See ARCHIBALD COX ET AL., LABOR LAW, CASES AND MATERIALS 15–39 (15th ed. 2011) (describing the history of and legal and political debate over labor injunctions in the 19th and early 20th centuries).

<sup>29</sup> *Id.* at 44. The Act's protection of employee free choice also reflected the labor movement's own longstanding political goal of preventing judicial interference with organizing efforts. See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128 (1991) (noting that the pre-Act labor movement was strongly focused on establishing its own legal legitimacy). The Act's protections of employee choice also reflected, in part, republican concerns about the tension between democratic citizenship and wage laborers' dependence upon employers. See Becker, *supra* note 8, at 524–27 (summarizing the pre-Act debate over compatibility of political democracy and wage labor).

protection.”<sup>30</sup> It also established the Board and empowered it to certify unions as workers’ exclusive bargaining agents,<sup>31</sup> and enumerated various unfair labor practices, including employer interference with organizing efforts.<sup>32</sup> That basic statutory structure has not changed, though Congress did alter various provisions of the Act in 1947’s Taft-Hartley Amendments.<sup>33</sup> Passed by a conservative coalition amid fears that the Wagner Act and New Deal labor policy had rendered unions too powerful, Taft-Hartley explicitly protected workers’ rights to refrain from unionizing, clarified that the Board could certify a union only following a secret-ballot election, ratcheted back workers’ powers to strike, and protected employers’ rights to communicate their opposition to unionization, so long as they did not threaten workers.<sup>34</sup>

In interpreting the Act’s provisions regarding workers’ rights to organize, Board members and judges have frequently adopted a particular model of the proper preconditions for autonomous choice: They have sought to enhance employee free choice by enabling workers to make calm, rational, and individualized decisions based upon their individual self-interest. This section traces such reasoning through three areas of doctrine: the Board’s regulation of employer and union speech during campaigns, the Supreme Court’s restrictions on workers’ powers to strike and picket, and the secret-ballot requirement itself. It then argues that scholars—while often critical of that doctrine—have nevertheless largely worked within the same model.

Interestingly, while judges tend to analyze such issues in terms of employee free choice, each area of doctrine implicates overt political questions regarding the balance of power between employers and unions. The secret-ballot requirement, for example, became the Board’s favored method of union certification only after more liberal practices sparked a political backlash from employers, Southern Democrats, and others.<sup>35</sup> Similarly, for each area of doctrine—campaign speech, strikes and picketing, and the secret-ballot requirement—employers have often defended their preferred rules in terms of goods other than employee free choice, including employers’ First Amendment rights and the purported economic effects of certain strikes.<sup>36</sup>

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<sup>30</sup> 29 U.S.C. § 157 (1940). That section was amended in 1947 to explicitly protect workers’ rights *not* to unionize or engage in concerted action. See Act of June 23, 1947, 61 Stat. 140 (codified as amended at 29 U.S.C. § 157 (2006)).

<sup>31</sup> See 29 U.S.C. § 159 (2006).

<sup>32</sup> The various unfair labor practices that the Act enumerates include coercing workers in the exercise of § 7 rights, 29 U.S.C. § 158(a)(1) (2006), and refusing to bargain in good faith, 29 U.S.C. § 158(a)(4) (2006).

<sup>33</sup> Other changes have taken place, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411, Pub. L. No. 86-257, 73 Stat. 519–46 (1959), though these are immaterial for present purposes.

<sup>34</sup> See 29 U.S.C. § 157 (2006) (providing that employees may refrain from unionization or collective action); 29 U.S.C. § 159(c)(1) (2006) (requiring secret ballots); 29 U.S.C. § 158(b)(4)(ii)(b) (2006) (prohibiting secondary boycotts); 29 U.S.C. § 158(c) (2006) (providing that employers’ have a right to communicate).

<sup>35</sup> See discussion *infra* notes 90–94.

<sup>36</sup> See discussion *infra* Section I.A.

This Article references such battles and arguments in the footnotes, but does not treat them in detail since the overall inquiry focuses upon legal actors' understanding of workers as rational actors, and because employers and their allies have often defended such proposals not as means to promote parochial interests, but as means to promote employee free choice.

Before proceeding, it should be helpful to summarize the organizing process under current law. A union or a group of workers seeking to unionize will typically solicit cards through which workers "designate the union as their bargaining representative."<sup>37</sup> Once a majority of workers has signed cards, the workers or the union may petition the Board for a secret-ballot election.<sup>38</sup> They may also request voluntary recognition from the employer, but the employer is under no obligation to extend recognition and may respond with a simple "no comment," at which point the union can either continue organizing or can petition for an election.<sup>39</sup> As Professor James Brudney has put it, "the election is thus a contest challenging the union's assertion that it enjoys majority support."<sup>40</sup> The average election is scheduled roughly six weeks after the petition is first filed, though longer intervals are not uncommon.<sup>41</sup>

During the period between filing and the holding of a secret-ballot election, "both union and employer vigorously campaign in an effort to influence the vote,"<sup>42</sup> though both are strictly prohibited from threatening or retaliating against workers based upon their position toward unionization, and from seeking to influence workers' views by promising benefits.<sup>43</sup> Employers are also strictly prohibited from terminating union supporters, though some have argued that the Board and the courts have difficulty deter-

<sup>37</sup> Brudney, *supra* note 8, at 824. I discuss the organizing phase in detail in Section III.

<sup>38</sup> *See id.* at 824–25.

<sup>39</sup> *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

<sup>40</sup> Brudney, *supra* note 8, at 824–25.

<sup>41</sup> *See* Sachs, *supra* note 8, at 666. Prior to scheduling such an election, the Board must hold a hearing between the union and the employer to resolve issues such as whether the union has proposed an appropriate bargaining unit. *See* 29 U.S.C. § 159(c)(1) (2006) (requiring a hearing); 29 U.S.C. § 159(b) (2006) (determining the bargaining unit). Becker and others have noted that employers can delay the process by raising issues at pre-election hearings regarding bargaining unit size and voter eligibility, and they may contest election results by refusing to bargain. *See* Becker, *supra* note 8, at 519 n.104 (discussing employer delay tactics). This reflects conventional wisdom among employers and anti-union consultants that delay works to the employer's advantage by giving it more time to campaign. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, 127 (1990).

<sup>42</sup> Weiler, *supra* note 8, at 1775.

<sup>43</sup> *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1963) (holding that it is an unfair labor practice to grant new benefits to workers just before election with the goal of influencing their votes); Wagner Elec. Corp., 167 N.L.R.B. 532, 533 (1967) (finding employer promises unlawful); Playskool Mfg. Co., 140 N.L.R.B. 1417, 1419 (1963) (finding employer threats unlawful). Unions are held to a similar standard. *See, e.g.,* NLRB v. Savair Mfg. Co., 414 U.S. 270, 280–81 (1973) (holding that the union's promise to waive initiation fees constituted an unlawful promise of benefit).

ring such acts.<sup>44</sup> Unions, of course, also break the law: Workers and former organizers have described a range of unseemly tactics used to obtain card signatures, ranging from misinformation to threats of violence.<sup>45</sup> That said, such claims remain relatively rare.<sup>46</sup> In any event, depending on the legality of campaign conduct, after the election the Board may certify the election results, order a new election, or in rare instances order an employer to bargain if it determines that unfair labor practices have made a fair election impossible.<sup>47</sup>

### A. *The “Standard Model” in Labor Law Doctrine*

#### i. *The Regulation of Campaign Messages*

In addition to policing threats and retaliation, the Board has long sought to promote autonomous employee choice by regulating union and employer speech during organizing drives. While in its early days the Board enforced a nearly *per se* rule against employer involvement on the grounds that workplace power dynamics made employer communications inherently coer-

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<sup>44</sup> NLRB v. Republic Steel Corp., 311 U.S. 7, 10–12 (1940) (finding that the Act is “essentially remedial” and confers no power on the Board to shape or impose punitive measures); *see also* Weiler, *supra* note 8, at 1790 n.70 (stating that the Act requires “subjective unlawful intent”); *id.* at 1790–92 (noting that penalties are too small to deter when compared to the likely cost of a union contract). The Board may issue cease-and-desist orders and remedial orders, and it may order reinstatement and back pay for wrongful discharges. *See* 29 U.S.C. § 160(c) (2006); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). But the Act makes no provision for enhanced damages, and unlawfully terminated workers must seek to mitigate their damages by finding another job while the Board’s processes play out. *See* 29 U.S.C. § 160(c) (2006) (mentioning back pay but no additional fines or multipliers); NLRB v. Phelps Dodge Corp., 313 U.S. 177, 197 (1941) (establishing the duty to mitigate); *cf.* Fair Labor Standards Act, 29 U.S.C. § 216 (2006) (providing for double damages). Enforcing NLRB orders requires application to a court of appeals, which adds delays. 29 U.S.C. § 160(e) (2006). While the precise incidence of retaliation remains in dispute, *see* Sachs, *supra* note 8, at 684 (summarizing data on prevalence of retaliatory terminations), there is little disagreement regarding its potency as an anti-union tactic. *See, e.g.*, Stephen B. Goldberg et al., *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564, 564 (1981) (arguing that employer communications should remain unregulated, but supporting faster and more powerful remedies for employer illegality).

<sup>45</sup> *See* HCF Inc., 321 N.L.R.B. 1320, 1320 (1996) (addressing threats of violence by an employee); *Strengthening America’s Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 5 (2007) (statement of Karen M. Mayhew, Employee, Kaiser Permanente) (misleading workers about purpose of card signatures); *id.* at 6–7 (statement of Ricardo Torres, Former Union Organizer, United Steelworkers) (threatening migrant workers with deportation).

<sup>46</sup> *See* Sachs, *supra* note 8, at 669 n.46; *see also* Adrienne E. Eaton & Jill Kreisky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 169–71 (2009) (finding little to no pressure from unions or coworkers in card check campaigns and significant management pressure in both card check and election campaigns).

<sup>47</sup> *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (holding bargaining order appropriate where employer unfair labor practices have made fair election impossible); COX ET AL., *supra* note 28, at 66–76 (summarizing the Board’s procedures); Becker, *supra* note 8, at 516 n.91.

cive,<sup>48</sup> in 1945, the Supreme Court held that non-threatening employer speech enjoyed First Amendment protection,<sup>49</sup> a policy later reflected in the Taft-Hartley Amendments.<sup>50</sup> As Becker notes, this created an interpretive thicket for the Board: Could it continue its pre-Taft-Hartley practice of policing employers' campaign tactics, and if so on what grounds?<sup>51</sup> In 1948's *General Shoe*—a case that remains good law today—the Board established it would continue to monitor employers' tactics by overturning election results where campaign messages were not “directed at employees' reasoning faculties,”<sup>52</sup> even if those messages did not rise to the level of threats or promises of benefits.<sup>53</sup> In the process, the Board analogized its role in representation campaigns to that of a scientist investigating some physical fact about the world. It would thereafter seek “to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”<sup>54</sup>

Several elements of the laboratory conditions doctrine are noteworthy. First, it explicitly seeks to enable a sober and rational analysis of the costs and benefits of unionization. The leading casebook's description of the preconditions of autonomous choice, which draws explicitly upon that doctrine, is worth quoting at length:

Congress contemplated that [employees] should be permitted to make a reasoned choice concerning this issue. Such a choice implies that employees should have access to relevant information, that they should use this data to estimate the probable consequences if the union is selected or rejected, and that they should appraise these consequences in the light of their own preferences and desires to determine whether a vote for the union promises to promote or impair their self-interest. This definition provides a key to the meaning of a free and unrestrained choice under the

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<sup>48</sup> See *Am. Tube Bending Co.*, 44 N.L.R.B. 121, 129 (1942) (finding that an employer must maintain “complete neutrality” with respect to an election); see also Becker, *supra* note 8, at 536–43 (discussing *American Tube* and subsequent cases).

<sup>49</sup> See *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945); Becker, *supra* note 8, at 544–45 (discussing *Thomas*).

<sup>50</sup> 29 U.S.C. § 158(c) (2006) (providing that an employer maintains the right to express “any views, argument, or opinion” in whatever form, as long as that expression “contains no threat of reprisal or force or promise of benefit”).

<sup>51</sup> Becker, *supra* note 8, at 547–48.

<sup>52</sup> *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

<sup>53</sup> While the Board did not state as much in the *General Shoe* decision, its power to oversee the election process arose under Section 9 of the Act. See 29 U.S.C. § 159 (2006). As Samuel Estreicher explains: “The [Supreme] Court has not purported . . . to alter the scope of the Board's authority, first announced in *General Shoe Corp.*, to establish under [S]ection 9 the preconditions (“laboratory conditions”) under which it will certify the results of an election . . . .” Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 14 (2009). Hence, such actions did not run afoul of Section 8(c)'s protection of non-coercive employer speech. See 29 U.S.C. § 158(c) (2006).

<sup>54</sup> *General Shoe*, 77 N.L.R.B. at 127.

statute. Ideally, at least, the employees should be free from restrictions which unduly obstruct the flow of relevant information, [as well as threats and retaliation].<sup>55</sup>

In implementing *General Shoe*, the Board has repeatedly focused on the effect of particular messages upon individual workers' abilities to make such a rational choice. As Becker notes, in cases immediately after *General Shoe*, the Board often focused less on the content of the employer's message, and more upon the location in which it was delivered, which the Board treated as evidence of whether "the employer's authority precluded free discussion of the representation question."<sup>56</sup> Later cases focused more directly on the content of the employer's message. For example, in 1967, the Board overturned an election because the company president gave a speech implying that unionization could require closure of the plant. That speech, the Board said, was "a display of enormous economic power, calculated to put the fear of unemployment in the minds of employees. Such a demonstration is unnecessary to a reasoned discussion of the pros and cons of unionism," as it could "only tend to make employees believe that, should they incur the employer's displeasure, he could easily find a formidable way to express his dissatisfaction."<sup>57</sup> Other cases do not involve veiled exertions of employer power so much as purported psychological effects of particular tactics. For example, the Board has often held that appeals to racial prejudice prevent workers' "sober and thoughtful" exercise of the franchise.<sup>58</sup> The Board also prohibits all campaigning at polling places, on the logic that doing so will "permit voting to take place in an atmosphere permitting sober reflection and calm deliberation."<sup>59</sup>

While most cases seek to protect employees against inflammatory messages from employers, the Board has generally held unions to the same standards. For example, employers and unions alike are prohibited from re-

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<sup>55</sup> COX ET AL., *supra* note 28, at 80; *see also* Barenberg, *supra* note 8, at 794 (citing identical text from prior edition).

<sup>56</sup> Becker, *supra* note 8, at 553.

<sup>57</sup> Thomas Indus., Inc., Thomas Prods. Co. Div., 167 N.L.R.B. 732, 733 (1967); *see also* Julius G. Getman et al., *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1476 (1975) (discussing *Thomas Products* and similar cases and quoting same language).

<sup>58</sup> Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962); *see also* Case Farms of N.C., Inc. v. NLRB, 128 F.3d 841, 849 (4th Cir. 1997) (upholding the Board's finding that it is not a *Sewell* violation to distribute a flyer to Latino workers stating that workers at another of the employer's plants were terminated and replaced by Latinos who would work for less); NLRB v. Eurodrive, Inc., 724 F.2d 556, 560 (6th Cir. 1984) (finding it a violation of the *Sewell* standard for an organizer to make a tacit racial appeal to white workers); NLRB v. Sumter Plywood Corp., 535 F.2d 917, 928 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) (finding that appeals to black worker solidarity were not violations of the *Sewell* standard).

<sup>59</sup> NLRB v. Hudson Oxygen Therapy Sales Co., 764 F.2d 729, 733 (9th Cir. 1985). The leading case is *Milchem, Inc.*, 170 N.L.R.B. 362, 362-63 (1968). *See also* Robert's Tours, Inc. v. NLRB, 578 F.2d 242, 244 (9th Cir. 1978) ("The purpose of the no campaigning rule near the polls is to allow voters quiet moments of appropriate reflection and a peaceful atmosphere for the casting of their votes.").

quiring workers to listen to campaign messages en masse in the twenty-four hours prior to a vote, on the grounds that—because they generally cannot be rebutted—such last-minute speeches have an “unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.”<sup>60</sup> As Becker notes, this logic is strained because unions have no power to compel workers to attend such a meeting, while employers can make attendance mandatory.<sup>61</sup> Nevertheless, as recently as 1997, one circuit court found that broadcasting pro-union music through a sound truck on election day disturbed laboratory conditions, stating that “we cannot imagine what would more create ‘mass psychology’ . . . than these lyrics, which, especially when set to music, appeal to the most visceral emotions of the workers.”<sup>62</sup> The logic seems to be that solidaristic messages override workers’ rational faculties and compel them to support unionization.

Two other aspects of the laboratory conditions standard are worth noting. First, it fails to capture the hurly-burly of democratic politics. As Barenberg and others have noted, it imagines workers’ preferences as a fixed and determinate substance to be isolated and identified.<sup>63</sup> This gives an incomplete picture of the organizing process and the ways in which solidarity may be built and eroded during campaigns, as detailed in Section II. Similarly, the laboratory conditions model misunderstands the organizing process as a contest between unions and management, with the workers’ role limited to receiving and processing information regarding the likely results of unionization. While such a focus on unions and employers rather than workers may be an inevitable effect of a litigation process in which unions and employers challenge one another’s conduct, that focus sits uneasily with the practical realities of union organizing drives, as described in Section II.

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<sup>60</sup> *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953) (finding captive audience meetings presumptively unlawful if held within twenty-four hours of the vote). Unions are held to the same standard. See *Indus. Acoustics Co. v. NLRB*, 912 F.2d 717, 721 (4th Cir. 1990) (holding that the Board had to apply the *Peerless Plywood* rule to a union that utilized a sound truck to broadcast messages to workers on the day before the election).

<sup>61</sup> See Becker, *supra* note 8, at 569–77 (outlining the doctrine that holds unions and employers to the same standard).

<sup>62</sup> *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 896 (3d Cir. 1997). This author cannot imagine many people finding those lyrics incendiary. What seem like the most aggressive lines follow: “As long as we’re together, our numbers will increase / and this will be our motto: prosperity and peace / Now all for one and one for all is something you have heard / But when the Teamsters say it, the boys mean every word.” *Id.* at 892. The full lyrics are reprinted in the opinion. *Id.*; cf. *NLRB v. Glades Health Care Ctr.*, 257 F.3d 1317, 1320 (11th Cir. 2001) (finding that conducting union rallies across the street from the plant on the day before an election was not a captive audience meeting under *Peerless*, nor did it create any risk of “mass psychology” since workers were not compelled to attend).

<sup>63</sup> See Becker, *supra* note 8, at 551 (arguing that the “uninhibited desires” of workers are not “a fixed substance that can be distilled through repeated trials”); see also Barenberg, *supra* note 8, at 794–96 (contrasting “laboratory conditions” with an “ideal of egalitarian deliberation”); cf. Bodie, *supra* note 8, at 38 (arguing that the model treats workers’ desires “as an essence to be distilled,” when the essence could only be workers’ desires for representation services).

Second, while *General Shoe* remains good law, the laboratory conditions standard has been applied intermittently and inconsistently, with the Board often treating union elections less like an experiment and more like a political campaign.<sup>64</sup> For example, employers may telegraph hard bargaining tactics by noting their right to ask for wage and benefit reductions,<sup>65</sup> and they may predict plant closure or negative economic consequences so long as such predictions are based in fact.<sup>66</sup> Employers may also utilize tactics calculated to display their near-plenary power over the worksite, rather than to communicate discrete information that could inform a rational calculus.<sup>67</sup> Granted, even such *laissez-faire* opinions may be consistent with a commit-

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<sup>64</sup> See, e.g., Becker, *supra* note 8, at 516–23 (discussing the “political analogy” that has competed with laboratory conditions in the Board’s campaign jurisprudence).

<sup>65</sup> See *Custom Window Extrusions, Inc.*, 314 N.L.R.B. 850, 851 (1994); *Fern Terrace Lodge*, 297 N.L.R.B. 8, 8 (1989); see also *Be-Lo Stores v. NLRB*, 126 F.3d 268, 285–86 (4th Cir. 1997) (explaining that an employer may distribute mock pink slips stating: “Dear Unionized Employees: I regret to inform you that because we have lost our ability to compete in this extremely competitive market, we shall be forced to close this store and put you out of work,” and holding that “[a]t worst, the pink slip flyer was . . . a prediction, based upon the experiences of similarly situated stores, of the probable economic consequences for Be-Lo and its employees if Be-Lo were to become unionized . . . .”, which “constituted free speech and legitimate propaganda”); *Medieval Knights, LLC*, 350 N.L.R.B. 194, 194–95 (2007) (finding it lawful for a consultant to tell employees that “by giving into lesser items or addendums on the contract, [an employer] would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything . . . not really getting anything done”); *John Wiley & Sons, Inc., Mock Negotiations: An Excellent Campaign Tactic*, MGMT. REP. FOR NON-UNION ORGS., Feb. 2000, at 5 (“One of management’s most important duties during the preelection period is to convince employees that selecting a union does not mean any automatic improvements in wages or benefits. Instead, all subjects must be negotiated, the union must ask for improvements, and during the negotiations process, the company has the right to say no.”).

<sup>66</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (finding predictions acceptable so long as they are based on fact); *Crown Bolt, Inc.*, 343 N.L.R.B. 776, 779–80 (2004) (reversing prospectively *Springs Industries, Inc., Bath Fashions Division*, 332 N.L.R.B. 40 (2000) which placed the burden to prove the dissemination of threats of plant closure and their impact on the election on the objecting party); see also *Int’l Union, UAW v. NLRB*, 834 F.2d 816, 819 (9th Cir. 1987) (holding that company may claim a vote against a union will “put the company on the road to success”); *Tri-Cast, Inc.*, 274 N.L.R.B. 377, 378 (1985) (“We cannot stay healthy with union restrictions. We are much too small.”); Sachs, *supra* note 8, at 690 (explaining that the Board has often permitted companies to make such predictions even without the type of evidence *Gissel* seems to require).

<sup>67</sup> See *Lechmere, Inc. v. NLRB*, 52 U.S. 527, 541 (1992) (holding that an employer may exclude non-employee organizers from the premises when alternative means of communication with employees are available); *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364–65 (1958) (finding that an employer may distribute anti-union literature while preventing employees from distributing any literature at all when no evidence is raised of an unfair labor practice); *F.W. Woolworth Co.*, 251 N.L.R.B. 1111, 1112–13 (1980) (finding that an employer may lawfully prohibit all questions at a meeting); *Beaunit Corp., Luxuray of N.Y. Div.*, 185 N.L.R.B. 100, 103 (1970) (finding that an employer may exclude union supporters from showing anti-union propaganda); *Litton Systems, Inc.*, 173 N.L.R.B. 1024, 1029 (1968) (leaving or failing to attend an anti-union speech can be used as one ground for terminating an employee); *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948) (holding that outside of the twenty-four hour pre-vote window, an employer may hold mandatory one-on-one or workplace-wide meetings where they communicate their opposition); see also *J.P. Stevens & Co.*, 219 N.L.R.B. 850, 850 (1975) (finding that an employer may terminate pro-union workers who plan to protest at a captive audience meeting).

ment to rational employee choice, for they may show what sort of bargaining partner an employer may be.<sup>68</sup> Richard Epstein has made precisely this argument,<sup>69</sup> which I discuss in more detail in Parts II and III. But other commentators have argued that such messages and tactics are inconsistent with employee autonomy because workers may well interpret them as tacit threats, and may view employers' heightened regulation of work space during campaigns as a sign that unionization is futile.<sup>70</sup> They have accordingly criticized the Board's elections jurisprudence as "internally inconsistent."<sup>71</sup>

ii. *The Regulation of Collective Action During Organizing Drives*

Similar fears about the need for calm and rational decision making—and related fears about the coercive effect of strong group identifications—have informed the regulation of strikes and picketing.<sup>72</sup> While outright bans on labor picketing are unconstitutional, the Supreme Court has granted less First Amendment protection to labor picketing than to virtually identical picketing by civil rights and other organizations, seemingly on the grounds

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<sup>68</sup> A similar rationale may underlie the Supreme Court's application of the "actual malice" standard to defamation cases arising out of labor disputes. See *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 65 (1966) (adopting the standard from *New York Times v. Sullivan*, 376 U.S. 254 (1964), not by "constitutional compulsion," but "to effectuate the statutory design with respect to preemption"); see also *id.* at 62 (acknowledging that debate in union campaigns "should be uninhibited, robust, and wide-open"); *id.* at 60 (noting that the Board and courts should generally "leav[e] to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements").

<sup>69</sup> Epstein writes as follows:

Employer speech provides valuable information to workers. Workers need to be able to form an educated view on the long-term implications of union representation, which includes some estimate as to how well employees think the union and employer will work together on points of common concern. . . . The relevant information includes some sense of the employer's reaction to the initial contract negotiations, ongoing informal adjustments, and future contracts.

RICHARD EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 25* (John M. Olin Law & Econ. Working Paper 2d. Series, No. 452, Jan. 2009).

<sup>70</sup> See Becker, *supra* note 8, at 576 (arguing that the Board has pursued a misguided approach in regulating both union and employer conduct with equal strictness, failing to adequately recognize employers' disparate power over workers).

<sup>71</sup> See *id.* at 497; see also Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 42–45 (1964) (discussing inconsistencies within Board doctrine).

<sup>72</sup> The doctrine is complicated—as Karl Klare has put it, labor law reflects "a conception of legitimate collective action that simultaneously encourages and confines worker self-expression through concerted activity and industrial conflict." Karl Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 61, 71 (David Kairys ed., 1990) (emphasis in original). For example, while employers may not retaliate against or terminate workers who strike in protest of unfair labor practices, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956), and workers are privileged, for a certain time, to peacefully picket worksites where they are seeking recognition, 29 U.S.C. § 158(b)(7)(C) (2006), employers may permanently replace workers who strike for recognition or for economic reasons, a fate that is often indistinguishable from termination, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–46 (1938).

that workers are emotionally or psychologically incapable of crossing a picket line.<sup>73</sup>

For example, concurring in a 1942 case, Justice Douglas described picketing 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.”<sup>74</sup> While Douglas may have been referring to the possibility that picketing workers project a physical threat,<sup>75</sup> subsequent cases have pushed in a somewhat different direction.<sup>76</sup> For example, in 1949, the Court referred to Douglas’s reasoning in upholding an injunction against picketing that sought to violate state antitrust law, but without any finding that the picketing was physically threatening.<sup>77</sup> In fact, the Court held that the picketing was unlawful—not because of any threats—but solely because it sought an unlawful objective.<sup>78</sup> Similarly, in 1957, Justice Frankfurter cited Douglas’s concurrence in upholding an injunction against picketing for the purpose of “coercing, intimidating and inducing the employer to force, compel, or induce its employees” to join a union.<sup>79</sup> Frankfurter also cited a wide array of cases which, he argued, justified injunctions against non-violent picketing so long as it threatened some important state policy—yet Frankfurter did not explain why picketing was *per se* problematic without a physical threat.<sup>80</sup> Finally, in a 1980 case, Justice Stevens wrote that picketing

<sup>73</sup> Compare cases cited *infra* notes 75–81, with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) (overturning the convictions of civil rights boycotters in Claiborne County, Mississippi, despite threats and acts of violence by the boycotters).

<sup>74</sup> *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring).

<sup>75</sup> See *Thornhill v. Alabama*, 310 U.S. 88, 105–06 (1940) (holding outright bans on picketing unconstitutional, noting the importance of labor being able to appeal to the public, and embracing the marketplace of ideas rationale); cf. *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 318–19 (1940) (Reed, J., dissenting) (comparing picketing that threatens violence with picketing that proffers “an appeal to reason and sympathy”).

<sup>76</sup> See *Int’l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 290–94 (1957) (reviewing cases upholding injunctions against picketing).

<sup>77</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949) (“A concurring opinion in the *Wohl* case . . . pointed out that picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation.”).

<sup>78</sup> See *id.* at 497–98:

It is contended that the injunction against picketing adjacent to Empire’s place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. . . . But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. . . . In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

<sup>79</sup> *Vogt*, 354 U.S. at 285; see also *id.* at 289 (citing *Wohl*, 315 U.S. at 776 (Douglas, J., concurring)).

<sup>80</sup> See *id.* at 293 (establishing through cases that “a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts,

“calls for an automatic response to a signal rather than a reasoned response to an idea,”<sup>81</sup> and compares unfavorably with hand billing, the effectiveness of which “depend[s] entirely on the persuasive force of the idea.”<sup>82</sup>

On its face, Stevens’s language is ambiguous—it could refer to the potentially coercive effect of mass picketing, or it could indicate that workers as a class are somehow incapable of crossing even a non-coercive picket line. Given the line of cases enjoining labor picketing absent any evidence of physical intimidation, various commentators, including Laurence Tribe, have interpreted Stevens to mean the latter. Tribe, for example, has read the cases to imply that “picketing bypasses viewers’ faculties of reason and, thus, in a sense brainwashes them” into respecting a picket line or complying with a boycott.<sup>83</sup> He and others have also criticized the Court for applying a different standard to labor picketing than to picketing by other groups. For example, in *NAACP v. Claiborne Hardware*, the Court, led by Justice Stevens, overturned the criminal convictions of civil rights boycotters despite clear threats and violent acts, as well as “[e]vidence that fear of reprisals caused some black citizens to withhold their patronage” from businesses targeted by the boycotters.<sup>84</sup> The Court held that all the peaceful activities were protected under the First Amendment, and that liability for individual acts of violence could not be attributed to the NAACP as a whole, nor to the boycotters in general. The political nature of the demands in *Claiborne* provides no grounds for such differential protection, given that in a

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could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy”).

<sup>81</sup> *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring); see also James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 *HASTINGS CONST. L.Q.* 189, 221–22 (1984) (noting that there was no evidence “that the picketing [in *Safeco*] had been physically coercive, or even that the pickets had persuaded anyone to join the boycott”). But see *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) (finding peaceful hand billing protected under the First Amendment, and distinguishing *Safeco* on grounds that handbills are “much less effective than labor picketing because they depend entirely on the persuasive force of the idea”).

<sup>82</sup> *Safeco*, 447 U.S. at 619 (Stevens, J., concurring); see also *Int’l Longshoremen’s Ass’n v. Allied Int’l*, 456 U.S. 212, 226 n.26 (1982).

<sup>83</sup> LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 200 (1985); see also Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 *MD. L. REV.* 4, 13–14 (1984) (asking whether doctrine assumes “that people will respond to a picket line according to their views of labor rather than to the message contained on any sign”); *id.* at 19–20 (noting that cases “manifest a common, stereotyped, and paternalistic vision of workers as people whose decisions are not made on the basis of ideas and persuasion but on the basis of fear, coercion, and discipline”).

<sup>84</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 (1982). According to the County Sheriff, NAACP leader Medgar Evers, in a speech designed to shore up support for the boycott, “told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him*” and that “any ‘uncle toms’ who broke the boycott would ‘have their necks broken’ by their own people.” *Id.* at n.28.

decision handed down a few months prior, the Court had found unlawful a labor boycott with an avowed political purpose.<sup>85</sup>

A similar logic has at times informed restrictions on strikes. For example, Congress has permitted employers to obtain fast injunctive relief against certain forms of recognitional picketing and against secondary boycotts (actions in which workers seek to apply economic pressure to parties who have contractual relationships with those workers' employer). The theory is that "a union must be immediately restrained from using self-help to force recognition by an employer, because such 'top-down organizing' obviously threatens employee self-determination."<sup>86</sup> Yet, as Paul Weiler notes, the law simply does not respond "with the same alacrity when the coercion is by the employer" rather than the union.<sup>87</sup> Moreover, even granting that such tactics may coerce unwilling workers, blanket prohibitions risk overbreadth and paternalism: Many workers will welcome the job action, while others will simply ignore it. The restrictions therefore will likely make it more difficult for workers to organize, despite being defended on grounds of protecting employees' ability to freely choose unionization.

### iii. *The Secret-Ballot Requirement*

Finally, concerns that strong group commitments threaten individual autonomy underlie a longstanding rule that governs this entire process: An employer generally need not bargain with a union unless and until it wins a secret-ballot election.<sup>88</sup> To understand this rule's importance to organizing drives, it may help to reframe the question as follows: If all the workers within a shop "sign statements saying they are forming a union and want to commence good faith negotiations," and the employer has no good faith doubt about their sincerity, why does the law permit the employer simply to refuse?<sup>89</sup>

This was not always the rule. As originally passed, the Act empowered the Board to certify a union either through "a secret ballot of the employ-

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<sup>85</sup> See *TRIBE*, *supra* note 83, at 202; Pope, *supra* note 81, at 2254 (discussing *International Longshoremen's Ass'n*, 456 U.S. 212).

<sup>86</sup> Weiler, *supra* note 8, at 1799.

<sup>87</sup> *Id.*

<sup>88</sup> *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974). This rule does have exceptions. Employers may voluntarily recognize unions after card check or a recognitional strike, and where serious unfair labor practices have made a fair election impossible the Board may issue a bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). A duty to bargain may also arise as a result of successorship (the purchase or corporate transfer of a company, some of whose employees are unionized), *see, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 30 (1987), or a valid collective bargaining agreement may contain a clause requiring the company to recognize a union based on card check in stores acquired or opened at a later date, *see, e.g., Shaw's Supermarkets & United Food & Commercial Workers Union Local 791*, 343 N.L.R.B. 963 (2004) (addressing specifically a so-called "after-acquired stores" clause).

<sup>89</sup> Lafer, *supra* note 21, at 79.

ees” or via “any other suitable method to ascertain such representatives.”<sup>90</sup> In its early days, nearly a quarter of the Board’s certifications relied on evidence other than elections, such as cards, affidavits, evidence of strike participation, petitions, and hearing testimony.<sup>91</sup> The Board did not begin requiring a secret ballot until 1939,<sup>92</sup> and did so “under intense political pressure” from various parties—including employers, Republicans, and Southern Democrats—who criticized it for actively promoting collective bargaining.<sup>93</sup> Congress later memorialized that policy in the Taft-Hartley Amendments.<sup>94</sup>

Despite the politicized origins of the secret-ballot requirement, courts and commentators have often defended it—not on the grounds that permitting card check or other open decision making methods would render unions too powerful—but rather on the grounds that the secret ballot better protects employee free choice by allowing workers to unionize only after sober consideration of costs and benefits. In a 1954 case, for example, Justice Frankfurter defended secret-ballot elections on the grounds that they serve what we might call the “cautionary” function of ensuring that workers have carefully considered their decisions.<sup>95</sup> An election, he wrote, “is a solemn and costly occasion, conducted under safeguards to voluntary choice.”<sup>96</sup> The fact that “the choice of the voters in an election binds them for a fixed time,” he added, “promotes a sense of responsibility in the electorate.”<sup>97</sup> It seems fair to read into this language an implication that workers need to be

<sup>90</sup> Becker, *supra* note 8, at 505; *see also id.* at n.47 (explaining William M. Leiserson’s argument that an election is not necessary after strikes in which a supermajority walked out: “[Y]ou do not have to have an election to determine what the 900 want. They are telling you. It is silly to go through the election business then.”).

<sup>91</sup> *See id.* at n.45, n.48 and cases cited therein; *see also* JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947*, at 20 (1981) (citing other similar decisions by the Board).

<sup>92</sup> *See In re Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939).

<sup>93</sup> Becker, *supra* note 8, at 508–09; *see also* MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 149–51 (1994) (discussing other means through which the early Board favored unions and describing Board staffers at the time “as missionaries for worker rights and trade unionism”). Congress later memorialized that policy in the Taft-Hartley Act. 29 U.S.C. § 185 (2006).

<sup>94</sup> *See* 29 U.S.C. § 401 (2006). *But see In re Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949) (holding that the employer committed an unfair labor practice by refusing to bargain with a union that presented evidence of majority support, where employer had no good faith doubt regarding that evidence).

<sup>95</sup> *See* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 635 (1982) (noting “cautionary” function of consideration doctrine and other contractual formalities) [hereinafter Kennedy, *Distributive and Paternalistic Motives*]; Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 102 (2000) (arguing that consideration doctrine imposes some formal requirements in part to ensure that parties “thought carefully before making the kind of promise in question”) [hereinafter Kennedy, *Will Theory*].

<sup>96</sup> *Brooks v. NLRB*, 348 U.S. 96, 99 (1954).

<sup>97</sup> *Id.* at 99; *see also* Bok, *supra* note 71, at 50 (noting that workers’ backgrounds and education will often prevent them from analyzing “the various factors in [a union] election with great care,” and lamenting the fact that workers’ decisions to unionize are often “not

protected against tendencies toward herd behavior. Workers who must make a decision at a certain time, and who know that decision will be binding, Frankfurter seems to say, will not unionize or decertify a union based on fleeting impulses.<sup>98</sup>

Similar arguments regarding information receipt and peer pressure are common in recent debates over card check certification<sup>99</sup> and debates over the related issue of when and whether the Board should issue a bargaining order based upon evidence that an employer's unfair labor practices have undermined a once-valid card majority and made a fair election impossible.<sup>100</sup> Those concerns also informed 1974's *Linden Lumber*, in which the Supreme Court held that an employer need not recognize a union—or even file for an election—when faced with a demand for recognition and evidence of majority support such as card signatures or a strike.<sup>101</sup> The *Linden* Court reasoned that “[a]n employer may . . . have valid objections to recognizing a union on [the] basis” of cards or a strike.<sup>102</sup> Furthermore, the Court argued, “[f]ear may indeed prevent some from crossing a picket line; or sympathy for strikers, not the desire to have the particular union in the saddle, may influence others.”<sup>103</sup> Later courts have made clear that, since such an employer does not commit an unfair labor practice, a subsequent recogni-

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based on logical reasoning in which self-interest figures to a large degree, but upon expediency—a reaction to the pressures of the moment”).

<sup>98</sup> See Kennedy, *Will Theory*, *supra* note 95, at 97 (arguing that Lon Fuller's contribution in *Consideration and Form* was to suggest that “even after the demise of the will theory, a ‘principle of private autonomy’ was and should be the key consideration in private law theory”).

<sup>99</sup> See Bodie, *supra* note 8, at 76–77 (noting risk that neutrality and card check agreements may limit information obtained by employees); Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success*, 112 *ECON. J.* 344, 350 (2002) (arguing that “peer pressure from fellow workers” may hinder employee choice under card check); Daniel Yager & Joseph J. LoBlue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 *EMP. REL. L.J.* 21, 29 (1999) (explaining that card check limits information upon which workers make decisions).

<sup>100</sup> The federal courts have long viewed card signatures with suspicion, and in the 1960s often described them as “notoriously unreliable”—language which originated as dicta in cases addressing situations where two unions were competing for the workers' loyalty, and became accepted wisdom with regard to all organizing efforts among the circuit courts in the late 1960s. *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965) (holding that the Board's “assessment” that cards are “notoriously unreliable” “cannot logically be said to have no bearing” even where only one union is involved); *Sunbeam Corp.*, 99 N.L.R.B. 546, 550–51 (1952) (describing cards as “notoriously unreliable” where two unions are competing). Several cases making the same argument were consolidated for argument in *NLRB v. Gissel Packing*, where the Court held that cards, while “admittedly inferior to the election process,” may nevertheless be “the most effective—perhaps the only—way of assuring employee choice” where employer unfair labor practices have disrupted the election process. 395 U.S. 575, 602–03 (1969).

<sup>101</sup> 419 U.S. 301 (1974).

<sup>102</sup> *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974).

<sup>103</sup> *Id.* Importantly, the dissenting justices, while arguing that employers should be required to recognize unions based on “convincing evidence” in certain instances, agreed that secret-ballot elections had the advantage of “ensuring a choice that is free from the influences of mass psychology.” *Id.* at 316, 317 n.6 (Stewart, J., dissenting).

tional strike will be “unprotected”; therefore, the employer will lawfully be able to permanently replace the striking workers.<sup>104</sup> Even if such a strike cannot be enjoined, then, it is very risky for the workers involved.

From the perspective of workers who have willingly signed authorization cards or who have gone on strike, the secret-ballot requirement may seem paternalistic, particularly in light of workers’ often well-founded fears that public support for unionization will invite the employer’s ire and may even lead to their termination.<sup>105</sup> In fact, the secret ballot is structurally similar to some other “cooling-off periods” established by legislatures to protect individuals from the negative consequences of decisions made while in “transient emotionally or biologically ‘hot’ states.”<sup>106</sup> While clearly paternalistic, such rules are relatively uncontroversial where they affect parties asymmetrically based on their likelihood of regretting prior decisions.<sup>107</sup> For example, a longtime couple that decides to marry will generally be happy to wait a few days between obtaining a license and formalizing their marriage, while a consumer who realizes she cannot afford a new car will benefit from laws enabling her to renege within a set period.<sup>108</sup>

Functionally, the secret ballot requirement requires a cooling-off period of the delay-before-consummation type: Workers wait weeks or even months between gaining majority support on cards and voting in a Board election. That delay may of course be defensible as a means of ensuring that unions and coworkers do not coerce workers into signing cards, an issue discussed in more detail *infra*.<sup>109</sup> But such delays will likely impose disproportionate costs on unions and pro-union workers who do not regret their decisions, and, as other authors have pointed out, create time for employers to undermine union support.<sup>110</sup> Indeed, the very fact that the certification procedure requires pro-union workers to reiterate their position before the union receives official state sanction may *invite* them to question their support for

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<sup>104</sup> See *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982) (finding that after *Linden Lumber*, an employer, when faced with a demand for recognition, may ignore it regardless of motive, and any recognitional strike that follows will not on that basis alone be considered an unfair labor practice strike and therefore be unprotected); *accord Terracon, Inc.*, 339 N.L.R.B. 221 (2003).

<sup>105</sup> See *supra* note 44 and accompanying text (discussing frequency and effectiveness of employer retaliation and terminations); see also *infra* Sections II.A.i–ii (discussing workers’ rational fears of such retaliation).

<sup>106</sup> Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1238 (2003).

<sup>107</sup> Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 795 (1983) (arguing that such rules imply a moral deficiency that “is prima facie inconsistent with the principle of equal respect for persons”); see also Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1171 (1986) (defining paternalism).

<sup>108</sup> Camerer et al., *supra* note 106, at 1240, 1242; see also Kronman, *supra* note 107, at 793.

<sup>109</sup> It may also be defensible insofar as individuals caught in social cascades or polarized group deliberation may act differently than they would in normal situations. See discussion *infra* Sections II.A.iv–v and III.A.

<sup>110</sup> See discussion *supra* Section I.B.

unionization. During his tenure as a member of the Board, Becker made a similar point, while reversing an earlier policy that required written notice to employees of their ability to file a decertification petition after voluntary recognition. That policy, he wrote, “undermined employees’ free choice by subjecting it to official question and refusing to honor it for a significant period of time.”<sup>111</sup>

The secret ballot requirement therefore signals that workers’ preferences are not wholly autonomous insofar as they are expressed through collective action. It does this in part based on fears that coworkers may coerce their fellow workers, and in part based on the notion that workers should be encouraged to make calm and rational decisions regarding unionization. Even without the delays that plague the Board process, then, the secret ballot requirement may in some instances render it more difficult for workers and organizers to build the kind of collective identity and solidarity needed for successful organizing and collective bargaining.

### B. *The “Standard Model” in Labor Law Scholarship*

While scholars have often criticized the law governing union certification, they too have often worked within the standard model of union organizing. Scholars tend to agree that the law should enable individual workers to make the most dispassionate and well-informed choice regarding unionization, and therefore they tend to embrace regulations that—in their view—will best promote such rational decision making. They nevertheless differ regarding which regulations are optimal in that regard, largely on the basis of different analyses regarding what sort of behavior by employers and unions tends to impede rational employee choice.

#### i. *Existing Reform Proposals*

Academic and policy debate revolves around whether the laws governing organizing processes should be reformed so as to reduce or eliminate employer involvement. As that debate has been aptly summarized elsewhere, I will treat it relatively briefly.<sup>112</sup> In recent years, it has centered on union efforts to replace the secret ballot election with mandatory card check certification, a proposal that Congress came close to passing in 2009 as part of the “Employee Free Choice Act” (“EFCA”).<sup>113</sup> Unions have defended that proposal on the grounds that the secret ballot process virtually invites

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<sup>111</sup> *In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72, at \*3 (2011).

<sup>112</sup> For an excellent overview, see Sachs, *supra* note 8, at 664–72, 701–11.

<sup>113</sup> See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The Act also provided for first contract arbitration and increased penalties for unfair labor practices. A number of states have adopted card check certification procedures for public employees. See MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 412 (2d ed. 2011) (“Illinois . . . New York, California, New Jersey, New Hampshire, Massachusetts and Oregon have provided for certification without elections.”).

employers to “launch a one-sided campaign to intimidate their employees out of supporting a union.”<sup>114</sup> The employer community has criticized card check—and defended the secret ballot election—on several fronts. Some argue that management has an affirmative right to express its views on unionization,<sup>115</sup> some that card check procedures leave workers vulnerable to coercion by unions and/or management,<sup>116</sup> and some that those procedures limit “the information upon which employees make their decision” by preventing employers from campaigning.<sup>117</sup>

The academic reception of both unions’ and employers’ arguments has been mixed. Scholars largely agree that the existing process enables employers to undermine legitimate union support.<sup>118</sup> They also tend to argue that employers have no legitimate entitlement to participate in workers’ decision processes. For example, Weiler analogizes the employer’s role to efforts by one nation to influence another’s elections, and Sachs analogizes it to efforts by a defendant to influence plaintiffs’ deliberations over seeking class certification.<sup>119</sup> Both actions are presumptively unlawful, the lesson being that B has no affirmative right to intervene in A’s decisions even where A’s decisions will impact B’s wealth and power. Reflecting this logic, Becker, Sachs, and Weiler propose more robust remedies to deter employer unfair labor practices, and endorse structural reforms to the certification process that would limit management’s ability to campaign.<sup>120</sup> For example, while a

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<sup>114</sup> *Why Workers Want Majority Sign-up*, AMERICAN RIGHTS AT WORK, <http://www.americansrightsatwork.org/employee-free-choice-act/resource-library/why-majority-sign-up-is-needed.html> (last visited Mar. 27, 2012).

<sup>115</sup> See Representation-Case Procedures, 76 Fed. Reg. 36812–01 (Dec. 22, 2011) (Member Hayes, dissenting) (stating that the “principal purpose” of rule changes is “to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining”).

<sup>116</sup> See Joint Brief for Petitioners at 3, *Dana Corp. et al. v. UAW*, 341 N.L.R.B. 1283 (2004) (No. 8-RD-1976), 2004 WL 1329345 (arguing that neutrality and card check agreements “leave[ ] employee rights in the abusive hands of employers and unions,” neither of which “has any interest in protecting employee rights to freely choose or reject union representation, the very rights the NLRB exists to protect”).

<sup>117</sup> *Examining the Employee Free Choice Act, Focusing on Restoring Economic Opportunity for Working Families: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 31 (2007) (statement of Peter J. Hurtgen, Senior Partner, Morgan, Lewis & Bockius LLP); see also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (summarizing employer’s argument that “cards cannot accurately reflect an employee’s wishes [possibly] because an employer has not had a chance to present his views, and thus a chance to insure [sic] that the employee choice was an informed one”); EPSTEIN, *supra* note 69, at 29–32 (stating that card check may lead to informational deficiencies and union coercion); Goldberg et al., *supra* note 44, at 564 (noting that the Board’s restrictions on employer speech are likely overbroad in that their influence on employee preferences is wholly unclear).

<sup>118</sup> See Sachs, *supra* note 8, at 683–88 (discussing impact of management campaigns).

<sup>119</sup> See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 215 (1990) (drawing a defendant/plaintiff analogy); Sachs, *supra* note 8, at 704 (citing WEILER, *supra*, at 259–60); *id.* at n.214 (discussing Becker’s use of similar analogies); *id.* at 705 (“Whether I hire Joy to represent me in my negotiations with Earl is really no business of Earl’s.” (citing Bodie, *supra* note 8, at 53)).

<sup>120</sup> Scholars have nevertheless often viewed such remedies as secondary to new certification procedures. See, e.g., Weiler, *supra* note 8, at 1790–99 (discussing, *inter alia*, proposals for damage multipliers, punitive sanctions, quicker reinstatement in 8(a)(3) proceedings, and

law professor, Becker suggested that the Board and Congress prohibit employers from contesting unit determination, voter eligibility, or campaign conduct; prohibit captive audience meetings altogether; and require employers to follow their own anti-solicitation rules.<sup>121</sup> Along similar lines, during Becker's recent tenure, the Board approved various changes to its campaign management procedures in an effort to reduce delays within the election process.<sup>122</sup>

Weiler and Sachs have focused more directly on the question of reform to the secret ballot process. They argue that authorization on the basis of cards might improve the process by enabling workers to avoid managerial involvement by organizing "without giving notice to management that a campaign is underway."<sup>123</sup> Yet Sachs fears that card check and other open decision making processes open the door to coercion by unions,<sup>124</sup> and Weiler argues that a secret ballot election "clears the air of any doubts about the unions' majority and also confers a measure of legitimacy on the union's bargaining authority."<sup>125</sup> Both therefore endorse variations on a "rapid election" system. Weiler proposes that workers be guaranteed a secret ballot election or other secret decision process within a short period of time after requesting one, a procedure modeled on the process in some Canadian provinces.<sup>126</sup> Sachs takes the argument further: Because even a rapid elections regime would enable management to campaign, he proposes that workers vote on union authorization on a rolling basis, but do so in secret via telephone, mail, or the internet, or in person at an offsite location established by

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more permissive use of *Gissel* bargaining orders); *id.* at 1804 (noting that such changes will be ineffective unless we also "chang[e] the background legal environment in order to reduce employers' opportunities to engage in illegitimate interference with their employees' choice"); *see also* Becker, *supra* note 8, at 583–84 (endorsing greater use of *Gissel* orders). *But see id.* at 592–93 (proposing new election rules that largely prohibit employer campaigning); Sachs, *supra* note 8, at 699 (noting importance of quick relief during organizing campaigns, proposing various reforms); *id.* at 700 (endorsing new certification procedures as a more desirable "structural solution" because ex post remedies for employer misconduct are almost inevitably insufficient).

<sup>121</sup> Sachs, *supra* note 8, at 592–93.

<sup>122</sup> 76 Fed. Reg. 80, 138 (Dec. 22, 2011); *see also* NLRB Office of Public Affairs, *Board Adopts Amendments to Election Case Procedures* (Dec. 21, 2011), <https://www.nlr.gov/news/board-adopts-amendments-election-case-procedures>. The proposed rules' fate is uncertain as this Article goes to press, as they have been challenged in federal court. *Chamber of Commerce et al. v. NLRB*, 1:11-cv-02262 (D.D.C., Dec. 20, 2011).

<sup>123</sup> Sachs, *supra* note 8, at 671; *see also id.* (explaining further that past scholars have also argued card check enables secrecy); Barenberg, *supra* note 8, at 936 (same). *But see* Weiler, *supra* note 8, at 1807–08 (noting that card check would enable organizing "quickly and invisibly" in small units, though not in larger units).

<sup>124</sup> Sachs, *supra* note 8, at 715–16 (explaining that under card check regime organizers and worker leaders may subject workers to psychological pressure); *id.* at 669 & n.46 (summarizing past criticisms of card check by legal and non-legal commentators); Bodie, *supra* note 8, 76–77 (noting that neutrality and card check agreements may impair employee free choice).

<sup>125</sup> Weiler, *supra* note 8, at 1811.

<sup>126</sup> *Id.* at 1805–19; *see also* WEILER, *supra* note 119, at 41–42.

the Board or a successor agency.<sup>127</sup> Such a system, he argues, will “[m]aximiz[e] employee preferences on the question of unionization.”<sup>128</sup>

Epstein and others’ arguments that card check robs employees of useful information about costs of unionization could easily be extended to these proposals.<sup>129</sup> But the arguments are specious. Workers generally do not lack information about general downsides to unionization, particularly given U.S. businesses’ well-known historical antipathy to unions, as well as the recent emergence of well-funded third-parties providing negative information about unions.<sup>130</sup> Employers also have an opportunity to demonstrate the advantages of non-union bargaining prior to any organizing drive, and workers should be able to predict the sort of bargaining partner that an employer would make based upon their pre-campaign behavior. Moreover, even if workers do glean some useful information from employer campaigns, that does not mean that such campaigns should be encouraged, but only that their downsides should be weighed against their upsides. In this regard, Matthew Bodie’s work is informative. Analogizing the unionization decision to a collective purchase of services, Bodie argues that current law compels neither unions nor employers to provide accurate information, and suggests that the costs of employer campaigns may be quite high.<sup>131</sup> Employers, he argues, will tend to overproduce negative information—to campaign hardest against unionization—precisely when workers stand to gain the most from unionization, and vice versa.<sup>132</sup> The marginal benefits of employer information were also highlighted in a recent study finding that, while card check campaigns led to workers being slightly less informed than election campaigns, “workers who felt they had insufficient information to make a decision about unionization tended not to sign cards.”<sup>133</sup> Finally, as Mark Barenberg has argued, even if employers were cut out of the representation process, they would still have the “very same financial and cultural incentive to weave a lawful ‘anti-union campaign’ into the organizational warp and woof of the enterprise . . . .”<sup>134</sup>

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<sup>127</sup> See Sachs, *supra* note 8, at 719–27 (proposing new procedures to protect workers against both management and union coercion).

<sup>128</sup> *Id.* at 727.

<sup>129</sup> See sources cited *supra* note 117.

<sup>130</sup> Sachs, *supra* note 8, at 708–09 (noting role of third-party organizations that provide information regarding potential detrimental effects of unionization); see also Weiler, *supra* note 8, at 1816 (noting that the amount of information gleaned from employer campaigns is “marginal at best”).

<sup>131</sup> Bodie, *supra* note 8, at 4, 35–70. Bodie ultimately does not propose detailed policy changes, but instead focuses on mapping various ways in which the “market for union representation” fails due to inadequate information. See *id.* at 69–77 (expressing “Preliminary Thoughts on Addressing the Information Gap”).

<sup>132</sup> *Id.* at 54. The contrary situation arises when a union and employers have reached a “sweetheart deal” under which the employer will not resist unionization, or will even support it, and the union will not demand significant wage or benefits increases. *Id.* at 55.

<sup>133</sup> Eaton & Kreisky, *supra* note 46, at 157.

<sup>134</sup> Barenberg, *supra* note 8, at 941.

*ii. Core Assumptions of the Current Debate*

Before taking up the complex empirical and normative questions raised by this debate, it will be useful to draw out various core assumptions shared by most parties. First, like courts, scholars tend to treat organizing essentially as a contest between unions and employers. A recent description of the process by Professor James Brudney is fairly typical:

A labor organizing campaign typically begins when a union is contacted by employees who for any number of reasons feel unfairly treated in their work environment. In the course of its campaign, the union distributes authorization cards, providing supportive employees with the chance to designate the union as their bargaining representative. If the union has received card support from a majority of employees at the establishment, it ordinarily will request that the employer recognize the union and enter into a collective bargaining relationship.<sup>135</sup>

In this view, workers' roles seem largely limited to receiving and processing information regarding the merits of unionization and deciding whether to sign a card. Likewise, Sachs describes the process of building worker support—which he calls the “organizing phase”—as one in which union organizers meet with workers, generally in their homes, to “field questions from employees about the process” and the merits of unionization, and to “urge employees to commit to voting in favor of unionization and to signing authorization cards.”<sup>136</sup> Bodie, meanwhile, does not even discuss the card solicitation process.<sup>137</sup> Granted, the threat of employer coercion is greatest during the period between filing and voting, and that period has generated much litigation over proper tactics, making it a natural focus for legal and academic analysis. But it also means that scholars—Weiler excepted<sup>138</sup>—have devoted less attention to unions' and workers' activities prior to filing, and thus may understate the extent of workers' activities other than discussion and card signing.

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<sup>135</sup> Brudney, *supra* note 8, at 824.

<sup>136</sup> Sachs, *supra* note 8, at 664–65.

<sup>137</sup> See Bodie, *supra* note 8, at 5 (“[T]he representation process begins with a petition—filed by employees, a labor organization, or an employer—avowing that a group of employees wish to be represented by a particular labor organization.”).

<sup>138</sup> Weiler views workers' efforts to build and exert power as critical. See Weiler, *supra* note 8, at 1788 (explaining that the purpose of retaliatory discharge is “to break the momentum of the union's organizing campaign . . . . [T]his setback to the employees' quest for a collective voice in their workplace cannot easily be repaired”); *id.* at 1811 (“[T]o achieve any degree of real authority in the bargaining unit and to win a decent contract that will give collective action a reasonable prospect of survival, the union must obtain a strike mandate from the employees. In practice this requires not just a bare majority, but a solid one.”); *id.* at 1794 (“If a decent employment package is to be extracted from a recalcitrant employer, it must come through the efforts of the workers themselves—that is, through the threat of strike action.”).

Second, Becker, Sachs, and others tend to describe unions as third parties vis-à-vis workers. For example, while Becker criticizes labor law for presuming “the equality of employers and unions as players in the union election process,”<sup>139</sup> he does not discuss in detail workers’ own roles in that process.<sup>140</sup> Bodie is fairly explicit in this regard: He describes unions and employers as the two relevant “actors in the ‘market’” for union representational services and criticizes efforts to describe them as merely workers’ own organic organizations.<sup>141</sup> Unions are, of course, third parties in various ways: They have legal personality as well as social, political, and economic commitments outside of the individual workplace. Yet, as I argue *infra*, such a framing understates the extent and importance of workers’ collective action and leadership in organizing drives, and the extent to which a union can be the workers’ own organization.

To the extent that they do discuss collective action and organizing tactics, even more progressive scholars sometimes view them as threats to employees’ autonomy.<sup>142</sup> Sachs, while noting that “public manifestations of mutual support and lived solidaristic experience are crucial for union success,”<sup>143</sup> also seems to fear that emotional appeals and social pressures may lead workers to make decisions they later regret. Even in the absence of physical coercion, he argues, card check and other public decisional mechanisms may enable persons with “epistemological authority,” such as organizers or natural workplace leaders, to exercise “more subtle but perhaps equally effective forms of influence” over workers if the decision making process is public.<sup>144</sup> Organizers, he says, are “trained in, and likely to have extensive experience with, precisely the sort of interpersonal dynamics involved in discussing the signing of an authorization card,” and thus may move workers to sign cards when they would not otherwise do so.<sup>145</sup>

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<sup>139</sup> Becker, *supra* note 8, at 499.

<sup>140</sup> *Id.* at 569–77; *see also id.* at 580 (“Before an election, the employer can deny a union any authority; in fact, most employers shun even casual contact with union leaders to prevent employees from mistakenly believing that the union shares authority in the shop.”). While this is true vis-à-vis union leaders, employers cannot so easily shun casual contact with worker leaders—and well-organized workers can exert some authority in the workplace even absent certification. *But see id.* at 586 (“Elections are simply the final step in the process of self-organization, expressing the extent of employee organization and, if majority support exists, vesting the organization—the union—with the authority to represent the individual employees.”).

<sup>141</sup> Bodie, *supra* note 8, at 4, 38.

<sup>142</sup> *See, e.g.,* Weiler, *supra* note 8, at 1799 (discussing the dangers of “top-down organizing”).

<sup>143</sup> Sachs, *supra* note 8, at 714. This endorsement of collective action seems challenging to reconcile with Sachs’s efforts to enable secret organizing since workers’ collective action is by its nature public. *See* Sachs, *supra* note 8, at 718–27.

<sup>144</sup> *Id.* at 716; *see also* WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 162 (1993); Weiler, *supra* note 8, at 1799 (noting possibility of union coercion in “top-down” organizing that utilizes recognitional picketing).

<sup>145</sup> Sachs, *supra* note 8, at 715–26.

Finally, while neither embraces it fully, the influence of rational choice theory is apparent in the work of Bodie and Sachs. Bodie, as noted above, argues that “the election should be treated as a collective economic decision about whether to engage in a certain kind of activity,”<sup>146</sup> and argues that “an economically rational decision to vote for or against a union would be based on whether the employee expects that the union will, in fact, improve terms and conditions.”<sup>147</sup> Sachs, meanwhile, frames his overall project as an effort “to structure the rules governing organizing campaigns in a manner that maximizes the satisfaction of employee preferences on the union question.”<sup>148</sup> His argument then draws upon the “preference-eliciting default theory of statutory interpretation and the reversible default theory from corporate law,”<sup>149</sup> both of which seek to maximize the satisfaction of some preference set under conditions of uncertainty.<sup>150</sup> While Bodie, Sachs, and the other authors do not explore the origins of individual preferences, such statements seem to treat them as facts to be discovered, and therefore as exogenous to law.<sup>151</sup>

## PART II. PREFERENCES, ORGANIZING, AND POWER

This Section first argues that workers’ preferences toward unionization are pervasively shaped by legal rules and by various social practices both before and during organizing campaigns. Workers’ preferences may reflect cognitive distortions, for example, or may be closely linked to the communal attachments that help constitute all of our identities. The Section then recharacterizes union organizing as an effort to build power by building a strong collective identity among workers, drawing from social movement theory, sociology, and unions’ own materials. These arguments have implications for the standard model of union organizing, discussed in the following section.

### A. *Law, Deliberation, and Preference Shaping*

Prior to or during organizing efforts, workers’ preferences regarding unionization may implicate concerns about their autonomy. For example,

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<sup>146</sup> Bodie, *supra* note 8, at 4.

<sup>147</sup> *Id.* at 36–37.

<sup>148</sup> Sachs, *supra* note 8, at 680.

<sup>149</sup> *Id.* at 658. Sachs does note that he does not seek to articulate a comprehensive theory of “fully autonomous and deliberative choice among workers,” but rather seeks to eliminate various well-established impediments to employee choice in the organizing context. *Id.* at 660–61.

<sup>150</sup> Sachs nevertheless disclaims any effort to “creat[e] ideal conditions for fully autonomous and deliberative choice among workers,” as such a project “would require agreement on the deeply contested issue of what constitutes fully autonomous (or free) choice.” Sachs, *supra* note 8, at 661.

<sup>151</sup> *But see* Sachs, *supra* note 8, at n.127 (discussing the phenomenon of adaptive preferences).

preferences may be shaped by cognitive distortions such as myopia, by subconscious adaptation of preferences to reflect the legal regime's distribution of entitlements, or by various deliberative processes particularly common among closely-knit social groups. This subsection catalogues various sources of non-autonomous preferences. First, though, it summarizes reasons why workers who might benefit from unionization may nevertheless oppose it—reasons that *do not* trigger autonomy concerns.

*i. Rational Cost-Benefit Assessment amid Unequal Entitlements*

Before and during an organizing drive, workers may be reluctant to support unionization due to natural and rational risk aversion arising out of their precarious economic position. As Robert Hale argued long ago, workers' decisions that the law deems "free" generally reflect a decision to accept wage labor rather than a less desirable alternative, based upon their lack of entitlement to utilize the property of others.<sup>152</sup> In the union context, workers' preferences may reflect accurate assessments that unions lack much power due to factors exogenous to the law governing union certification, including, for example, the regulation of strikes and picketing, the legal classification of particular workplace practices as "mandatory" or "permissive" subjects of bargaining,<sup>153</sup> and rules governing multi-employer bargaining.<sup>154</sup> In such instances, workers may desire unionization as a general matter, and yet oppose it in circumstances where it seems unlikely to increase their welfare. Put differently, workers may want more powerful forms of unionization and collective bargaining than are available to them under current law. While such decisions are not "coerced" in any legal sense, one cannot garner much information regarding workers' preference orderings from them.

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<sup>152</sup> Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478 (1923); see generally Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991) (discussing Hale's analysis of joint coercion against unequal entitlements established by private law).

<sup>153</sup> Labor law largely limits collective bargaining to questions of wages, benefits, and the employer/employee relationship; it does not require firms to bargain over issues that lie at the "core of entrepreneurial control," including most investment and production decisions. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that there is no duty to bargain over "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise," or other decisions which are within the "core of entrepreneurial control").

<sup>154</sup> Current labor law permits but does not require multiple employers in the same industry to bargain together with a union that represents employees in multiple firms. See *Detroit Newspaper Publishers Ass'n v. NLRB*, 372 F.2d 569, 570 (6th Cir. 1967) ("[M]ultiemployer [bargaining] units are voluntary and consensual."); see also *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (noting the "voluntary nature of multiemployer bargaining" but upholding the Board's finding of an unfair labor practice where the employer unilaterally withdrew from the multiemployer unit when bargaining reached an impasse).

ii. *Myopia and Risk Misperception*

Workers' preferences toward unionization may also reflect various cognitive distortions and biases, the result of which may be that workers "systematically fail[ ] to maximize their utility."<sup>155</sup> A significant strand of legal scholarship draws from social psychology and behavioral economics to better understand such biases and suggests that humans usually demonstrate bounded rationality rather than the perfect rationality assumed by the standard model.<sup>156</sup> For example, workers' behavior may be myopic: Even assuming that organizing will increase their long-term welfare—and assuming they believe this to be true—workers may fail to organize due to the high short-term costs of organizing. This is a classic collective action problem.<sup>157</sup> Workers also face an "intertemporal" collective action problem, wherein union pioneers who bear the upfront costs of unionization will reap an out-sized share of the benefits over time,<sup>158</sup> and an interpersonal collective action problem, in which would-be pioneers are deterred because "the short-term costs of supporting unionization almost always exceed the short-term benefits."<sup>159</sup>

Workers may also misperceive the risks associated with remaining non-union, or the risks of supporting unionization. For example, workers have often displayed optimism bias regarding the possibility that they will be terminated without notice or cause.<sup>160</sup> Presumably, knowledge that such terminations are generally lawful would marginally increase union support. Conversely, after news of an organizing drive in which workers were terminated, or of a failed strike, workers may overestimate the likelihood of being terminated or underestimate the chances that an organizing drive at their workplace will succeed.<sup>161</sup> This is particularly likely given that union or-

<sup>155</sup> Kahan et al., *supra* note 16, at 1075.

<sup>156</sup> Some applications of this literature to labor and employment law include Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002); Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, in BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (Mitu Gulati & Michael Yelnosky eds., 2007); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001). Mark Barenberg also touches on such issues in his work. See Barenberg, *supra* note 8, at 935.

<sup>157</sup> See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 11 (1965).

<sup>158</sup> See Barenberg, *supra* note 8, at 933–34; see also Sachs, *supra* note 8, at 682 (discussing Barenberg).

<sup>159</sup> Sachs, *supra* note 8, at 681.

<sup>160</sup> See Sunstein, *supra* note 156, at 229–30; see also Christine Jolls, *Behavioral Law and Economics* 14 (Yale Public Law & Legal Theory, Research Paper No. 130, 2004) (discussing optimism bias); Roger G. Knoll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 754 (1990) (describing related phenomena of overconfidence in one's own judgments and "anchoring," or "a tendency to resist altering . . . a probability estimate, once formed, when new information comes to light").

<sup>161</sup> See Kahan et al., *supra* note 16, at 1077 (discussing "availability heuristic" wherein unusual occurrences such as airplane crashes induce an irrational fear of flying); see also Dan Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, in HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS AND SOCIAL IMPLICATIONS OF RISK

ganizing is an unusual occurrence—and is a misperception that employers may have incentives to foster.

*iii. Adaptive Preferences*

A more significant threat to autonomy arises when preferences are endogenous to the legal system's current allocation of entitlements. This phenomenon has a long lineage in social theory, and was discussed extensively within Critical Legal Studies in the 1970s and 1980s.<sup>162</sup> One form of endogenous preferences, called “adaptive preferences,” arises where individuals do not desire particular goods only because they cannot have them. The important fact is that such individuals do not perceive any threat to their autonomy—they are not coerced in any legal sense, nor do they “choose” a course of action simply because the alternative seems worse. Rather, to avoid cognitive distortion, they subconsciously adapt their preferences such that they no longer desire the unavailable good. A classic example is Aesop's fable of the fox who derides grapes as sour once he realizes he cannot get them.<sup>163</sup> Conversely, endogenous preferences may arise due to the availability of goods: We may value goods more highly simply because we already possess them, a phenomenon known as the “endowment effect” or “offer-asking problem.”<sup>164</sup> Such preferences are pervasive—by some accounts they emerge whenever the law establishes baseline entitlements—and some are clearly desirable. Civil rights law, for example, may help individuals lose their preferences for segregation or gender inequality.<sup>165</sup>

Cynthia Estlund and others have argued that non-union workers may develop adaptive preferences against unionization based upon their “expectations about both employers' future bargaining behavior and what the law will or will not do about it.”<sup>166</sup> This effect may be compounded insofar as

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746–47 (Roeser et al. eds., 2012) (same); Knoll & Krier, *supra* note 160, at 754 (same); Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 646 (1999) (discussing “confirmatory bias” in which, after individuals develop a view on social phenomena, they “tend to misread evidence as additional support for initial [views]”).

<sup>162</sup> See, e.g., Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 671 (1979) (discussing the offer-asking problem); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401 (1981) (same). The argument of utilitarian theories and other arguments that law or policy should maximize satisfaction of existing subjective preferences has a longer lineage. See generally JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); KARL MARX, *Estranged Labour*, in *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 106 (Dirk J. Struik ed., Martin Milligan trans., 1964) (1844); Sen, *supra* note 15.

<sup>163</sup> See ELSTER, *supra* note 162, at 109–40 (defining adaptive preferences).

<sup>164</sup> Sunstein, *supra* note 107, at 1138, 1146–52 (discussing adaptive preferences and endowment effects).

<sup>165</sup> See Sunstein, *supra* note 17, at 13.

<sup>166</sup> Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 13–14 (2010); see also Sachs, *supra* note 8, at 686 & n.127 (discussing employer intervention in the bargaining process).

employee preferences are influenced by coworkers' preferences. Conversely, social scientists have documented that unionized workers tend to have a high opinion of unions,<sup>167</sup> which may reflect in part an endowment effect or "counteradaptive preference," particularly if those workers perceive decertification as difficult or impossible. Either way, such preferences complicate conceptions of autonomy as unencumbered individual choice, as well as arguments that particular laws or reforms are justified because they satisfy existing preferences. Where preferences emerge from "existing consumption patterns . . . and governmental rules, it seems odd to suggest that individual freedom lies exclusively or by definition in preference satisfaction."<sup>168</sup>

iv. *Social Cascades*

Group interactions and deliberations also shape our preferences. For example, the diffusion of information through social networks can lead group opinion or belief to move rapidly in one direction or another.<sup>169</sup> Relatively benign examples include viral internet videos and fashion fads.<sup>170</sup> But such "social cascades" can affect more significant aspects of individual behavior as well. Studies have shown, for example, that "a good way to increase the incidence of tax compliance is to inform people of high levels of voluntary tax compliance" and that binge drinking may go down where students are told that binge drinking is relatively uncommon.<sup>171</sup>

Social cascades seem to occur through several processes. First, there are reputational pressures: As individuals see many peers acting in particular ways or holding particular beliefs, a desire to conform may drive them to harmonize their acts and expressions with those of the group. These are of course not all-encompassing phenomena. Individuals may prefer to break with the crowd, or they may have other desires or beliefs that are strongly held and incompatible with such a cascade. Nevertheless, the pressures of conformity that arise from reputational cascades are a significant threat to autonomy.<sup>172</sup> Second, there are informational cascades, which arise when individuals, often because they "lack a great deal of private information," rely heavily on the information they receive from others.<sup>173</sup> This has been observed both with regard to individuals' judgments about issues of fact and

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<sup>167</sup> See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 98 (updated ed., 2006) (stating that union members generally have positive opinion of unions).

<sup>168</sup> Sunstein, *supra* note 17, at 11.

<sup>169</sup> See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 77 (2000).

<sup>170</sup> See Meeyoung Cha et al., *Characterizing Social Cascades in Flickr*, MAX PLANCK INST. FOR SOFTWARE SYS., (Aug. 18, 2008), [www.mpi-sws.org/~gummadi/papers/Cascades-WOSN.pdf](http://www.mpi-sws.org/~gummadi/papers/Cascades-WOSN.pdf) (discussing social cascades in online media).

<sup>171</sup> See Sunstein, *supra* note 169, at 77–78 (citing primary studies).

<sup>172</sup> See ELSTER, *supra* note 162, at 23–24 (arguing that conformism is incompatible with moral autonomy).

<sup>173</sup> Sunstein, *supra* note 169, at 82.

their judgments about moral and political issues.<sup>174</sup> Informational cascades are particularly problematic insofar as rational cost-benefit analysis is understood as critical to autonomy. They are to reputational cascades as adaptive preferences are to coercion: Individuals caught up in an informational cascade may perceive themselves as autonomous while an outsider may perceive herd behavior.

v. *Group Polarization and Social Group Membership*

Cascades appear to be especially common among close-knit groups, in part due to the greater trust accorded to in-group members, and in part because individuals' preferences often have an expressive dimension, particularly in situations where social groups are in status conflict. As Dan Kahan has argued, "[w]hich activities individuals view as dangerous and which policies they view to be effective embody coherent visions of social justice and individual virtue."<sup>175</sup>

Cascades are also closely related to perhaps the most important phenomenon for present purposes: the risk that deliberation will lead to "group polarization," where "an initial tendency of individual group members toward a given direction is enhanced following group discussion."<sup>176</sup> This process is not driven by simple conformism. Such groups shift not toward median opinion, but rather toward one or the other extreme.<sup>177</sup> In various studies, for example, juries tasked with deciding on punitive damages eventually settled on a number significantly higher than any individual juror's pre-deliberation assessment.<sup>178</sup> This same phenomenon has also been observed where, for example, a group of "moderately profeminist women" become more so after deliberating with one another, and where white indi-

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<sup>174</sup> Cass Sunstein describes social cascades as follows:

Suppose, for example, that A believes that affirmative action is wrong and even unconstitutional, that B is otherwise in equipoise but shifts upon hearing what A believes, and that C is unwilling to persist in his modest approval of affirmative action when A and B disapprove of it. It would be a very confident D who would reject the judgments of three (apparently) firmly committed others.

*Id.* at 82–83.

<sup>175</sup> Kahan et al., *supra* note 16, at 1088; *see also* Kahan, *supra* note 161, at 741 (explaining that white males tend to perceive "all manner of societal risk as smaller in magnitude and seriousness than do women and minorities," in part because males in general "have a special stake in putatively dangerous activities" that mediate social processes of gender differentiation).

<sup>176</sup> Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141, 1141 (1986); *see also* ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 200–45 (1986) (discussing group polarization, summarizing studies, and proffering various theories regarding its causes).

<sup>177</sup> In fact, "polarization" is not a wholly accurate term; opinion does not become bimodal but rather shifts strongly toward one pole.

<sup>178</sup> *See, e.g.*, David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000); *see also* BROWN, *supra* note 176, at 226–29 (discussing the evidence of group polarization in jury verdicts and recommended punishment).

viduals' preexisting prejudices are amplified after discussion among whites with similar prejudices.<sup>179</sup> Note that the term "polarization," as used here, has a neutral connotation, in contrast to the labor relations context, where management anti-union campaigns may criticize unions for "polarizing" the workforce, i.e., sowing discontent where allegedly none existed.<sup>180</sup>

Several explanations have been proffered for group polarization. It may emerge where one position within a deliberative forum has a rhetorical advantage. This may occur because in a group that tilts in a particular direction only arguments that support that tilt are raised.<sup>181</sup> Alternately, since arguments may be more persuasive where they are presented more confidently, and since "extreme positions tend to be more confidently held," those within a group who hold stronger and more extreme opinions may trigger a polarization process.<sup>182</sup> Finally, individuals may simply be cautious in expressing their judgments until they hear what others have to say, at which point reinforcement of their initial judgment can lead them to hold it more confidently, and their expression of it may have the same effect on other group members, leading to polarization.<sup>183</sup>

Importantly, polarization is also not observed in all groups at all times. It is more likely, and typically more extreme, where those deliberating consider themselves to be part of the same social group and linked by bonds of solidarity,<sup>184</sup> perhaps due in part to the expressive character of preferences. As Sunstein writes, "[a] sense of common fate and intragroup similarity tends to increase [polarization]."<sup>185</sup> In contrast, the introduction of dissenting voices or "opposed subgroups" within the deliberative body can make polarization less likely,<sup>186</sup> and skilled facilitators who can frame issues so as to reach diverse participants may be able to "induce citizens to change their minds on contested issues of fact."<sup>187</sup>

Like cascades, group polarization seems to be a significant factor in contemporary politics, and it raises important questions regarding individual autonomy. Some polarization clearly occurs due to reputational concerns and conformism, rendering individual participation presumptively non-au-

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<sup>179</sup> See Sunstein, *supra* note 169, at 86.

<sup>180</sup> See, e.g., Richard W. Hurd, *Fear, Conflict, and Union Organizing* 181 (Cornell Univ. School of Indus. & Lab. Rel., Paper No. 321, 1998).

<sup>181</sup> Sunstein, *supra* note 169, at 89.

<sup>182</sup> *Id.* at 92.

<sup>183</sup> *Id.* at 90.

<sup>184</sup> *Id.* at 92.

<sup>185</sup> *Id.* at 91.

<sup>186</sup> *Id.* at 90.

<sup>187</sup> Kahan et al., *supra* note 16, at 1101 (discussing James Fishkin's "deliberative poll"). Cultural assessments of risk may become less pronounced where evidence of risk is presented "in forms that affirm rather than denigrate" individuals' values. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 149, 167 (2006). Similarly, experimental subjects may be more receptive to arguments that cut against their general disposition so long as they are delivered by authorities whom they "perceive as sharing their values." Kahan, *supra* note 161, at 749-52 (discussing the "cultural credibility heuristic").

onomous. But, at other times, individuals caught up in a polarization process will perceive themselves as acting freely, particularly insofar as they see their opinions and decisions as advancing the interests of a group to which they belong. Polarization may create a sort of “safe space” for individuals to express controversial or provocative opinions. Moreover, like some adaptive preferences, group polarization can have socially beneficial effects. The “enclave deliberation” within those groups that live outside the mainstream can “promote[ ] the development of positions that would otherwise be invisible, silenced, or squelched in general debate.”<sup>188</sup> Various social movements have arisen out of such circumstances, including third-wave feminism, the U.S. Civil Rights and LGBT rights movements, and the anti-abortion movement.<sup>189</sup>

### *B. Organizing: Shaping Preferences by Building Power*

Union organizers often spark social cascades or group polarization among workers and do so for a specific reason: to overcome workers’ skepticism toward or fears of organizing, either of which may arise as a result of the phenomena discussed above. Organizers and worker leaders utilize emotionally- and politically-charged appeals: (i) to build collective identity among workers; (ii) to move workers into action; (iii) to win concrete changes in workplace policies; (iv) to change workplace power dynamics well before certification; and, therefore, (v) to convince workers that unionization is possible and desirable. This subsection summarizes the process of union organizing, which is far from dispassionate. It draws upon unions’ own organizing manuals and upon academic studies of organizing efforts from within ethnography and social movement theory.

#### *i. Modern Union Organizing Strategies*

Over the past few decades, in response to declining membership and a sense that unions needed to organize broadly or risk irrelevance, unions have developed and even sought to formalize a new model of organizing that more often leads to success. Scholars and unions often contrast such new organizing tactics with more traditional approaches:

The [traditional] strategy is designed for groups of people who already know they want to be unionized . . . . The organizer appeals to potential union members with the prospect of better wages and fringe benefits . . . . The organizing strategy is based entirely on workers’ identities as workers . . . [t]he organizer does not attempt to relate workers’ other identities (as women, blacks, southerners, and so on) . . . the union views organizing ability as

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<sup>188</sup> Sunstein, *supra* note 169, at 111.

<sup>189</sup> *Id.*

strictly a technical skill rather than also as something that grows out of shared experience . . . [and] all energies and strategies are focused on winning the representation election . . . . Once an election has been won, the traditional strategy assumes that the main organizing task is over.<sup>190</sup>

Such a strategy worked, if ever, during the era of mass industrialization, where workers could be easily reached through leafleting at plant gates and where workers often shared some experience of union representation from past jobs, or had family members or friends who were union members. With private sector unions now representing less than 7% of the workforce, such strategies simply no longer work. Instead, unions' organizing strategies and the academic literature often focus on what organizers call "acting like a union," building an active organization well before certification.<sup>191</sup> Organizers utilize several interrelated strategies to do this, three of which are especially important: worker involvement and leadership throughout the campaign, the use of escalating tactics through which workers gain experience in exercising power, and building or tapping into a collective identity among the workers.

Unions' own organizing manuals break campaigns into five stages: (i) targeting and first contacts with workers; (ii) identifying leaders; (iii) building an organizing committee; (iv) building majority support, generally through a public campaign; and (v) recognition or election.<sup>192</sup> In the targeting or reconnaissance phase, union organizers seek to determine whether to begin a drive in a particular workplace or set of workplaces. Sometimes unions will begin drives because they have been contacted by workers in a particular company, but many of the most prominent recent campaigns have begun as part of a union's overall strategic planning. For example, a union representing workers at three out of five local grocery chains may want to organize the other two for strategic reasons, and because the union sees its mission as broadly protecting workers beyond just its members. Modern 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.<sup>193</sup> Unions may

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<sup>190</sup> James Green & Chris Tilly, *Service Unionism: Directions for Organizing*, 38 LAB. L.J. 486, 486–87 (1987).

<sup>191</sup> See Lafer, *supra* note 21, at 85.

<sup>192</sup> See, e.g., AM. FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME ORGANIZING MODEL & MANUAL 1-3 (1999) (listing stages of campaign in the organizing model and manual's table of contents, and including a sixth stage of obtaining a first contract) (on file with author) [hereinafter AFSCME Manual]; INT'L BHD. OF TEAMSTERS, ORGANIZING GUIDE, TABLE OF CONTENTS (on file with author) [hereinafter IBT Manual].

<sup>193</sup> As one Justice for Janitors organizer told Ruth Milkman and Kenneth Wong, "[w]e always try to understand the industry as it understands itself." Ruth Milkman & Ken Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY 99, 108 (Turner et al. eds., 2001).

begin contacting a few workers to gauge their interest in unionizing, but will attempt to do so quickly and quietly so as to avoid attracting the employer's attention.<sup>194</sup>

Organizers generally try to keep the campaign secret through the second and third stages as well, though because worker contact begins in earnest at those stages, avoiding the employer's attention is not always possible.<sup>195</sup> The union's primary goals during these stages are to determine which issues motivate the workforce—whether wages, benefits, treatment by management, safe working conditions, etc.—and to form a strong “organizing committee” (“OC”), a group of workers who will publicly lead the campaign among their co-workers. Members of this group will “take part in planning the campaign and developing and implementing tactics”<sup>196</sup> and will “move the campaign with their co-workers, providing the sense of ownership of the campaign . . . by taking action together.”<sup>197</sup> In building an OC, unions generally try to focus on finding the “natural leaders” in the workforce: those workers who have “influence and respect AND a *following among other workers*.”<sup>198</sup> Such workers may be initially for or against unionization, and organizers will approach them first and seek either to gain their support or at least to prevent them from opposing the campaign.<sup>199</sup> Over time, organizers will ask leaders to take public actions such as handing out a flyer to announce a union campaign.<sup>200</sup> Ideally, such meetings will actually lead to improvements in working conditions, demonstrating to workers that winning changes through collective action is both possible and desirable.

Importantly, the manuals may instruct organizers not to distribute or collect authorization cards before they have “prepare[d] the leadership to lead the campaign.”<sup>201</sup> Only then, and once the OC members have developed a list of workers' names and addresses, will the union start getting cards signed. It will generally “launch” the campaign, beginning stage four (building majority support) with a “visible action by the committee (signed leaflet or letter, march on boss, mass leaflet), followed quickly by a massive house-calling operation (blitz) to contact all of the workers in the bargaining unit in a very short time.”<sup>202</sup> After that point, the union seeks to build majority support as quickly as possible through meetings with workers in their homes (“house calls”) in which individuals' specific concerns and attitudes can be assessed. Stages four and five are thus generally built around a series

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<sup>194</sup> See IBT Manual, *supra* note 192, at 9; AFSCME Manual, *supra* note 190, at 1-4.

<sup>195</sup> See, e.g., IBT Manual, *supra* note 192, at 14, 26.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> AFSCME Manual, *supra* note 192, at 1-10.

<sup>198</sup> IBT Manual, *supra* note 192, at 13 (emphasis in original); see also Barenberg, *supra* note 8, at 781 (discussing role of “men with a following” in organizing drives).

<sup>199</sup> See IBT Manual, *supra* note 192, at 26.

<sup>200</sup> See *id.* at 27.

<sup>201</sup> AFSCME Manual, *supra* note 192, at 1-10.

<sup>202</sup> *Id.* at 1-12.

of “increasingly visible public activities demonstrating support for the union.”<sup>203</sup> Workers might, for example, pass out leaflets in front of the worksite, all wear t-shirts or union buttons on a particular day, deliver a set of signed cards to management and demand recognition, and hold rallies, or marches, ideally alongside community allies.<sup>204</sup>

Both the AFSCME and the Teamsters’ manuals emphasize the critical importance of building an organization of workers through such actions. As AFSCME puts it, “[b]uilding power is at the heart of organizing,”<sup>205</sup> and public actions “show the workers and the boss the strength of the union support, build the self-confidence of the union supporters,” and help organizers and leaders assess workers’ levels of support.<sup>206</sup> Unions therefore often try to have such activity “peak” at a particular date—either right before an election or right before the union decides to demand card check recognition—so that uncommitted workers will come over and support the effort.<sup>207</sup> In this context, unions describe card solicitation as a means not just of tallying support but also of building organization. According to the Teamsters, in an ideal campaign, the organizer will not even ask for card signatures until after the first round of house calls. According to that manual, if an organizer and leaders can “build a strong effective organization in the workplace that can take on the employer. . . . [they] can get a majority of signed cards, participation in actions, and get recognition and a good contract. But first [they] have to build an organization.”<sup>208</sup> Then, by the time an organizer circulates cards, the workers “already have worked with each other and the organizers, and feel a strong ownership of the campaign.”<sup>209</sup>

ii. *Academic Studies of Organizing Strategies*

As training materials, such manuals present ideal organizing drives, and will of course differ in various ways from campaign tactics on the ground. Yet, they largely track academics’ analyses of union success in organizing drives.<sup>210</sup> For example, in a leading 1997 study of tactics that tended to lead to union success in Board elections, Kate Bronfenbrenner confirmed her hy-

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<sup>203</sup> *Id.* at 1-22.

<sup>204</sup> *See id.*

<sup>205</sup> *Id.* at 1-23.

<sup>206</sup> *Id.* at 1-22.

<sup>207</sup> *Id.*

<sup>208</sup> IBT Manual, *supra* note 192, at 38 (emphasis added).

<sup>209</sup> *Id.* at 37; *see also* AFSCME Manual, *supra* note 192, at 1-14 (“The purpose of having workers sign authorization cards or a public petition is to get a commitment to the union. It does not do any good to soft-pedal what an authorization card means by saying it is just to get an election.”).

<sup>210</sup> That literature remains somewhat sparse, and most of it is qualitative rather than quantitative. *See* Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Organizing Strategies*, in *REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT* 17, 18 (Ruth Milkman & Kim Voss eds., 2004) (discussing a “handful” of studies that discuss union tactics in quantitative terms).

pothesis that “union success in organizing depends on running campaigns with a focus on representative leadership, personal contact [with workers], [a message focused on] dignity and justice, and building an active union presence in the workplace from the very beginning of the campaign.”<sup>211</sup> In 2004, Bronfenbrenner published a subsequent study of over 400 elections that reconfirmed her earlier results.<sup>212</sup> “Perhaps the single most important component of a comprehensive campaign,” she found, “is an active representative committee that gives bargaining unit members ownership of the campaign and allows the workers to start acting like a union inside the workplace.”<sup>213</sup>

Other studies, in addition to Bronfenbrenner’s, have pointed to worker involvement in all stages of the campaign as a key determinant of union success. James Green and Chris Tilly argued that in a successful campaign at Yale University, “the members rather than the organizers and union officials owned the organizing drive.”<sup>214</sup> Green and Tilly viewed this as necessary to success: Because service workers, especially, often have no past history with unions, organizers needed “to convince them that they [would] participate in the organizing drive and its decisions, just as they [would] in the affairs of the union itself.”<sup>215</sup> More generally, based on his ethnographic studies of union organizing and mobilization efforts, Rick Fantasia argued that “it is in the *process* of its formation that the character of a union is created.” In general, “a successful union [campaign] represents the institutionalization of that which brought it about,” determining the degree to which members will manage and lead the resulting union.<sup>216</sup>

Academics have also pointed to the importance of escalating public tactics. Such actions serve several functions. By demonstrating the union’s level of support, public actions both can “reinforc[e] commitment among pro-union workers” and can “help[ ] to convince undecided workers that they can safely support the union.”<sup>217</sup> In fact, even in secret-ballot campaigns, union supporters will often “publish a public petition of support” to demonstrate the depth of pro-union sentiment.<sup>218</sup> In this regard, union or-

<sup>211</sup> Kate Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections*, 50 INDUS. & LAB. REL. REV. 195, 198 (1997).

<sup>212</sup> Bronfenbrenner & Hickey, *supra* note 210, at 20.

<sup>213</sup> *Id.* at 24.

<sup>214</sup> Green & Tilly, *supra* note 190, at 489; *see also* Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in REBUILDING LABOR, *supra* note 210, at 67 (noting the importance of worker involvement and leadership, but also discussing necessity of partial staff leadership of planning and strategy).

<sup>215</sup> Green & Tilly, *supra* note 190, at 489.

<sup>216</sup> RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 131 (1988).

<sup>217</sup> Bronfenbrenner, *supra* note 211, at 200; *see also* Brodtkin & Strathman, *supra* note 19, at 1, 3 (discussing unions’ efforts to “engage workers in a program of mutually reinforcing actions to challenge employer intimidation and build understandings”).

<sup>218</sup> Lafer, *supra* note 21, at 84.

ganizing drives are much like other mass-based social and protest movements. As William Eskridge has explained, within such movements “[e]veryone understands that joint action would benefit them all and would like to participate in the creation of this public good, but no one is inclined to participate unless everyone else (or a specified portion of the group) is also participating or is expected to participate.”<sup>219</sup> Steven Winter has described this process in more existential terms:

The onus of commitment is that the act of sacrifice necessarily precedes the knowledge of its consequences. But the power of commitment is that, if enough others elect to follow the example of committed action and risk the consequences, it can create the very real possibility that no one at all need pay the price.<sup>220</sup>

Public campaigns, by creating social space in which workers can discuss and display their preferences, can enable workers to judge whether an organizing effort will likely be effective.

Finally, and most importantly, academics have noted the importance of either building or tapping into workers’ senses of collective identity. At times, this is done by linking workplace struggles to broader identity-based social movements. In the 1960s, for example, the large health care workers’ union, District 1199, “consciously appeal[ed] to black pride and the consciousness raised by the civil rights movement”; the United Farm Workers utilized similar race-conscious appeals in organizing migrant farm workers;<sup>221</sup> and various organizing efforts among female clerical workers in the 1980s built upon the activities and gains of feminist organizations.<sup>222</sup> Today, this is a prominent theme in the literature on organizing immigrant workers. In a sociological account of the factors underlying the recent growth of unions in Los Angeles, for example, Ruth Milkman pointed to “vibrant ethnic networks and communities rooted in extended kinship ties as well as the shared experience of migration from particular communities in their countries of origin.”<sup>223</sup> That “intricate web of social connections,” Milkman argues, “can be a key resource in building labor solidarity, particularly if

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<sup>219</sup> William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 451 (2001). This has led Eskridge and others to argue that the “dynamics of collective action” within social movements can be modeled as an “assurance game,” a game theory scenario in which the best outcome for both players is to match strategies, but where one matched strategy is more lucrative than the other. *Id.*; see also Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 220 (2009).

<sup>220</sup> Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 722, 832 (1996); see also Lafer, *supra* note 21, at 84 (explaining that in union campaigns “everyone is literally looking around to see who else is in or out . . .”).

<sup>221</sup> Green & Tilly, *supra* note 190, at 492.

<sup>222</sup> *Id.* at 491; see also JOHN HOERR, *WE CAN’T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD* 112 (1997).

<sup>223</sup> Ruth Milkman, *Immigrant Organizing and the New Labor Movement in Los Angeles*, 26 CRITICAL SOC. 59, 66 (2000).

unions can identify and recruit key actors in kin and community networks.”<sup>224</sup> Similarly, some scholars have attributed some recent successes of “workers centers,” non-union organizations that organize, advocate, and litigate on behalf of immigrant workers in discrete areas and industries, to such centers’ involvement in the social life of the communities in which they work.<sup>225</sup>

At other times, a salient collective identity *as workers* must be constructed. This often occurs via tactics and messages that define workers as a discrete social group with interests opposed to management. Identity construction processes are a major theme in recent social movement theory, particularly through what theorists call “collective action frames.”<sup>226</sup> Collective action frames are interpretations and descriptions of social phenomena that do not emerge spontaneously from groups’ common experiences or conditions, but rather result from movement participants and others’ ongoing efforts at “negotiating shared meaning.”<sup>227</sup> Organizers, leaders, and participants use framing processes to “diagnose” particular phenomena or conditions as injustices and/or attribute “blame for the injustice to a particular actor.”<sup>228</sup> In so doing, they connect individual and group identities by pointing to common structural conditions,<sup>229</sup> and develop proposed solutions to the problem, often through a “‘call to arms’ or rationale for engaging in ameliorative collective action.”<sup>230</sup>

Much of the literature has examined this process in the context of the “new social movements”—such as feminism, LGBT rights, peace, and nuclear energy—“that seemed to be displacing class-based political mobilization in Western Europe in the 1970s and 1980s.”<sup>231</sup> But frames drive collective action processes in the workplace as well. For example, in the Los

<sup>224</sup> *Id.*; see also Jackie Gabriel, *Si, Se Puede: Organizing Latino Immigrant Workers in South Omaha’s Meatpacking Industry*, 29 J. LAB. RES. 68 (2008); Milkman & Wong, *supra* note 193, at 111 (explaining that L.A. janitors “lived in the same neighborhoods or even the same buildings and rode the buses to work together,” and had suffered common “stigmatization . . . in the process of immigration”).

<sup>225</sup> See Janice Fine, *Workers Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005–2006).

<sup>226</sup> Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614 (2000); see also Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 812–13 (2008) (discussing framing in context of intellectual property law).

<sup>227</sup> Benford & Snow, *supra* note 226, at 614 (citing WILLIAM A. GAMSON, *TALKING POLITICS* 111 (1992)).

<sup>228</sup> Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2724 (2008).

<sup>229</sup> See Benford & Snow, *supra* note 226, at 631.

<sup>230</sup> *Id.* at 617.

<sup>231</sup> Francesca Polletta & James M. Jasper, *Collective Identity and Social Movements*, 27 ANN. REV. SOC. 283, 286 (2001); see also Christina Cregan et al., *Union Organizing as a Mobilizing Strategy: The Impact of Social Identity and Transformational Leadership on the Collectivism of Union Members*, 47 BRIT. J. INDUS. REL. 701, 702 (2009) (“There has been no systematic investigation of [union] organizing from the perspective of a mobilizing strategy.”).

Angeles Justice for Janitors campaign, organizers often pointed out that janitors worked for outsourcing companies to clean buildings occupied by highly profitable major corporations.<sup>232</sup> This counterposed workers and corporations, highlighting the unfairness of wealth disparities in modern financial centers, and suggested that workers should act collectively and target building owners rather than cleaning contractors.

In this light, the two main tactics outlined above—recruiting workers to lead campaigns and structuring campaigns around public actions—can function to solidify or reinforce workers’ senses of themselves as a discrete group.<sup>233</sup> This may be especially true where campaign messages and tactics explicitly pit workers against management. As Poletta and Jasper put it:

[P]articipants may share demographic or economic traits . . . but these do not add up to a perception of the preexisting ‘groupness’ of collective identity. Their political activity itself provides that kind of solidarity: We are student radicals, we are people who care about the environment, we are caring, critical citizens. These ‘movement identities’ may come to serve much the same function as a preexisting collective identity.<sup>234</sup>

In the union context, such identities arise in part because activist workers bear significant risk and literally depend upon other workers for protection; the larger the group, the more difficult it is for management to retaliate, and the more likely it is that management will accede to some of workers’ demands. But that means more committed workers often must convince less committed workers to join in. Where such actions spark changes in workplace conditions, workers can become “the agents of their victory,” reinforcing their sense of collective identity and power.<sup>235</sup>

### PART III. RETHINKING “EMPLOYEE FREE CHOICE”

The discussion above has proposed a revised account of the sources and nature of workers’ and unions’ power which complicates each of the assump-

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<sup>232</sup> See Milkman & Wong, *supra* note 193.

<sup>233</sup> See Bert Klandermans & Marga de Weerd, *Group Identification and Political Protest*, in SELF, IDENTITY, AND SOCIAL MOVEMENTS 68, 70 (Stryker et al. eds., 2000) (stating that collective identity formation involves, inter alia, “the creation of boundaries that insulate and differentiate a category of persons from the dominant society”); Poletta & Jasper, *supra* note 231, at 291 (“[A]ctivists’ efforts to strategically ‘frame’ identities are critical in recruiting participants.”).

<sup>234</sup> Poletta & Jasper, *supra* note 231, at 291. The importance of such solidarity is underscored by one union-avoidance consultant’s writings. As Martin Levitt put it, “The enemy was the collective spirit. I got hold of that spirit while it was still a seedling; I poisoned it, choked it, bludgeoned it if I had to, anything to be sure it would never blossom into a united work force . . . .” MARTIN LEVITT, *CONFESSIONS OF A UNION BUSTER* 2 (1993).

<sup>235</sup> Brodtkin & Strathmann, *supra* note 217, at 3; see Sachs, *supra* note 228, at 2734–35 (discussing “self-reinforcing dynamics of success and failure” during union organizing drives).

tions within the standard model. The revised account holds (i) that workers' preferences may be endogenous to existing law and social practices and may be powerfully shaped by group identities well before organizing drives; (ii) that organizing often involves shaping workers' preferences by creating collective identity and that workers often play a central rather than peripheral role in that process; and (iii) that workers' decisions regarding unionization are often based, not simply on information, but also on their own experiences of taking collective action and exercising power, and that the value of solidarity may often inform their analyses of the costs and benefits of individual actions. Subsection A unpacks those counterpropositions in a bit more detail. Subsection B then addresses the fourth proposition in the standard model—(iv) that strong communal attachments and emotional appeals tend to undermine workers' autonomy. It argues, in contrast, that workers' collective action is consistent with—if not necessary to—autonomous employee choice, insofar as it seeks to place workers and management on more equal footing. Subsection C then considers some potential law reforms that would better reflect this vision.

#### A. *Unions' and Employers' Preference-Shaping Strategies*

Disruptive organizing tactics move workers into action despite rational skepticism toward unions, their existing adaptive preferences, or the influence of particular social cascades. One might think of organizers as “polarization entrepreneurs,” individuals who consciously create social spaces in which workers “can hear a particular point of view from one or more articulate people, and also participate . . . in a deliberative discussion in which that point of view becomes entrenched and strengthened.”<sup>236</sup> By encouraging workers to identify collective grievances, to attribute those grievances to management, and to take collective action, organizers can spark reputational cascades or even group polarization, and thereby can move workers into action. Through such action, workers can gain experience in wielding collective power, particularly if they win concessions from management. That success, in turn, may alter workers' calculations of the costs and benefits of unionization, such that they both see unionization as efficacious, and consider solidarity, unity of purpose with coworkers, and a drive for justice or fairness to be among the benefits of organizing activity. Ultimately, the esteem attached to being a union pioneer may make stepping out more beneficial than costly—but only if a union is *organizing* workers rather than just seeking their support.<sup>237</sup>

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<sup>236</sup> Sunstein, *supra* note 167, at 97.

<sup>237</sup> See Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 410 (2005–2006) (“Unions cannot overcome collective action problems by appeals to economic rationality. They must persuade potential members and activists to redefine their interests.”); *cf.* Sachs, *supra* note 8, at 681–83 (discuss-

Past studies strongly suggest that cascades and polarization can inform workers' decisions regarding unionization. Rick Fantasia's account of the internal dynamics of a wildcat strike is particularly illustrative. Fantasia found that many workers were initially noncommittal and decided to walk off the job only after emotional appeals by strike leaders. After the strike succeeded, however, many workers within the shop felt a new sense of empowerment. Fantasia argues that the strike created "a locus of oppositional sentiment . . . which remained solidly rooted in the day-to-day culture of the department" and led to a second successful strike a few months later.<sup>238</sup> Studies of worker decision making bear this point out. Professor Derek Bok argued in 1969 that workers' decisions often turn on factors that could be bases for social cascades and polarization. Those included:

[W]hether the 'key' men selected by the union command respect within the plant; whether opinion in the community is sharply favorable or unfavorable to the union; whether the employee has close friends or relatives who are members of other unions; whether the organizer seems more likable and credible than the management officials; [and] whether the background and psychological orientation of the employees dispose them toward union membership . . . .<sup>239</sup>

Where collective action can help reinforce workers' sense of collective identity and show positive dividends, we can expect cascades and polarization to become especially pertinent.

The importance of emotional appeals to this process—and to social movements more generally<sup>240</sup>—should not be understated. Particular emotions have characteristic "action tendencies." For example, anger often motivates people "to strike out . . . . [a] person, while angry, develops a temporary preference to strike the person who offends him."<sup>241</sup> An angry person "feels less pain, tires less quickly," and "overestimates the probability that the offender will attack him, or that the provocation was not an accident but the result of intent to harm or humiliate."<sup>242</sup> By encouraging workers to attribute grievances to management or even particular managers, organizers tap into workers' anger and move them into action. In fact, it is an article of faith among union organizers that workers are far more likely to organize when they are angry, and less so when they are fearful.<sup>243</sup> Saul Alinsky captured this well in one of his axioms for organizers: "Pick the

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ing collective action problems that impede union organizing, but not considering the role of solidarity or the possible esteem attached to being a union pioneer).

<sup>238</sup> See FANTASIA, *supra* note 216, at 110.

<sup>239</sup> Bok, *supra* note 71, at 51.

<sup>240</sup> See generally MICHAEL WALZER, *POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM* (2004).

<sup>241</sup> Eric A. Posner, *Law and the Emotions*, 89 *GEO. L.J.* 1977, 1981 (2001).

<sup>242</sup> *Id.* at 1982.

<sup>243</sup> See generally Hurd, *supra* note 180 (discussing role of fear in demobilizing workers).

target, freeze it, personalize it, and polarize it.”<sup>244</sup> Similarly, by encouraging workers to share a collective identity *as workers*, organizers build hope, making it more likely that workers will have and share positive beliefs and attitudes toward unionization.<sup>245</sup>

The law plays a complex role in such processes. On the one hand, it can be a powerful resource for organizers. As Benjamin I. Sachs has noted in another context, employment rights statutes may be deployed “as diagnostic frames—that is, as the mechanism through which negative workplace conditions are cast as injustices, and blame for those injustices is attributed to employers.”<sup>246</sup> Immigrant workers earning very low wages who learn that such wages are in fact illegal are more likely to view their working conditions “as a problem, rather than an inevitable condition of immigrant work,” and their employers as having treated them unfairly.<sup>247</sup>

On the other hand, the relatively weak protections for workers under U.S. labor law are a main reason why such identity-building processes are important to organizing efforts. Labor law’s secret ballot requirement and restrictions on picketing will tend to disfavor pro-union polarization by requiring a cooling-off period between workers’ decisions to strike or sign cards and their receipt of official legal certification. Similarly, restrictions on workers’ abilities to advocate for unionization or even to discuss unionization while at work will tend to disfavor pro-union polarization. This complex interaction between law and organizing has led Michael McCann to observe that legal rights can play a “constitutive role . . . both as a strategic resource and as a constraint, as a source of empowerment and disempowerment, for struggles to transform, or to reconstitute, the terms of social relations and power.”<sup>248</sup>

Unions are of course only one among many institutions and actors that shape workers’ preferences, whether deliberately or not. Employers have ample opportunity to shape workers’ preferences well before any organizing drive, for example, by building strong corporate cultures that touch employees at all levels of the firm’s hierarchy. During organizing drives, this process may accelerate. For example, consultants brought in after an organizing drive may make a point of “listening to workers’ problems and complaints

<sup>244</sup> SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* 130 (1989). Note that this meaning of “polarize” differs from that within social psychology—Alinsky means that organizers should stoke anger toward particular powerful individuals.

<sup>245</sup> Conversely, the “action tendency” of fear is flight, and a fearful person often “overestimates the probability of harm associated with the threat.” Posner, *supra* note 241, at 1981. Fear may thus be a powerful means of demobilizing workers.

<sup>246</sup> Sachs, *supra* note 228, at 2724. See generally Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 *LAW & SOC’Y REV.* 367 (2000) (explaining the role of law in defining injustices in civil rights movement).

<sup>247</sup> Sachs, *supra* note 228, at 2723 (citing JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 171 (2005)).

<sup>248</sup> Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2006 *ANN. REV. L. SOC. SCI.* 17, 22 (2006).

[and] blaming unpopular supervisors for problems,” so that workers do not attribute them to the organization as a whole.<sup>249</sup> Top management may appear at such meetings and “demonstrate care and contrition.”<sup>250</sup> Management and consultants may also portray unions as “outsiders” who will destroy workplace morale, or may emphasize the competitive strength of the company’s wages and benefits.<sup>251</sup> Such actions frame the firm as akin to a family, a community governed both by hierarchical relationships and bonds of affection.<sup>252</sup>

At the same time, delay tactics, efforts to portray unionization as futile, and efforts simply to increase tension in the workplace all may push workers from hope toward resignation, sowing doubts as to whether unionization is worth the struggle. Similarly, management efforts to portray unionization as a major decision that will have a significant economic impact on the firm, even if lawful, may encourage workers to polarize toward the more cautious course of action—namely, retaining the non-union default. As social psychologist Roger Brown found, this is a common response among groups debating a decision that “threatens a fiancée, a family, or parents, and not only the protagonist.”<sup>253</sup>

### B. *Rational Choice and Countervailing Workers’ Power*

Organizing is not just a process of building support for the union, understood as wholly a third party vis-à-vis workers, but also a process of building worker power and organization through collective action. Power, in this view, is not a thing or a quantity, but “an ongoing interplay of strategic maneuvering between partners,” and it is partially constitutive of individual subjectivity.<sup>254</sup> A full account of how organizing changes power relationships would examine the moment-by-moment interactions when workers collectively demand changes to workplace governance, and individual managers must assess whether granting those demands will embolden workers or dissipate their anger, and whether failure to do so will lead to a strike or even violence.<sup>255</sup> Collective action is, therefore, disruptive in several senses.

<sup>249</sup> Brodtkin & Strathman, *supra* note 19, at 15.

<sup>250</sup> *Id.*

<sup>251</sup> For example, one union avoidance newsletter included a “Sample Letter Urging Employees Not to Sign Union Authorization Cards,” which argued in part “[i]t is not necessary for our employees to belong to a union to receive fair treatment. We have proved it, since your pay and benefits package is equal to or better than what other employees in this area receive.” Wiley Periodicals, *Management Report for Non-Union Organizations*, WILEY ONLINE LIBR., (May 2003), <http://onlinelibrary.wiley.com/doi/10.1002/mare.10020/pdf>.

<sup>252</sup> See Brodtkin & Strathman, *supra* note 19, at 14. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1980).

<sup>253</sup> BROWN, *supra* note 176, at 210.

<sup>254</sup> Winter, *supra* note 220, at 818–19.

<sup>255</sup> See *id.* at 819–32 (noting that actions and decisions in moments of conflict are both profoundly shaped by the social roles we are expected to play, and constitutive of those social roles and social hierarchies, as well as arguing that what the dominant fear most at such mo-

It disrupts the ordinary operations of the workplace; it disrupts the settled power relations and hierarchies within the workplace; and it disrupts workers' and managers' expectations regarding what sort of workplace governance is possible. Legal certification is then an intermediate step in a process of building collective worker power; that power ordinarily must pre-exist a vote if a union is to gain certification, and it must be carried forward into the bargaining process if a union is to win decent concessions.

Such a view of power relations complicates arguments that decisions made during calm moments are necessarily more autonomous, as well as arguments that the law should protect workers against emotionally-charged appeals. Consider a version of the question presented in *Linden Lumber*: Should an employer have to bargain with workers who unanimously demand recognition, absent any evidence of coercion or misinformation? One might answer "no" on the grounds that organizers had polarized workers against management by skillfully manipulating their emotions, and that they may regret their actions the next day. But within a normative framework dedicated to free choice, that answer begs an important underlying question: Do tactics that move workers into biologically "hot states" distort workers' perceptions of their true interests, or do they help illuminate those interests?<sup>256</sup> The latter view is compelling if one views emotions as "appraisals or value judgments"—as states of mind that "ascribe to things and persons outside the person's own control great importance for that person's flourishing."<sup>257</sup> This line of thinking, associated with Martha Nussbaum, suggests that strong emotional reactions may clarify rather than distort individuals' views about particular working conditions. It also helps explain why group polarization can be beneficial among marginalized groups seeking to articulate demands for justice.

This revised understanding also offers a new perspective on the question of whether employers should be prohibited from informing workers that they plan to exploit all lawful opportunities to resist unionization or meaningful bargaining. A legal actor could analyze such tactics' relationships to employee autonomy in several different ways. First, a pure rational actor model might suggest that employees would want to know whether the law grants employers significant power to "resist meaningful collective bargaining"<sup>258</sup> and would value information regarding what sort of bargaining ad-

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ments "are the awful consequences of weakness," the loss of prestige and social esteem that may come from failure to effect order).

<sup>256</sup> Roberto Unger has often endorsed collective action that draws on such "hot states" as a crucial means of social transformation. See ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 402 (2004).

<sup>257</sup> MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 4 (2003); see also Posner, *supra* note 241, at 1212 (arguing that emotions may assist our perception of moral realities).

<sup>258</sup> Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 14 (2010).

versary an employer will be. But scholars who advocate limiting or preventing employer communications take a second approach, arguing that employers' ability to communicate should be restricted on the ground that employers' economic power makes it impossible for workers or courts reliably to distinguish threats from predictions.<sup>259</sup>

From the perspective outlined herein, those positions unduly narrow the debate. Whether an employer follows through on her predictions of resistance will depend not only upon the law governing certification and bargaining tactics but also upon workers' levels of organization and their abilities to project countervailing power. A minimally rational employer will be far less likely to discharge a worker in retaliation for organizing if her co-workers are so well-organized that they could pull an unfair labor practice strike to protest. Such an employer will also be far more likely to concede in bargaining if workers appear ready to strike. Given the costs of hiring replacement workers and the headline risks associated with strikes, this will be true even if such a strike would be unprotected. Well-organized and sophisticated workers should recognize such facts and discount the employer's bluster accordingly.

Ultimately, employees will be free to choose unionization only if unionization is a realistic option, and only if they perceive it as a realistic option. Those conditions will be met only if workers can build collective power, which requires enabling organizers and worker leaders to build collective identity. That, in turn, requires emotional appeals, disruption, and some eruptions of the irrational. In other words, creating the preconditions for autonomous employee choice requires space *both* for reasoned deliberation and for the building of countervailing workers' power.

This view of autonomy differs somewhat from the view within the standard model, though it is arguably closer to modern liberal conceptions of autonomy.<sup>260</sup> It views autonomous decisions as those taken with "a full and vivid awareness of available opportunities . . . and without illegitimate or excessive constraints on the process of preference formation."<sup>261</sup> It requires rough substantive equality as a precondition for autonomous choice, holding that workers' decisions could be wholly autonomous only if they enjoyed the option of "participation as an equal in a system of cooperative production."<sup>262</sup> Such complete equality—and such complete autonomy—would of

<sup>259</sup> See discussion *supra* Part I.B.i. Note that this is, in part, an argument for changing the background legal regime rather than the laws governing certification. See Estlund, *supra* note 258, at 16 ("The underlying problem is not really what employees know, nor what employers are allowed to say, about the consequences of unionization; the problem lies in what those consequences *are* under current law.").

<sup>260</sup> See Walzer, *supra* note 12, at 21 ("Contemporary liberals are not committed to a presocial self, but only to a self capable of reflecting critically on the values that have governed its socialization.").

<sup>261</sup> Sunstein, *supra* note 17, at 11.

<sup>262</sup> Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 321 (1999); see also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*

course be impossible to achieve without radical changes to the basic structure of the employment relationship and to the legal and economic governance of production itself.<sup>263</sup> Particular preferences and choices can nevertheless be classified as more or less autonomous based upon an analysis of such background constraints.<sup>264</sup> If the law made unionization a viable option for workers, restricted management's ability to resist unionization, and enabled workers to collectively counteract management's power, workers would be less likely to reject unionization based on a sense that it is not effective, less likely to have adaptive preferences against unionization, and less likely to misperceive the risks of organizing.

While space prevents full consideration of such ideas, it is worth noting that this argument parallels debates within deliberative democratic theory over the preconditions for and structure of ideal deliberative processes. Wholly autonomous employee choice—both regarding the choice among alternative systems of workplace governance and choices regarding the operation of such systems—arguably could exist only amid a broader system of political and economic governance in which the exercise of power is justified “on the basis of a free public reasoning among equals.”<sup>265</sup> Yet, there is no contradiction between embracing such reasoned deliberation as an ultimate ideal<sup>266</sup> and also embracing disruptive political tactics, at least insofar as those tactics aim to establish the substantive equality without which deliberative governance may simply legitimate existing inequalities.<sup>267</sup> As Joshua

165–83 (1983) (arguing that the role of work in social structure is founded on justice); Iris Marion Young, *Status Inequality and Social Groups*, 1 ISSUES IN LEGAL SCHOLARSHIP 9 (2002) (discussing Walzer, arguing that “[p]ersons who do some of the least desirable but necessary work in the society . . . ought not to have their work looked down upon”).

<sup>263</sup> *Accord* Sachs, *supra* note 8, at 661. For proposals along those lines, see generally JOSHUA COHEN & JOEL ROGERS, *ON DEMOCRACY* (1983) (same); Barenberg, *supra* note 8, at 793–98, 946–83 (proposing workplace governance based upon an “ideal of egalitarian deliberation”); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 SOC. PHIL. & POL'Y 25 (1989) (proposing democratic governance of economy); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 4 (1988) (discussing that labor law “should no longer remain indifferent to the hierarchical governance structures found in most firms” and that it “should be framed and administered with a commitment to democratizing decision-making in the workplace and to redistributing power in labor markets in favor of employees . . .”). This is also of course a prominent theme within Karl Marx's philosophical works. See KARL MARX, *On the Jewish Question*, in *Selected Essays* 40 (H.J. Stenning trans., 1926) (stating that liberal political equality does not result in true autonomy as long as economic and social processes lead to class divisions that substantially restrict individuals' life chances).

<sup>264</sup> See Sunstein, *supra* note 107 at 1170–71 (“No desire is unaffected by social forces . . . [b]ut it would be a mistake to give up on the idea entirely, or to refuse to make distinctions in degrees of autonomy and in the nature of the processes by which preferences emerge.”).

<sup>265</sup> JOSHUA COHEN, *Procedure and Substance in Deliberative Democracy*, in *PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS* 154, 160 (2009); see also Cohen, *supra* note 263, at 25.

<sup>266</sup> Cf. Sachs, *supra* note 8, at 692 n.152 (stating that ideal deliberative procedure requires a relative balance of power not generally present between workers and management).

<sup>267</sup> See Joshua Cohen & Joel Rogers, *Power and Reason*, in *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE*, 237, 241 (Archon Fung & Erik Olin Wright eds., 2003) (criticizing other deliberative theorists for being inatten-

Cohen has argued, “it is sometimes necessary to resort to destabilization, threats, and open conflict as answers to people who won’t reason in good faith.”<sup>268</sup> In that regard, workers’ collective action is neither aberrational nor a threat to workers’ autonomy—rather, it is partially *constitutive* of workers’ autonomy. Moreover, insofar as autonomy is a good, the substantive inequalities of employment relationships can help justify legal efforts to proactively encourage collective action. To be clear: The argument is not that collective action is a good *per se*, but that it is often a good insofar as it seeks to alter unequal and unjust power relationships.

### C. *Thoughts on Law Reform*

This subsection outlines several means of reforming labor law so as to balance workers’ needs for time to reflect on their decisions with the need to encourage disruptive collective action. It first asks whether existing law or existing proposals already appropriately strike that balance by building delays into the process that may “debias” workers. It then outlines an alternative certification procedure that *would* better balance these competing goals. Finally, it sketches some thoughts on broader means of labor law reform that would center on empowering workers to act collectively outside the organizing context.

#### i. *Debiasing as an Incomplete Solution*

Although the existing regime’s bias toward calm decision making tends to empower employers, there are still sound reasons not to hold individuals to commitments made in an emotionally-charged state. Strong emotional reactions may lead individuals to take actions they later regret,<sup>269</sup> and may increase the pressures toward conformity among groups of workers.<sup>270</sup> In

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tive to “conditions of background power”); see also COHEN & ROGERS, *supra* note 263, at 157 (“[T]he absence of material deprivation is a precondition for free and unconstrained deliberation . . . .”); SACHS, *supra* note 8, at 661 & n.16 (“[D]eliberative democratic theorists agree that an ideal deliberative process requires both formal and substantive equality among the participants in the debate.”); Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 356 (1997) (arguing that without such equality, the deliberative ideal’s “connotations of cautiousness and order,” can have powerful *antidemocratic* implications, bolstering aristocratic “claim[s] that the many fail to deliberate: that is, they are too hasty, or insufficiently thoughtful, especially about problems not of immediate concern to them”); accord Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 28 (Stephen Macedo ed., 1999).

<sup>268</sup> Joshua Cohen, *Reflections on Deliberative Democracy*, in PHILOSOPHY, POLITICS, DEMOCRACY, *supra* note 265, at 341 (explaining the productive tension between participation and deliberation); Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670, 688 (2001) (contrasting “activist” and deliberative styles of democracy, describing activist style as “far more rowdy, disorderly, and decentered”).

<sup>269</sup> See discussion of “cooling-off periods,” *supra* Section I.A.iii; see also Posner, *supra* note 241, at 1981–82 (explaining that emotion-state preferences differ from calm-state preferences).

<sup>270</sup> See discussion of social cascades and polarization, *supra* Section II.A.iv.

addition to such effects on autonomy, emotionally-charged reactions may also have negative externalities, including potentially racist, sexist, or otherwise exclusionary overtones. Similar concerns have led past scholars to advocate for certification processes—such as the secret ballot or instant elections—that grant workers time to consider how they feel about unionization, rather than enacting preferences they may have expressed in the heat of the moment. Such delays are therefore akin to “debiasing through law”;<sup>271</sup> they assist workers in overcoming problems of bounded rationality, such as preferences “tainted” by polarization, cascades, or risk misperception. Delays built into the certification process may then have the desirable effect of enabling workers to make a final decision while not in the midst of collective action or on the receiving end of a harsh management message or an emotion-laden appeal for solidarity.

That said, applying the terminology of “debiasing” to existing law implies that workers’ collective action is aberrational and a source of bias, rather than also being a source of moral and political insight. The argument can easily be flipped: Employers’ tactics may “bias” workers against unionization, and collective action may help “debias” them. After all, employers’ activities are likely a far more common source of endogenous preferences than unions’ activities, given the infrequency of organizing drives, employers’ control over workplace communications, and legal restrictions on collective action and on workers’ abilities to discuss unionization at work. This is not an argument that time for reasoned consideration should be eliminated from the certification process. Rather, it is an argument that the law should encourage both dispassionate reflection *and* disruptive collective action, and that disruptive action is consistent with, rather than threatening to, worker autonomy.

## ii. *An Opt-Out Process*

An alternative proposal would open the door to unionization to more workers through relatively modest changes to the certification process.<sup>272</sup> It seeks to combine some of the spark from existing organizing strategies with the anti-coercion and debiasing effects of cooling-off periods. To capture the benefits of collective action and some degree of pro-union polarization, while also protecting workers against coercion, the law could be reformed to require recognition based on card check or other valid indicia of majority support, but only if a union subsequently maintains its majority over a short

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<sup>271</sup> Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) (outlining certain legal policies that respond to “problems of bounded rationality . . . by operating directly on the boundedly rational behavior and attempting to help people either to reduce or to eliminate it”).

<sup>272</sup> See also Brishen Rogers, “Acting Like a Union”: *Protecting Workers’ Free Choice by Promoting Workers’ Collective Action*, 123 HARV. L. REV. F. 38 (2010) (proposing a certification process based on card check followed by a brief cooling-off period during which workers could confidentially disavow their card signatures).

cooling-off period. During that time, card signers could confidentially disavow their union support, and previously uncommitted workers could confidentially register their own votes.<sup>273</sup> Procedurally, after workers or a union file a card majority, the Board could meet with them to inform them of their rights to opt out, and provide them with information regarding how to do so. To tally such decisions, the Board could utilize confidential internet and/or telephone voting techniques, such as those developed by the National Mediation Board for union certification under the Railway Labor Act, and recently discussed by Benjamin I. Sachs as alternative means of voting in Board elections.<sup>274</sup>

In contrast to existing law, which imposes disproportionate costs on unions and on pro-union workers who sign cards without regrets, a shorter cooling-off period would impose disproportionate costs on unions that build majority “support” through questionable means. While reasonable people may disagree about the length of such a period, given that management will often have been campaigning well before a union reaches a majority, a short cooling-off period of forty-eight to seventy-two hours may be sufficient. During that time, management would be able to campaign against unionization, not because such campaigns are necessarily legitimate or helpful to employees, but rather because they are politically and legally inevitable.<sup>275</sup> Any such new certification regime would ideally be coupled with provisions for rapid injunctive relief and significantly increased damages to deter employer threats and coercion. Regardless, having a short period between card collection and certification would help ensure that workers’ choices would not be reactive to the heat of battle or to management’s efforts to ratchet up workplace tension.

Such a regime offers advantages over both card check and rapid elections. Like card check, it would encourage open and public actions, helping workers solve the coordination problems that may otherwise hinder organizing. It would also correct for coercion and social pressures.<sup>276</sup> Furthermore, it would allow workers the option of secrecy in decision making, while not falling victim to the delays that would likely beset even the best-intentioned

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<sup>273</sup> Ironically, this system has some similarities to the Board’s now-defunct *Dana* rule, under which voluntary recognition would not become final until a forty-five-day waiting period had elapsed, during which time workers would be informed of their right to file a decertification petition. *In re Dana Corp.*, 351 N.L.R.B. 434 (2007), *overruled by In re Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (2011).

<sup>274</sup> See Sachs, *supra* note 8, at 720 (describing National Mediation Board procedures).

<sup>275</sup> Eliminating all management communications would, under current doctrine, run afoul of the First Amendment. See *Thomas v. Collins*, 323 U.S. 516 (1945); see also *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (holding that the California law banning recipients of state funds from campaigning against unionization is preempted by the NLRA).

<sup>276</sup> See, e.g., Camerer et al., *supra* note 106, at 1240 (noting that sellers subject to cooling-off periods “may actually take pains to ensure that the consumer is not only cool, but has deliberated about the costs and benefits of the purchase”). Of course, unions would have the same incentives under current law.

rapid elections procedure.<sup>277</sup> By ensuring that workers understand their rights to opt out, it could also protect workers against the chance that a union and management will collude to impose a sweetheart relationship; this is a risk that the Board could highlight in the mandatory post-filing meeting.

Of course, workers who prefer not to express their preferences in public would bear some costs under this rule. Conversely, there is nothing stopping workers in a secret ballot regime from revealing their votes to coworkers or taking collective action. Yet actions speak louder than words: Workers will likely find it much more informative to see a coworker sign a semi-binding card or petition (or refuse to do so) than to hear a coworker verbally commit to vote yes (or no). Voting is different in kind from deliberation—“like the prospect of being hanged, [it] concentrates the mind wonderfully, forcing the voter to consolidate her reactions and to assign weights or priorities to the various factors that bear on the decision.”<sup>278</sup> This regime would encourage such public acts, in part because the law should take workers’ publicly expressed preferences more seriously, and in part because doing so would better enable workers to build collective power.

### iii. *Countervailing Workers’ Power as a Regulatory Strategy*

Given the near-total collapse of private sector unionism, the time may be right to begin considering more profound changes to labor law.<sup>279</sup> For example, the law could radically reshape workplace governance so as to emphasize workers’ collective action as a means, not just of gaining union certification, but also of solving day-to-day conflicts within the workplace. The underlying insight here is that workers’ collective action, with or without a union, can be a very effective strategy to promote at least some of the goods associated with labor law, including redistribution and fair workplace policies. Moreover, as scholars and court cases show, workers often take action around workplace grievances in the non-union context—action that may range from group meetings with management to slowdowns to actual strikes.<sup>280</sup> This would likely become much more common if the Act’s

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<sup>277</sup> See Sachs, *supra* note 8, at 719 (“[T]here is nothing ‘rapid’ about the [Board].”).

<sup>278</sup> Adrian Vermuele, *Open-Secret Voting* 12 (Olin Ctr. for Law, Econ., & Bus., Harv. L. Sch., Discussion Paper No. 674, 2010). *But see id.* at 15 (arguing that open-secret voting is “most useful for the advisory aggregation of judgments,” but is not useful for “binding aggregation of preferences,” and that the utility of “binding aggregation of judgments” is unclear).

<sup>279</sup> I borrow the title of this sub-subsection from Karl Klare, *Countervailing Workers’ Power as a Regulatory Strategy*, in *LEGAL REGULATION OF THE EMPLOYMENT RELATION* (Hugh Collins et al. eds., 2000).

<sup>280</sup> Non-union workers do enjoy Section 7 rights, even if they make no effort to unionize. See *Labor Board v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962); see also *Atlantic Scaffolding Co.*, 16-CA-26108, 2011 NLRB LEXIS 107, at \*2 (Mar. 18, 2011) (explaining that it is an unfair labor practice to terminate workers “for engaging in a work stoppage over a pay raise” without any apparent union involvement); *HMY Roomstore, Inc.*, 5-CA-30809, 2004 NLRB LEXIS 237, at \*6–7 (May 7, 2004) (holding that it is an unfair labor practice to suspend workers who sought a collective meeting with employer to discuss wage increase with no apparent union involvement); *Am. Red. Cross Ariz. Blood Servs. Region*, 28-CA-23443, 2012

prohibitions on retaliation were significantly beefed up and enforced through fast injunctive relief, and if other legal restrictions on such activity were removed.

In such a situation, collective action might nevertheless be less contentious; it would be a constant underlying threat to unilateral employer authority and, therefore, a powerful incentive for employers to treat workers fairly. Collective bargaining, similarly, might become more common but less formal. In a sense, this would be a form of private ordering—one empowering workers to bargain collectively on a day-to-day basis, with or without a union intermediary.<sup>281</sup> Unions or similar institutions would nevertheless remain a necessity, as workers will always need legal services and organizing assistance. But the intricate set of rules governing unions' institutional forms<sup>282</sup> and the proper sites and topics of collective bargaining could be up for discussion. Reformers might enable unions to represent a minority of workers within a particular worksite, or to represent only their own members.<sup>283</sup> Alternatively, they might encourage bargaining at the sectoral or regional level rather than the firm level, while still encouraging workers at particular firms to solve disputes through collective action whenever possible. Reformers might even consider making decertification easier, though any such proposal would need to be accompanied by a package of aggressive worker protections and carefully crafted so as not to facilitate management resistance to collective bargaining.<sup>284</sup>

Innumerable other details would need to be worked out, including how to distinguish legitimate from illegitimate collective demands and questions around contract administration in situations in which workers choose more permanent representation. The baseline and critical reform, however, would

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NLRB LEXIS 43, at \*43–44 (Feb. 1, 2012) (explaining that it is an unfair labor practice to terminate employee for organizing coworkers around alleged harassment by supervisor with no apparent union involvement); Wade Rathke, *A Wal-Mart Workers Association?: An Organizing Plan*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 261, 274 (Nelson Lichtenstein ed., 2006) (noting that organizers, when beginning a drive, often find that workers have already taken collective action); Richard Michael Fischl, *Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (summarizing Section 7 doctrine and its boundaries). *But see* Quietflex Mfg. Co., 344 N.L.R.B. 1055, 1055 (2005) (noting that it was an unfair labor practice to terminate eighty-three employees who refused to leave company parking lot after a “peaceful 12-hour work stoppage to protest their terms and conditions of employment”).

<sup>281</sup> In this regard, it parallels in some ways Benjamin I. Sachs's suggestion that labor law be reformed to protect the early stages of union organizing, while taking a hands-off approach to many other matters. *See* Sachs, *supra* note 228, at 2724.

<sup>282</sup> *See, e.g.*, Bodie, *supra* note 8, at 40–43 (discussing legal constraints on unions' institutional forms).

<sup>283</sup> *See* CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 1–2 (2005) (noting that the NLR protects right of a minority of workers to bargain collectively on a members-only basis).

<sup>284</sup> Professor Samuel Estreicher, *Public Meeting on Proposed Election Rule Changes*, N.L.R.B., <http://www.nlr.gov/sites/default/files/documents/525/publicmeeting07-18-11-corrected.pdf> (July 18, 2011) (noting that our system is one of “hard in, hard out. It's hard to get a union in. It's hard to get a union out.”).

be to require the Board or some successor agency—or perhaps federal courts—to respond quickly and powerfully to enumerated employer practices including retaliation and failure to negotiate in good faith with any group of workers who desire collective bargaining. The entire representation campaign could become irrelevant in many instances, as workers—whether alone, or backed by unions or successor organizations that provide the legal services necessary to obtain such injunctive relief—quickly negotiate raises or new workplace policies. Countervailing workers' power would be a regulatory strategy, not just a means to the end of gaining union certification.

#### IV. CONCLUSION

Existing case law and scholarship on union certification processes reflect a set of interrelated assumptions regarding how best to promote autonomous employee choice. Judges and scholars tend to favor rational decision making informed by self-interest; to view organizing as a process of aggregating workers' preferences; and to suspect that strong communal attachments are a threat to workers' autonomy. Drawing upon sociological studies of union organizing, social movement theory, and the literature on endogenous preferences and bounded rationality, this Article has challenged such assumptions. It has argued that organizing is a process of building collective power by building collective identity. Organizing, therefore, often requires disruptive collective action and powerful appeals to group solidarity, not cool deliberation regarding costs and benefits. When successful, a worker-led organization emerges to advance workers' interests well before certification and to press for a strong contract after certification.

While such organizing tactics, therefore, involve preference shaping, discouraging them on that ground disregards the broader extent to which individual preferences are pervasively shaped by law and social practices. Both employers and unions may shape workers' preferences, whether deliberately or inadvertently, and may do so well before organizing begins. In fact, common employer anti-union tactics seem like deliberate efforts to shape workers' identities and foster identification with the firm rather than coworkers. This revised account of organizing, therefore, has significant implications for how we understand employee autonomy. Insofar as autonomous choices are those made with full awareness of alternatives, and without cognitive or behavioral distortions resulting from gross power differentials, employees' collective action may in fact be a necessary (though not sufficient) condition for autonomous employee choice. Depending on the context, it can place workers and management on a more equal footing. This is not an argument that efforts to promote autonomy by permitting reasoned and deliberate decision making are misguided, so much as they are incomplete. To promote autonomous choice, labor law needs to encourage both disruption and deliberation.

Hopefully this account will not only shed light on ongoing debates over reform of federal and state labor law but also stimulate further discussion of the normative foundations of workplace regulation. Of the two most prominent sources of normative theorizing in law today—law and economics and post-Rawlsian liberal egalitarianism—the former is generally opposed to regulation of the workplace, while the latter has said little about it outside the anti-discrimination context. Similarly, labor scholars have rarely engaged with liberal egalitarianism.<sup>285</sup> Note, in this regard, that ideas of free choice and individual responsibility are central to both discourses,<sup>286</sup> which may help explain some of the tilt toward individual protections within contemporary labor law doctrine and scholarship. In an era of growing inequality and social exclusion, exploring when and why material conditions of employment and restrictions on workers' collective action are incompatible with basic liberal egalitarian commitments may be an important task for legal theorists.

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<sup>285</sup> Mark Barenberg and Joel Rogers are counterexamples. See Barenberg, *supra* note 8, at 797; COHEN & ROGERS, *supra* note 263.

<sup>286</sup> This strikes me as obvious in the case of most law and economics scholarship. In liberalism, see “luck egalitarian” theories of distributive justice which seek to prevent inequalities based on accidents of birth (“brute luck”), while leaving individuals responsible for their own poor choices (“option luck”). For a leading account and summary, see Anderson, *supra* note 262, at 321.

