Fall 2023

Political Polarization in America: Its Impact on Industrial Democracy and Labor Law

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ITS IMPACT ON INDUSTRIAL DEMOCRACY AND LABOR LAW

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INTRODUCTION

Over the last decade, political scientists have worried that the conditions necessary to maintain a democratic society in the United States have broken down.[1] They are particularly concerned about what they believe has been an increase in political polarization.[2] They point to the challenges faced by the US Congress in reaching compromise,[3] what seems like an

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[1] Thomas B. Edsall, Opinion, *America Has Split, and It's Now in 'Very Dangerous Territory,'* N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html [https://perma.cc/Y6MT-P6WR] (stating that "[p]olarization has become a force that feeds on itself, gaining strength from the hostility it generates, finding sustenance on both the left and the right"); Thomas Edsall, Opinion, *Red and Blue America Will Never Be the Same*, N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/opinion/trump-red-blue-america.html [https://perma.cc/43WF-JFRT] (describing the shift toward sorting of parties along region, religion, and race instead of social class); Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT INT'L PEACE (Jan. 18, 2022) https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190 [https://perma.cc/QE37-3WMH] (noting the deep political divide among elites, the erosion in institutional norms, and the efforts by politicians to pursue their aims outside of democratic institutions); David Brooks, Opinion, *Here's the Mindset That's Tearing Us Apart*, N.Y. TIMES (Oct. 7, 2021), https://www.nytimes.com/2021/10/07/opinion/essentialism-stereotypes-bias.html [https://perma.cc/3R9X-C4A7] (describing the increase in an essentialist mindset as one of the reasons for the inability to find compromise among political parties).

[2] *See* Kelli Maria Korducki, *How America Lost Its Grip on Reality*, ATLANTIC (Feb. 1, 2023), https://www.theatlantic.com/newsletters/archive/2023/02/how-america-lost-its-grip-on-reality/672918/ [https://perma.cc/85MM-EPPG].

[3] Jonathan Haidt, *Why the Past 10 Years of American Life Have Been Uniquely Stupid: It's Not Just a Phase*, ATLANTIC (Apr. 11, 2022), https://www.theatlantic.com/magazine/archive/2022/05/social-media-democracy-trust-babel/629369/ [https://perma.cc/AS68-SULT].

increase in hostility across the political divide,[4] and evidence indicating that people's opinions of the political "other" are influencing decisions in other realms.[5] As an example, scholars point to the different ways in which state governments and their citizens reacted to the COVID-19 pandemic. Not only did red and blue states adopt different policies to address the pandemic, but members of the public also responded very differently to those policies.[6] Early findings show that "the single most important" factor explaining mask usage was political partisanship.[7] Scholars also point to the different ways in which segments of the public reacted to the events of January 6, 2021, at the US Capitol, with Democrats uniformly condemning the event and Republicans either ignoring or supporting the actions of the rioters.[8] This divide extends beyond pandemics and politics to the labor arena as well.

This article explores the impact that political polarization is having in the social, legal, and regulatory space, particularly on American worker-management relations. Polarization is affecting decisions involving social relationships and market transactions,[9] the ability of institutions built to generate debate and discussion to successfully complete these missions,[10] and people's willingness to listen to and engage with views contrary to their own. Research indicates that over 80

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[4] Mehdi Alavi, *The Colossal Corruption of the Two-Party System*, FAIR OBSERVER (Feb. 24, 2023), https://www.fairobserver.com/politics/the-colossal-corruption-of-the-two-party-system/ [https://perma.cc/XA7A-EFRA].

[5] Lakshita Singh, *Dating Someone With Opposing Political Views: 7 Women Share Their Thoughts*, HERZINDAGI (Dec. 12, 2022), https://www.herzindagi.com/relationships-tips/dating-someone-with-opposing-political-views-7-women-share-their-thoughts-article-212937 [https://perma.cc/YX3Q-XYHF].

[6] Bret Jaspers, *Power Struggles Between State and Local Officials Escalate in Texas—and Across the Nation*, KERA NEWS (Feb. 21, 2023), https://www.keranews.org/government/2023-02-21/power-struggles-between-state-and-local-officials-escalate-in-texas-and-across-the-nation [https://perma.cc/D8XU-BNE3]; Austin L. Wright et al., *Political Polarization Impedes the Public Policy Response to Covid-19*, VOXEU: CEPR POL'Y PORTAL (Dec. 23, 2020), https://cepr.org/voxeu/columns/political-polarisation-impedes-public-policy-response-covid-19 [https://perma.cc/SL38-EK96].

[7] Wright et al., *supra* note 6.

[8] John Gramlich, *A Look Back at Americans' Reactions to the Jan. 6 Riot at the U.S. Capitol*, PEW RSCH. CTR. (Jan. 4, 2022), https://www.pewresearch.org/short-reads/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/ [https://perma.cc/9KRY-XG59].

[9] *See* Simon Levin et al., *The Dynamics of Polarization*, 118 PROC. NAT'L ACAD. SCIS., no. 50, Dec. 2021, at 2, https://www.pnas.org/doi/epdf/10.1073/pnas.2116950118; *Researchers Find Broad Impact from Political Polarization*, UNIV. WYO. NEWS (Feb. 10, 2021), https://www.uwyo.edu/news/2021/02/researchers-find-broad-impacts-from-political-polarization.html [https://perma.cc/MGH3-3DCR].

[10] *See* Haidt, *supra* note 3 (noting that the "epistemic operating system" of institutions for generating knowledge has been interrupted by polarizing forces, which makes it too risky for individuals to engage in debate).

percent of members of both major political parties have an "unfavorable" view of members of the other party and over 40 percent have a "*very* unfavorable view[.]"[11] Two decades ago, the corresponding figures were about 60 and 13 percent respectively, indicating that the divide is growing.[12] Not surprisingly, members of each camp are less likely to engage in debate with those not in the same group,[13] making exposure to different views rare. At a minimum, political polarization interferes with the ability of democratic processes to function. By stifling debate and decreasing the level of trust across members of different political parties, polarization makes the exchange of arguments and information more difficult. This article extends the current scholarship on the effects of political polarization to the labor law and labor relations regulatory arena.[14] It starts with the observation that US labor law and regulation are based, at their core, on the principle of "industrial democracy."[15] That is, the system operates on the belief that the inherent struggle between workers and employers is best resolved by creating conditions that will replicate democratic ideals, such as free speech and the free exchange of ideas.[16] Thus, the National Labor Relations Act (NLRA or Labor Act or Act) safeguards the ability of employees

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[11] PEW RSCH. CTR, AS PARTISAN HOSTILITY GROWS, SIGNS OF FRUSTRATION WITH THE TWO-PARTY SYSTEM 15, 18 (2022), https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/ [https://perma.cc/K7U8-MQMK]; PEW RSCH. CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER: SHARP SHIFTS AMONG DEMOCRATS ON AID TO NEEDY, RACE, IMMIGRATION 65–66 (2017), https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/ [https://perma.cc/ZR46-T7N9].

[12] *See* THE PARTISAN DIVIDE ON POLITICAL VALUE GROWS, *supra* note 11, at 66.

[13] Jenna Bednar, *Polarization, Diversity, and Democratic Robustness*, 118 PROC. NAT'L ACAD. SCIS., no. 50, Dec. 6, 2021, at 3–4, https://www.pnas.org/doi/epdf/10.1073/pnas.2113843118 (last visited Nov. 26, 2023).

[14] *See infra* notes 160–172 and accompanying text. Other legal scholars have taken notice regarding the effect that political polarization could have in various areas of the law. *See, e.g.*, Robert Vischer, *Legal Education in an Age of Polarization*, 17 U. ST. THOMAS L.J. 1100 (2022); Carrie Menkel-Meadow, *Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5 (2018); Nancy Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. DISP. RESOL. 27 (2018); Erik Cleven, Robert Baruch, & Judith Saul, *Living With No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 43 (2018); Robert Bordone, *Building Conflict Resilience: It's Not Just About Problem-Solving*, 2018 J. DISP. RESOL. 65 (2018); Arne Spieker, *Stakeholder Dialogues and Virtual Reality for the German Energiewende*, 2018 J. DISP. RESOL. 75 (2018).

[15] *See infra* notes 97–130 and accompanying text.

[16] "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955).

to decide whether to join a union and bargain collectively with their employers. That choice is generally made by means of a secret ballot election, the integrity of which is protected by the National Labor Relations Board (NLRB or Board). The election is preceded by a campaign period, also monitored by the Board, and during which the union and the employer try to convince employees to vote in favor of their respective positions, either in favor of or against unionization. This framework is based on two underlying assumptions: first, that employees represent a somewhat monolithic block of people with similar concerns and preferences and thus the focus of the law should be on protecting employees against undue pressure from either the employer or the union; and second, that if given the necessary information, employees will be able to make an informed choice regarding the decision to unionize.

This article argues that increased polarization in the United States calls into question the basic assumptions on which many of the rules involving the labor organizing process are based. It avers that in order to advance the goal of the NLRA—promoting the practice of collective bargaining—one needs to consider the implications that political polarization has on the rules regulating the conduct of organizing campaigns. Further, this article argues that rules based on the presumption that "free debate" in and of itself is a sufficient condition for employees to express their true preference regarding unionization do not comport to today's environment.

Part I discusses the extent to which current labor organizing rules are based on the belief that voters in an election share a "willingness to be convinced" and the expectation that such rules facilitate the exchange of information between the voters (employees) on the one hand and union and employers on the other, and thus achieve the goals of the NLRA. This part explores how the principles of industrial democracy, on which the NLRA is based, are undermined by the recent increase in political polarization. In particular, the article asserts that the law as currently interpreted has focused on protecting the rights of employees to be informed about their choices in a representation election by allowing employers and unions a roughly equal chance to communicate with employees. To be sure, there has been ample debate as to whether the NLRB and courts have achieved the proper balance, with both sides challenging existing policies. But it is clear that the rules the NLRB and courts have adopted are based on a rationale of questionable validity: that employees are willing to be convinced

and that open debate between employers and unions will allow them to reach the proper decision. This article argues instead that the increased polarization undermines this assumption and thus makes the current rules potentially inadequate to handle the current moment in our national environment. Part II examines the literature on polarization, and in particular, the causes and effects of political polarization. It also explores the recommendations observers and scholars have made for reducing said polarization. Part III develops the central focus of this article by describing the relationship between the increase in polarization and the basic assumptions on which labor organizing rules are founded. Part IV finishes the analysis by discussing various suggestions, based on polarization research, on how the NLRB could begin to use approaches to organizing elections that are somewhat responsive to a polarized workplace environment.

I. THE DEMOCRATIC GROUNDING OF LABOR ORGANIZING RULES

The contention of this article is that the increased political polarization experienced in the last two decades presents a challenge to some of the basic assumptions by which labor law has developed in the United States. This part starts with a brief description of the NLRA's representation-elections process. Next, with this background in mind, it explores the foundations of the current framework for regulating such a process. In particular, this part develops the argument that the rules the NLRB and courts have adopted are based on the rationale that, in the context of a representation election, employees are willing to be convinced and thus, that the goal of the law is to provide unions and employers the opportunity to inform employees about their choice.

A. The Basic Framework for Representation Elections Under the National Labor Relations Act

The Wagner Act, as the NLRA was originally known, had the goal of promoting collective bargaining.[17] Collective bargaining refers to the processes by which labor unions, employers, and employees interact and jointly agree to the rules

[17] National Labor Relations Act § 1, 29 U.S.C. § 151.

that will govern their employment relationship.[18] As a means to this end, and for the purpose of encouraging industrial peace,[19] the Wagner Act made it an unfair practice and therefore impermissible for employers to interfere with union organizing activities.[20] The Wagner Act also imposed a duty on employers to bargain in good faith with the representative chosen by the employees.[21] To accomplish these objectives, the Wagner Act created a machinery for determining employee representation in collective bargaining[22] and gave the NLRB the job of prosecuting and remedying unfair employer practices.[23] Essentially, the law relied on a representation-election process for determining whether the majority of employees in a given workplace (or bargaining unit) wanted to be represented by a labor organization.

Section 9 of the NLRA sets out the general rules for the Board's role in determining collective bargaining representatives and defines the Board's powers and duties in connection with that function.[24] The NLRA, as amended by the Labor-Management Reporting and Disclosure Act of 1959, permits the Board to delegate its powers to its regional directors under Section 9—these powers include the ability to determine the appropriate bargaining unit, order a hearing, determine whether a question of representation exists, and direct an election and certify its results.[25] Under this delegation of authority, regional directors rule on objections and challenges and are also empowered to decide questions, such as which employees are eligible to vote and what qualifies as an appropriate bargaining unit.[26] Overall, the Board supervises every step in the election procedure, usually through its regional

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[18] ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW ANALYSIS AND ADVOCACY 847 (2013).

[19] Section 1 of the Act provides that "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

[20] *Id.* § 158(a)(1), (3). Under the Wagner Act, only employers' actions were targeted as potentially unfair labor practices. It was not until the Act was amended in 1947 that unions were placed under similar restraints. In 1947, the NLRA was amended by what has come to be known as the Taft-Hartley Act (officially entitled the Labor Management Relations Act, 1947). The Taft-Hartley Act added a number of unfair union practices.

[21] *Id.* § 158(a)(5).

[22] *Id.* § 159.

[23] *Id.* § 160.

[24] *Id.*

[25] *Id.* § 159.

[26] *Id.*

offices. It sets the election date, decides what unions will be allowed on the ballot, makes the election arrangements, sends an agent to the polls, decides the eligibility of voters, determines rules on challenged ballots, and judges any objections raised as to the manner or circumstances in which the election was conducted. More broadly, in its adjudicatory function, the Board has defined the parameters of the types of conduct in which the parties will be allowed to engage during a representation election.[27]

Elections are generally conducted in the workplace, at a time that is appropriate with the operations of the company. An NLRB agent sets up a polling area where employees can cast ballots. The employer and the participating unions have the right to appoint an equal number of observers to act as their respective representatives at the polls. The observers assist the Board agent in conducting the election by acting as watchers, checkers, and tellers, and also by identifying the employees who are entitled to participate in the election. To win an election, a union must receive a majority of the votes cast in the election; it need not win the approval of a majority of all the employees in the bargaining unit who were eligible to vote.[28]

B. The Industrial Democracy Narrative

Democracy was considered foundational to the NLRA since before its enactment. On the eve of the US Senate vote on whether to enact the NLRA on May 15, 1935, Senator Robert Wagner, the major sponsor of the bill, made it clear that the Act was entirely consistent with democratic traditions. He explained that in collective bargaining, "majority rule[s]" and that "democracy in industry must be based upon the same principles as democracy in government."[29] Senator Wagner believed that this democratic foundation was essential in achieving the Act's two stated goals: industrial peace and workers' empowerment.[30]

The Act intended to improve workers' lot by outlawing employers' interference with the rights of employees to act

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[27] *See generally* NLRB v. Gissel Packing Co. Inc., 395 U.S. 575 (1969) (discussing the NLRB's power to regulate speech in NLRB elections and deferring to the NLRB's expertise in this regard).

[28] *See generally id.*

[29] 79 CONG. REC. 7571 (1935) (statement of Sen. Wagner).

[30] *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 39 (6th ed. 2019) [hereinafter GOULD, LABOR LAW PRIMER] (noting that the constitutional theory underlying the NLRA was the belief that statutory regulation of labor and management was necessary to dimmish industrial conflict and prevent disruptions in interstate commerce).

concertedly.[31] The goal of providing employees a collective voice required reliance on many of the facets of what seem to be the basis of a democratic society: freedom of speech, freedom to associate, and the right to vote.[32] Industrial democracy, as these various principles were known when applied to the workplace, was a foundational piece of the legislative scheme created by the Labor Act.[33] This can be seen in NLRB and court decisions regarding the number of votes needed to win an election, free speech, and the value of collective bargaining.

Since the enactment of the Labor Act, the NLRB and the judiciary both have frequently evoked the industrial democracy narrative when interpreting the legislation.[34] For instance, in an early case dealing with the issue of the certification of an election, the Fourth Circuit found that the union needed to obtain the majority support of the employees participating in the election as opposed to the majority support of the employees eligible to vote.[35] The court noted that "the political principle of majority rule should be applied" and that representation elections were held "for the purpose of setting up industrial democracy by choosing some one to represent the interest[s] of the employees[.]"[36] As such, courts have held that the protections and processes afforded to citizens in political elections must find their counterparts in the labor representation election process. Thus, the NLRB, with judicial approval, has overturned election

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[31] To that end, the Act protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3)." 29 U.S.C. § 157.

[32] This is not to say that the NLRA was successful in realizing a complete version of democracy in the workplace. As articulated by Professor Nikolas Bowie, "the Act's version of industrial democracy was modest." Nikolas Bowie, *Antidemocracy*, 135 HARV. L. R. 160, 184 (2021).

[33] This notion that some degree of industrial democracy at work was important in the development of democracy at large has existed since the early days of the Republic. *See* Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 967–69 (1990) (noting that officials in President Jefferson's administration and Alexis de Tocqueville referred to the importance of instituting democratic norms in other spheres of life). *See also* William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L. J. 461, 485 (2007).

[34] Crain, *supra* note 33, at 963–69.

[35] NLRB v. Standard Lime & Stone Co., 149 F.2d 435, 436–37 (4th Cir. 1945).

[36] *Id.* at 436, 438; *see also* MV Transp., 337 N.L.R.B. 770, 776 (2002) (comparing representation elections to elections for public office); NLRB. v. Deutsch Co., 265 F.2d 473, 479 n.5 (9th Cir. 1959); Producers Grain Corp., 169 N.L.R.B. 466, 477 (1968); S.F.D.H. Assocs. L.P., 330 N.L.R.B. 638, 638–39 (2000) (Hurtgen, J., dissenting).

results where the integrity and confidentiality of the secret ballot has been compromised.[37]

The industrial democracy narrative has also been central to the development of the law surrounding workplace speech issues.[38] The NLRB and the courts, at times, have relied on general principles of free speech in protecting employees' speech rights in the workplace. The Supreme Court, for instance, recognized the free speech right of employees and of unions and their agents to discuss the advantages and disadvantages of unionization.[39] The NLRB has noted that in delineating the contours of the rights of employees under the Act, it has "drawn sustenance from the First Amendment decisions . . . all of which promote wide open and robust speech as part of good public policy."[40] To be sure, the democratic ideal has not always resulted in favorable decisions for employees and unions, as the speech rights of employers have also come into play. For instance, in the 1941 case of *NLRB v. Virginia Electric & Power Co.*,[41] the Supreme Court found the NLRB's implementation of its "strict neutrality" doctrine, which prohibited all employer antiunion speech during union representation campaigns, unconstitutional.[42] The Court found the NLRB's policy to

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[37] *S.F.D.H. Assocs.*, 330 N.L.R.B. at 638.

[38] The Taft-Hartley 1947 amendments in Section 8(c), 29 U.S.C. § 158 (c), enacted an NLRA "free speech" provision. This provision, in practical terms, provides that employers and unions have a right to freely speak their views about unionization, so long as the said speech does not contain any sort of "threat" or promise. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969); NLRB v. Garry Mfg. Co., 630 F.2d 934, 938 (3d Cir. 1980); NLRB v. Exchange Parts Co., 375 U.S. 405, 409–10 (1964) (finding that an employer cannot lawfully counter a union's organizational drive by liberalizing overtime pay and vacation benefits, even though the benefits were made irrevocable and could not be withdrawn if employees voted for union representation); Acme Wire Prods. Corp., 224 N.L.R.B. 701 (1976) (giving unions more leeway in making promises, given that employees understand that a union cannot obtain benefits automatically by winning an election, and that any such promises are dependent on the outcomes achieved through collective bargaining); 52nd Street Hotel Assocs., 321 N.L.R.B. 624 (1996) (holding that the financing of the employees' FLSA lawsuit by the union was fundamentally different from conduct condemned as an objectionable grant of benefits). *Cf.* Stericycle, Inc., 357 N.L.R.B. 582 (2011) (holding that, under certain circumstances, a union does engage in objectionable conduct warranting a second election by financing a lawsuit involving federal or state wage and hour laws on behalf of employees in the unit).

[39] Thomas v. Collins, 323 U.S. 516, 532 (1945).

[40] Caterpillar, Inc., 321 N.L.R.B. 1178, 1184 (1996).

[41] NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941).

[42] *Id.* at 477–79; *see* Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 756–58 (1979) (noting that in applying Section 7 of the NLRA in the early years of the Act, "the Board placed a high value on the full freedom of employees to form, join, or assist labor unions, and was reluctant to permit any interference with this right[]" and that this approach was based on "the belief that an employer's superior economic position carrie[d] with it an inherent suggestion of economic reprisal"); *see also* Andrew M. Kramer, Lee E. Miller & Leonard Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play*

illegally impinge on employer First Amendment free speech rights and held that an employer's expression of his views on labor matters could not per se be deemed to violate the NLRA.[43]

The industrial democracy narrative has also been central in the debate on whether employers can enforce workplace no-solicitation rules against employees. In particular, such no-solicitation rules have been particularly contentious in situations where the employer orders employees, in the context of an organizing campaign, to attend a "captive audience" speech—an antiunion speech by employers delivered at company premises on paid company time.[44] Initially, the NLRB held that an employer violated the Labor Act when it delivered such a speech to employees in anticipation of an organizing election and then denied the union an opportunity to respond in kind.[45] In defending this position, an NLRB member stated that "[b]ehind the . . . principle that employees have the right to hear both sides under the circumstances of approximate equality, is the explicit recognition that freedom of speech is for all and not for a few."[46] A few years later, however, the NLRB reversed course, rejecting the view that the ability of employers to engage in campaign speech could be conditioned on whether the union was given a comparable opportunity. This time, the NLRB pointed to the "employer free speech" provision of the NLRA.[47] In a passage that could have been describing a campaign for any elected office, the Board noted that, while it agreed with the principle that "both parties to a labor dispute have the equal right to disseminate their point of view," the Act imposed no obligation on either party "to underwrite the campaign of the other."[48] The NLRB concluded by noting that "the equality of

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or Foul?, 23 B.C. L. REV. 39, 56–57 (1981); Maurice Shams, *Employer Free Speech in Union Organizing Campaigns*, 15 U. FLA. L. REV. 231, 231–33 (1962).

[43] *Va. Elec.*, 314 U.S. at 479–80. Under Section 8(c) both parties could, as the Supreme Court put it in *United States Chamber of Commerce v. Brown*, engage in "uninhibited, robust, and wide-open debate" about unionization and labor issues. U.S. Chamber of Com. v. Brown, 554 U.S. 60, 68 (2008). Pursuant to this provision, parties will commit NLRA unlawful practices essentially only if their speech rises to the level of being "threatening" in nature. *Id.* at 68–69.

[44] *See* GOULD, LABOR LAW PRIMER, *supra* note 30, at 148 (emphasis omitted).

[45] Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951), *remanded on other grounds*, 197 F.2d 640 (2d Cir. 1952); *see also* Metro. Auto Parts, Inc., 102 N.L.R.B. 1634, 1634 (1953); Seamprufe, Inc., 103 N.L.R.B. 298, 298–99 (1952); Onondaga Pottery Co., 103 N.L.R.B. 770, 786–87 (1953); Stow Mfg. Co., 103 N.L.R.B. 1280 (1953).

[46] Livingston Shirt Corp., 107 N.L.R.B. 400, 417 (1953) (Murdock, Board Member, dissenting in part).

[47] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[48] *Livingston Shirt Corp.*, 107 N.L.R.B. at 406.

opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them."[49]

The NLRB has also relied on the democracy narrative to explain the central role that collective bargaining plays in the framework created by the Act. The Board has repeatedly defended the practice of collective bargaining on the grounds that bargaining grows from a choice, democratically made by employees, "paralleling and implementing the political democracy which the employee enjoys outside the plant."[50] The collective bargaining agreement itself has been described as "more than a contract; it is a generalized code to govern a myriad of cases . . . . It calls into being a new common law—the new common law of a particular industry or of a particular plant."[51]

The NLRB has invoked the industrial democracy narrative even when that narrative seemed in tension with other stated goals of the Act. Thus, while the Act recognizes that collective bargaining requires majority rule, the NLRB and reviewing courts have also recognized the importance of protecting the rights of individual employees, vis-a-vis majority rule.[52] Thus, in *East Texas Motor Freight*, the Board stated that

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[49] *Id.* at 407. Based on the same reasoning, the Board has also been resistant to regulate the content of campaign speech (except for threats and promises), even when the speech contained statements that were racially motivated—either by the employer or the union. *See also* Congdon Die Casting Co., 176 N.L.R.B. 482, 489 (1969); Shepherd Tissue, Inc., 326 N.L.R.B. 369, 369–70 (1998) (Gould, Chairman, concurring). To be sure, various Boards and courts have acknowledged the differences between principles of democracy at large and industrial democracy. For example, the Second Circuit has noted that representation elections, unlike elections for elected office, do not involve "debate on public issues," but instead "involve a more intimate relationship between the 'candidates'—union and employer—and the 'electorate'—employees." Bausch & Lomb Inc. v. NLRB, 451 F.2d 873, 879 (2d Cir. 1971).

[50] Timken Roller Bearing Co., 70 N.L.R.B. 500, 520 (1946); *see also* Inland Steel Co., 77 N.L.R.B. 1, 34 (1948) (stating that "[t]he trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted"); Producers Grain Corp., 169 N.L.R.B. 466, 476 (1968) (holding that "when a labor organization is freely selected by the employees, it may negotiate with the employer a contract or charter to govern the parties thereto in their exercise of industrial democracy").

[51] United Steelworkers of Am. v. Warriors & Gulf Navigation Co., 363 U.S. 574, 578–79 (1960). *See also In re* Ala. Symphony Ass'n, 155 B.R. 556, 566 (Bankr. N.D. Ala. 1993); Airline Pilots Ass'n v. TACA Int'l Airlines Inc., 748 F.2d 965, 968 (1984).

[52] Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192, 202 (1944) (finding that unions have a duty of fair representation under the Railway Labor Act); Syres v. Oil Workers Int'l Union, Local No. 23, 350 U.S. 892 (1955) (per curiam). *See also* GOULD, LABOR LAW PRIMER, *supra* note 30, at 333–66 (discussing the duty of fair representation); William B. Gould, *Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74, 75–76 (1980) (discussing *Allis-Chalmers* and providing a proposal for balancing the interests of labor unions in disciplining members and the member's right to avoid discipline by resigning from the union).

"[u]nder the general concept of industrial democracy, fair representation includes the duty to guarantee the rights of members to participate 'fully and freely in the internal activities of their own union.'"[53] In that fashion, the Board has tried to replicate the balancing that, at times, we see courts apply whenever individual rights seem to be in tension with collective rights.

Moreover, in other cases, courts have relied on the industrial democracy narrative to limit the NLRB's ability to issue a bargaining order to employers who have engaged in serious unfair labor practices during the course of an organizing campaign.[54] As a general matter, where the employer engages in misconduct during an organizing campaign, the Board can issue a cease-and-desist order, reinstate and order backpay for any employee who might have been terminated, require the employer to post notices advising employees of the employer's illegal behavior, and order that the election be rerun, among other remedies.[55] In a narrow set of circumstances involving extreme illegal behavior by the employer, with judicial approval, the Board has been given the authority to obviate the election process and issue an order requiring the employer to bargain with the union that was seeking representation.[56] This so-called *Gissel* bargaining order can be issued as a remedy only in extreme situations in which the employer has dramatically interfered with, restrained, or coerced employees,[57] or otherwise discriminated against employees because of their union activities.[58] In these cases, the bargaining order might be issued because the union seeking representation either lost the election or the election was never held; however, in both cases, it is because a free election was not possible due to an employer's highly unjustified behavior.[59]

Despite having been given wide discretion by the Supreme Court to utilize such a remedy in cases in which the employer engaged in serious unfair labor practices, the Board has been guarded in its usage.[60] The Board has been particularly

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[53] E. Tex. Motor Freight, 262 N.L.R.B. 868, 906 (1982).

[54] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

[55] BRUCE S. FELDACKER & MICHAEL J. HAYES, LABOR GUIDE TO LABOR LAW 106–09 (5th ed. 2014).

[56] *See Gissel Packing Co.*, 395 U.S. at 610.

[57] 29 U.S.C. § 158(a)(1); *see Gissel Packing Co.*, 395 U.S. at 610–13.

[58] 29 U.S.C. § 158(a)(3); *see Gissel Packing Co.*, 395 U.S. at 610–13.

[59] *See* FELDACKER & HAYES, *supra* note 55, at 107.

[60] There are also cases involving "minor" and isolated unfair labor practices. Due to their nature, the presumption is that the employer's behavior does not preclude the running of a free and fair election. As the result, the Board will not issue a bargaining

concerned that bargaining orders risk "negating [employee] choice . . . by imposing a bargaining representative upon employees without some history of majority support for the Union."[61] Courts have voiced similar concerns about the antidemocratic nature of bargaining orders, noting, for example that "[i]ndustrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election."[62] As a result, the *Gissel* decision, which arguably runs contrary to the industrial democracy narrative, is utilized only in extraordinary situations.[63]

In short, the NLRA's goal of establishing a system of industrial democracy across workplaces in the United States has helped to shape the development of the Act itself.[64] Various important doctrines have been developed on the premise that one of the Act's main goals is to institute democratic practices in the workplace.[65] This is not to say that the goal of a democratic workplace has been achieved.[66] For example, an attempt to establish workplace practices was secondary to the property rights of employers, as demonstrated by the 2021 Supreme Court decision *Cedar Point Nursery v. Hassid*.[67] *Cedar Point Nursery* involved a challenge to a regulation under California's

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order in these types of cases and instead just order the rerunning of the election. *See Gissel Packing Co.*, 395 U.S. at 615.

[61] United Dairy Farmers Ass'n, 242 N.L.R.B. 1026, 1028 (1979).

[62] NLRB v. Am. Cable Sys., 427 F.2d 446, 449 (5th Cir. 1970); *see also* Chromalloy Am. Corp., 620 F.2d 1120, 1129 (5th Cir. 1980); Riley Electric Inc., 290 N.L.R.B. 374, 378–79 (1988). In another Fourth Circuit decision involving the enforcement of a bargaining order, the court again relied on the industrial democracy rationale in disagreeing with the Board's decision not to consider changed circumstances between the time the unfair labor practice was committed and the time the bargaining order was issued. The court stated that "the Board ought not to deprive itself of the opportunity to appraise the prospects for a fair election by looking at the scene at the time of the hearing without an arbitrary limitation to the murkier view available as of the time of the commission of the last charged unfair labor practice." Gen. Steel Prods. v. NLRB, 445 F.2d 1350, 1357 (4th Cir. 1971) (Haynsworth, C.J., concurring). Interestingly, the dissent also relied on the industrial democracy narrative in arguing that, where the employer has so compromised the election process, recognizing that an antiseptic election is not achievable is perhaps the only outcome that would be consistent with the goal of advancing democratic values in the workplace. *Id.* at 1360 (Winter, J., dissenting).

[63] Ian Word, *The Lie That Helped Kill the Labor Movement*, POLITICO MAG. (June 7, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/07/the-lie-that-helped-kill-the-labor-movement-00037459 [https://perma.cc/YM5F-R9VB] (citing rarity of bargaining orders under *Gissel*). The Board might issue a bargaining order, but only if there is a showing (again, via authorization cards) that at some point, the union enjoyed the support of the majority of the employees in the bargaining unit.

[64] *See, e.g., Am. Cable Sys.*, 427 F.2d at 449 (discussing conditions needed for industrial democracy).

[65] Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1996) (emphasizing the importance of open and free debate in the labor relations context).

[66] *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 163 (2021).

[67] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

labor relations act applying to agricultural workers that allowed unions—after giving notice to the state agency and the employer—to enter private farm property for purposes of soliciting support for unionization for up to three hours per day, during 120 days per year.[68] Without giving notice, members of the United Farm Workers union entered one farm and attempted to enter a second.[69] The union filed unfair labor practices charges under the state law, and the property owners filed suit in federal court, arguing that the access regulation affected an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments by appropriating the owners' property without compensation.[70] The Supreme Court held that the provision, which had been upheld by the state's supreme court, was unconstitutional, as it violated the "Takings Clause" of the Constitution.[71]

The preeminence of the property rights of employers—granted by the judiciary—has made it difficult to achieve a complete measure of equality and is likely leading to workplaces that fall short of complete democratic ideals. Yet, the general goal of achieving some degree of democratic practices in the workplace has been central to the development of labor law. Thus, the rules that have developed in various areas—including union representation campaigns and elections, access to the workplace by employees and nonemployee organizers, and the regulation of speech during such campaigns—are based on a set of premises about the operation of democratic society. In particular, at the center of any democratic experiment is the expectation that the members of the democratic community will be open to the free exchange of ideas.[72] That is, one expects that in a democratic society, there is a willingness to engage in debate, to listen, and to entertain the possibility of persuasion. When conditions interrupt those dynamics, the very foundations of democracy are undermined.

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[68] *Id.* at 2069.

[69] *Id.* at 2066.

[70] *Id.*

[71] *Id.* at 2074, 2076. In a concurring opinion, Justice Kavanaugh explicitly noted his strong support for a broad employer property rights interpretation of the NLRA. *Id.* at 2080–81 (Kavanaugh, J., concurring). While *Cedar Point* arose under a different statute and is not directly applicable to the NLRA, further future erosion of access by union organizers to the workplace does not seem far-fetched.

[72] *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 284 (1974).

C. *Union Organizing Rules*

Following the argument that democratic ideals were central to the creation of the NLRA and have continued to shape its development, this section provides an overview of the current landscape of rules pertaining to union organizing, such as rules regulating campaign speech, solicitation, and access to the workplace. In particular, this section contends that the law regulating organizing campaigns can be fairly described as involving a balance between the needs of employees to obtain the necessary information to make an informed and free choice regarding the decision to organize collectively and the preservation of the rights of employers to control their property and manage the workplace.

Consider first the issue of the regulation of an employer's speech. Under NLRA Section 8(c), statements containing no threats of reprisal or promises of benefit do not, in themselves, constitute interference with, or restraint or coercion of, employees in their right to self-organization.[73] An employer may lawfully express opposition to a union in general and may argue against a strike or other concerted activity, provided there is no suggestion that employees will be penalized for refusing to adopt the employer's views.[74] The privilege of free speech has been extended at times to situations involving derogatory remarks about unions,[75] statements as to the evil effects of unionization,[76] declarations as to the futility of unionization,[77] and similar remarks.[78]

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[73] Historically, in the early New Deal days of the administration of the NLRA, the NLRB interpreted the law's unfair labor practice provisions prohibiting employer "interference" with unionization activities as essentially completely limiting the rights of employers to speak out against labor union organizing activity. *See Labor Law Reform*, *supra* note 42, at 757. The Supreme Court, though, in the important 1941 case of *NLRB v. Virginia Electric & Power Co.*, discredited this interpretative approach by the NLRB and held that NLRB policies requiring employers to remain silent and neutral with respect to union organizational activities violated employer free speech rights guaranteed by the First Amendment. NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 479–80 (1941).

[74] As the Supreme Court pointed out in the subsequent case of *Linn v. United Plant Guard Workers*, Congress, in enacting Section 8(c), explicitly sought to encourage "free debate" on labor-management issues. Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966).

[75] Great Lakes Screw Corp., 164 N.L.R.B. 149, 159 (1967), *set aside on other grounds*, 409 F.2d 375 (7th Cir. 1969).

[76] Laborers' Dist. Council of Ga. & S.C. v. NLRB, 501 F.2d 868, 871 (D.C. Cir. 1974).

[77] Masdon Indus., Inc., 212 N.L.R.B. 505, 506 (1974). *But see* Little Rock Downtowner, Inc., 168 N.L.R.B. 107, 108 (1967).

[78] For example, no violation was found in a case where an employer declared that his employees would experience economic hardship should they join a union. NLRB v. Aerovox Corp. of Myrtle Beach, S.C., 435 F.2d 1208, 1210–11 (4th Cir. 1970).

On the other hand, threats of reprisal against employees for exercising their rights under the NLRA are *not* protected as free speech, regardless of whether the threats are express or implied. "If there is any implication that an employer may or may not [act] solely on" the employer's "own initiative for reasons unrelated to economic necessities and known only to" the employer, a statement about the effects of unionism is not "a reasonable prediction based on available facts but a threat of retaliation[.]"[79]

A similar balance has been pursued with regard to solicitation and distribution rules for employees in the workplace. No-solicitation and nondistribution rules have been defended by employers on the grounds that they are necessary for the efficient operation of business. For example, employee rules prohibiting the distribution of union leaflets on the selling floor of a retail establishment have been justified on the grounds that they would directly interfere with store sales.[80] However, if company property was entirely eliminated as a site for organizational activities, the most appropriate location for effective unionization would be unavailable and the right to self-organization would thus become almost meaningless.[81] The case of union access to nonemployee organizers is illustrative. While during the early years of the Act, the Supreme Court allowed nonemployee organizers to enter the workplace, the Court later held that employers are generally free to exclude nonemployee union organizers from their property, at least if there are alternative means of communicating with employees available to the union.[82] Similarly, under ordinary circumstances, an employer may prohibit union activity during the times that employees are on duty. Employees may not be prohibited, however, from engaging in solicitation during breaks and other nonworking hours, even if that time is paid time.[83] Evidence may be presented to overcome the presumptive invalidity of a no-solicitation rule. Thus, a no-solicitation rule during working hours may be lawful if it can be shown that the rule is necessary to maintain production or discipline, as in a case where such solicitation causes constant bickering and dissension between pro-union and antiunion employees.

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[79] NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

[80] Montgomery Ward & Co., 145 N.L.R.B. 846, 853 (1964).

[81] NLRB v. United Steelworkers of Am., 357 U.S. 359, 360 (1958).

[82] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992).

[83] Olin Indus., Inc. v. NLRB, 191 F.2d 613, 617 (5th Cir. 1951).

Although not explicitly recognized as such, the rationale for all access and speech rules seems to be that, as in the public sphere, the role of the law should be to provide a space for employees who might have different views on what choice to make, so as to have the opportunity to listen to one other and gather information. The expectation is that if such a space is provided, employees will then make the "right" choice for themselves, whether that choice involves choosing a union/collective representation or not.

Debate clearly exists regarding whether current policy has achieved the right balance in regulating speech and access during an organizing campaign. Unions have argued for increased access and limits on employers. Unions have also been particularly critical of the approach the NLRB and the courts have taken with regard to access to the workplace for organizing activities.[84] Union and labor advocates believe that rules regarding the overall organizing process, particularly rules regulating what unions can and cannot do in reaching and talking to employees, are tilted in favor of employers and place unions at a systematic disadvantage to get their message to employees.[85] To illustrate the manner in which they have been limited in their ability to mount a vigorous organizing campaign, they point to rules limiting the ability of union organizers to enter the workplace;[86] rules limiting when and where employees can talk to each other or if employees can wear buttons advancing the union's message;[87] and rules determining if employees are able to use work phones, computers, and even

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[84] *See* Nathan Newman, *The Legal Foundations for State Laws Granting Labor Unions Access to Employer Property*, 62 DRAKE L. REV. 689, 691 (2014).

[85] *See, e.g.*, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING 3–5 (2020), https://files.epi.org/pdf/202305.pdf [https://perma.cc/4Z2J-RMV3].

[86] *See* Newman, *supra* note 84, at 694–99.

[87] *See, e.g.*, Republic Aviation v. NLRB, 324 U.S. 793, 795–98 (1945); NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 775–80, 790 (1979); ConAgra Foods, Inc. v. NLRB, 813 F.3d 1079, 1090–92 (8th Cir. 2016); NLRB v. Starbucks Corp., 679 F.3d 70, 71–72 (2d Cir. 2012); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 616–17 (1962); Cent. Hardware Co., 181 N.L.R.B. 491, 491 (1970). The Board has protected the right of fast-food employees to wear buttons with messages like "Fight for 15." In-N-Out Burger, Inc., 365 N.L.R.B. No. 39, 1, 2, 5 (2017). The Board has also protected the right of telephone technicians to wear buttons stating "Cut the Crap! Not My Healthcare" and "WTF Where's The Fairness." Pacific Bell Tel. Co., 362 N.L.R.B. 885, 887–88 (2015). On the other hand, the Board found in favor the employer in cases where the employees displayed a button that read "JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30." Starwood Hotels & Resorts Worldwide, Inc., 348 N.L.R.B. 372, 372–73, 376 (2006). The Board also prohibited employees from wearing sweatshirts with the phrase "Ma Bell is a Cheap Mother." Sw. Bell Tel. Co., 200 N.L.R.B. 667, 668 (1972).

bulletin boards to share information about the union.[88] Unions also point to limitations on the ability to pressure an employer collectively by means of restrictions in picketing activity.[89]

Employers, on the other hand, see these measures as failed efforts attacking their constitutional right to control and manage access to their properties.[90] Employers contend that nonemployee organizers should have no access to the workplace, challenging even the limited access that courts have granted in rare cases involving remote logging camps and similar settings.[91] Employers resent rules that allow employees to discuss unionization efforts with other employees while on company property and have attempted to limit the extent of such discussions by imposing limits on when they can take place,[92] where they can occur,[93] and the nature of the interaction that can occur between the union organizer and the other employee.[94]

Captive audience speeches present perhaps the most significant decisions by the courts and the NLRB with respect to diminishing the ability of US labor unions to organize. Various observers have noted that such speeches, which involve an employer giving employees paid time off from work to listen to an antiunion speech, are the most potent form of possible employer antiunion campaign activity.[95] As Professor Howard Lesnick pointed out, "[w]hen an employer gathers his employees for a group meeting on paid company time to deliver an antiunion speech, [the employer] is implicitly telling [the employees] that he cares more about their position on unionization than about their work." [96] Because of the potency of this type of employer antiunion campaign activity, early NLRB

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[88] *See, e.g.*, Purple Commc'ns, Inc., 361 N.L.R.B. 1050, 1064 (2014); Guard Publ'g Co., 351 N.L.R.B. 1110, 1114–15 (2007).

[89] *See* WILLIAM B. GOULD IV, FOR LABOR TO BUILD UPON: WARS, DEPRESSION AND PANDEMIC 33 (2022).

[90] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).

[91] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (discussing union access in situations involving remote and isolated logging and mining camps, as well as isolated mountain summer resorts).

[92] *Id.*

[93] *See generally id.* (holding that employers can rightfully bar nonemployees from company property).

[94] *Id.*

[95] Jay Gresham, *Still As Strangers: Non-Employee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 152–53 (1983); Leonard Bierman, *Extending Excelsior*, 69 IND. L. J. 521, 531 (1994).

[96] *See* Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 780 (1979) (citing Transcript of Television Program *"The Advocates": Should Congress Provide More Protection for Union Organizing?* 17 (Apr. 27, 1978) (statement by Professor Howard Lesnick)).

and court decisions found such speeches to per se violate the NLRA.[97]

Another line of early cases permitted employers to make captive audience speeches, but required companies to allow union representatives the opportunity to come onto company premises to formally reply.[98] In *NLRB v. United Steelworkers* (*Nutone*), however, the Supreme Court overturned this approach and held that employers were generally free to engage in this kind of activity without allowing unions the opportunity to come onto employer premises to rebut.[99] Subsequent NLRB decisions have directly affirmed the Court's decision in the context of antiunion captive audience speeches.[100] In direct response to these decisions, though, the NLRB developed the so-called "home visits doctrine" to provide labor unions with an organizational opportunity "offset."[101] Under the home visits doctrine, unions are permitted to campaign by visiting employees at their homes, while employers are prohibited from engaging in such activity. The Supreme Court has upheld the notion that the ability of unions to reach employees via home

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[97] *See, e.g.*, Clark Bros. Co., 70 N.L.R.B. 802, 804–05 (1946), *aff'd sub nom.*, NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947). The Protecting the Right to Organize Act, or "PRO Act," H.R. 2474, which recently passed the US House of Representatives, would formally amend the NLRA to achieve this goal. *See* Protecting the Right to Organize Act, H.R. 2474, 116th Cong. § 2(d)(7)(3) (2020).

[98] *See, e.g.*, Bonwit Teller, Inc., 96 N.L.R.B. 608, 628–633 (1951).

[99] NLRB v. United Steelworkers of Am., 357 U.S. 357, 364 (1958).

[100] *See, e.g.*, Gen. Elec. Co., 156 N.L.R.B. 1247, 1249 n.1 (1966). The debate over captive-audience speeches continues, as illustrated by events related to the union organizing drive at a handful of company-owned Starbucks restaurants in Buffalo, New York. These efforts culminated on December 9, 2021, in a 19-8 union victory in a bargaining unit consisting of baristas at the Elmwood Avenue store in Buffalo. *See* Matt Glynn, *NLRB Certifies Unions' Win at Elmwood Starbucks Store*, BUFFALO NEWS (Dec. 17, 2021), https://buffalonews.com/news/local/nlrb-certifies-unions-win-at-elmwood-starbucks-store/article_3007c1b6-5db9-11ec-91e1-17bfadc53fbf.html [https://perma.cc/45AM-BKKM]. Just a few weeks before the union representation election, Starbucks founder and former CEO Howard Schultz flew to Buffalo and gave all Buffalo-area Starbucks employees (who were released early from work and paid to listen) a "captive audience" speech outlining why they should oppose unionization. He also posted on the Starbucks global website "A Message from Howard Schultz: From Buffalo with Love," which outlined in writing what the company does for its workers and why they don't need an "outside representative" in their relationship. *See A Message From Howard Schultz: From Buffalo with Love*, STARBUCKS STORIES & NEWS (Nov. 6, 2021), https://stories.starbucks.com/press/2021/a-message-from-howard-schultz-from-buffalo-with-love/ [https://perma.cc/A4ME-4G28]. On April 7, 2022, the NLRB's General Counsel issued a memorandum indicating her intention to urge the Board to "adopt sensible assurances that an employer must covey to employees in order to make clear that their attendance [to captive audience speeches] is truly voluntary." *See* Memorandum from Jennifer A. Abruzzo, General Counsel, NLRB 3 (Apr. 7, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and [https://perma.cc/J63P-MTLQ].

[101] *See* Leonard Bierman, *Toward A New Model for Union Organizing: The Home Visits Doctrine and Beyond*, 27 B.C. L. REV. 1, 2 (1985).

visits works to counterbalance employer opportunities to reach employees at the workplace.[102] The rules regarding captive audience speech are another example of the effort by the Board and reviewing courts to find a balanced way in which unions and employers both can reach employees to communicate their messages. This then puts employees in a position to make an informed decision about their choices regarding representation.

II. POLARIZATION: DEFINITION, CAUSES, AND EFFECTS

This part explores the concept of political polarization, starting with a definition of the term and the various dimensions of polarization that have been identified. It then describes the causes of polarization and the surprising finding that the effects of polarization are felt outside the political realm, as it seems to affect behavior in social and economic interactions.

A. The Different Dimensions of Polarization

For decades, media accounts have described the United States as a polarized polity, with members of the two main political parties disagreeing on major policy issues.[103] This divide has been a staple of American politics since the beginning of the Republic.[104] This "issue" or "ideological" polarization refers to differing attitudes on substantive issues[105] that exist among political elites (i.e., party leadership),[106] and to a degree, among

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[102] *See* Lechmere v. NLRB, 502 U.S. 527, 540–41 (1992).

[103] *See* Ronald Brownstein, *One Nation Very Divided, Becoming Even More So*, PITTSBURGH POST-GAZETTE (Nov. 6, 2003) (noting the results of the survey showing a "nation profoundly polarized between two political camps virtually identical in size but inimical in their beliefs on virtually all major questions"); Evan Thomas, *The Closing of the American Mind* (Dec. 22, 2007), https://www.newsweek.com/closing-american-mind-95029 [https://perma.cc/WDG7-BUUL] (discussing how the evolution of the two political parties has hardened ideological divisions); Michael Dimock et al., *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/MZ32-V98P] (discussing survey results showing that the partisan divide was higher along different kinds of policy issues than at any time in the previous twenty years).

[104] *See* Eli J. Finkel, et al., *Political Sectarianism in America: A Poisonous Cocktail of Othering, Aversion, and Moralization Poses a Threat to Democracy*, 370 SCI. 533, 533 (2020) (noting that "competition among groups in the marketplace of ideas is a hallmark of a healthy democracy").

[105] PETER T. COLEMAN, THE WAY OUT: HOW TO OVERCOME TOXIC POLARIZATION 21 (2021) (defining different dimensions of polarization, including affective, ideological, political, and perceptual).

[106] HOWARD ROSENTHAL, KEITH POOLE & NOLAN MCCARTY, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 12 (2d ed. 2016).

the general public.[107] Examples of issue polarization include controversies regarding gun control,[108] universal basic income,[109] and even health-related policies regarding the COVID-19 pandemic.[110]

Recently, however, political scientists and social psychologists have identified a different and perhaps more divisive kind of polarization, the so-called "affective polarization." Grounded in social identity theory,[111] affective polarization theory proposes that "group affiliations . . . play a key role in an individual's identity development."[112] Identity development, in turn, creates a divide in which members of a group see other members in a positive light and see nonmembers negatively.[113] Put another way, there are perceived "in groups" and "out groups." This divide results in a situation in which those within each group "increasingly dislike each other without any direct or conditional connection to issue-based ideological disagreements."[114] In the US political context, this polarization clearly manifests itself in the tendency of members of one

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[107] Morris Fiorina, Samuel Abrams & Jeremy Pope, *Polarization in the American Public: Misconceptions and Misreadings*, 70 J. POL. 556, 556–59 (2008); Alan Abramowitz & Kyle Saunders, *Is Polarization a Myth*, 70 J. POL. 542, 548–49 (2008).

[108] *See* Katherine Schaeffer, *Key Facts about Americans and Guns*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/fact-tank/2021/05/11/key-facts-about-americans-and-guns/ [https://perma.cc/58WE-7E6S].

[109] *See* Hannah Gilberstadt, *More Americans Oppose than Favor the Government Providing a Universal Basic Income for All Adult Citizens*, PEW RSCH. CTR. (Aug. 19, 2020), https://www.pewresearch.org/fact-tank/2020/08/19/more-americans-oppose-than-favor-the-government-providing-a-universal-basic-income-for-all-adult-citizens/ [https://perma.cc/SJ2B-CS6G].

[110] Maria Milosh et al., *Political Polarization Impedes the Public Policy Response to Covid-19*, VOX: CEPR POL'Y PORTAL (Dec. 23, 2020), https://cepr.org/voxeu/columns/political-polarisation-impedes-public-policy-response-covid-19 [https://perma.cc/MF7U-5YVQ].

[111] Michael A. Hogg, *Social Identity Theory*, *in* SHELLEY MCKEOWN ET AL., UNDERSTANDING PEACE AND CONFLICT THROUGH SOCIAL IDENTITY THEORY: CONTEMPORARY GLOBAL PERSPECTIVES, 3, 13–14 (Daniel J. Christie, ed. 2016) (defining social identity as "a unified conceptual framework that explicates group processes and intergroup relations in terms of the interaction of social cognitive, social interactive, and societal processes, and places self-conception at the core of the dynamic").

[112] Ryan Strickler, *Deliberate with the Enemy? Polarization, Social Identity, and Attitudes Toward Disagreement*, 71 POL. RSCH. Q. 3, 6 (2018); Shanto Iyengar & Sean Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 691 (2015) (defining affective polarization as "the tendency of people identifying as Republicans or Democrats to view opposing partisans negatively and copartisans positively").

[113] Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCIS. 129, 130 (2018).

[114] Lilliana Mason, *Ideologues Without Issues: The Polarization Consequences of Ideological Identities*, 82 PUB. OP. Q. 866, 866–870, 884 (2018).

political party to view members of the other party negatively and to view other members of their own party in a positive light.[115]

Scholars have developed a variety of instruments to measure the levels and trends of affective polarization.[116] Among the most commonly used instruments is the "feeling thermometer" of the American National Election Study (ANES).[117] ANES researchers have surveyed the public for decades, gathering information about how individuals feel about their own party and the opposing party. Data collected by ANES show that while feelings for one's own party ("in-party feelings") has remained strong over the last four decades, negative feelings toward the other side ("out-party feelings") have increased.[118] For instance, between 1980 and 2016, the feelings thermometer measure of affective polarization doubled, going from twenty-six to 52.2.[119] In fact, just between 2016 and 2020, the measure increased by 25 percent.[120] The increase over the forty-year period, and particularly the last decade, was driven primarily by changes in people's attitudes (i.e., dislike) toward the so-called "out party."[121] Data show that while feelings toward one's own party have been relatively stable and remained "warm," feelings

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[115] *Id.* at 867, 869, 884. Party alliance is an effective identifier, given that it is fairly stable over time and that the frequent recurrence of political elections serves to reinforce the identity. Iyengar et al., *supra* note 113, at 130; *see generally* Joshua Robison & Rachel Moskowitz, *The Group Basis of Partisan Affective Polarization*, 81 J. POL. 1075 (2019).

[116] The measures include survey self-reports; implicit measures, such as the Implicit Association Test documenting unconscious partisan bias; and behavioral measures, such as outcomes in economic games. *See* Iyengar & Westwood, *supra* note 112, at 691–92; Iyengar et al., *supra* note 113, at 133.

[117] *Affective Polarization of Parties: Own-party and Rival-party Feelings*, AM. NAT'L ELECTION STUDS., https://electionstudies.org/data-tools/anes-guide/anes-guide.html?chart=affective_polarization_parties [https://perma.cc/YKQ9-7AST]. The survey instrument asks participants "to rate Democrats and Republicans . . . on a 101-point scale ranging from cold (0) to warm (100)." *See* Iyegnar et al., *supra* note 113, at 131. Researchers compute the degree of affective polarization by calculating the difference between the score given to the respondent's party and the score given to the opposing party. *See id.*

[118] *See* Iyengar et al., *supra* note 113, at 131–32. To be sure, there is ongoing debate among political science scholars regarding the scope and extent of polarization, with some scholars arguing that the increase in affective polarization is limited to those in elected office (referred to as "elites"), and others arguing that affective polarization has reached the masses, as evidenced by the decline in the proportion of the population that identifies as ideological moderates. *See* Fiorina et al., *supra* note 107, at 556–58; Abramowitz & Saunders, *supra* note 107, at 543.

[119] *Affective Polarization of Parties: Own-party and Rival-party Feelings*, *supra* note 117.

[120] *Id.* In fact, a 2022 report by the Carnegie Endowment for International Peace showed that the United States has the highest and longest lasting levels of polarization among all wealthy democracies. *See* McCoy & Press, *supra* note 1, at 5–6.

[121] *See* Iyengar et al., *supra* note 113, at 131. *See also* Robinson & Moskowitz, *supra* note 115, at 1079 (finding that partisans' evaluations of the social groups associated with each party have polarized over time).

toward the other party have become "cold[er]."[122] Polarization has been found to exist not only along the partisan divide (Democrats and Republicans), but also along ideological labels such as "liberals" and "conservatives."[123] Research shows that "liberals and conservatives are distancing themselves from one another on behalf of their identity-related feelings about who is 'in' and who is 'out.'"[124]

B. Causes of Affective Polarization

The increase in American affective polarization is attributed to various factors. Research indicates that over the last five decades, Republicans and Democrats have each become more ideologically homogenous in the sense that the number of individuals who identify with each political party has increased.[125] At the same time, each party has become more internally similar in terms of other social identities, such as race and religion, which in turn has increased the perceived differences between the groups.[126] This "sort[ing]" process has reinforced the movement toward affective polarization.[127] As those in the "in group" become more similar in terms of their various identities, they tend to like what they see and hear from those in the "in group" and dislike what they see and hear coming from outside.[128] Thus, "sorting has made it much easier for partisans to make generalized inferences about the opposing side, even if those inferences are inaccurate."[129] Researchers argue that the "effect of a 'sorted' set of social and partisan identities is to increase the volatility of emotional reactions to partisan messaging—further reinforcing the affective aspect of polarization that has been observed elsewhere."[130] Moreover,

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122 *See* Strickler, *supra* note 112, at 6.

123 *See* Mason, *supra* note 114, at 870.

124 *Id.* at 884.

125 *Id.*

126 *Id.*

127 Lilliana Mason, *A Cross-Cutting Calm: How Social Sorting Drives Affective Polarization*, 80 PUB. OP. Q. 351, 352–53 (2016). To be sure, there is an ongoing debate regarding the role that sorting plays in the marked increase in polarization. *See* Thomas B. Edsall, Opinion, *We Can't Even Agree on What is Tearing Us Apart*, N.Y. TIMES, (May 25, 2022), https://www.nytimes.com/2022/05/25/opinion/polarization-politics-red-blue-america.html [https://perma.cc/F5QW-W6GE].

128 Steven W. Webster & Alan I. Abramowitz, *The Ideological Foundations of Affective Polarization in the U.S. Electorate*, 45 AM. POL. RSCH. 621, 624 (2017).

129 *See* Iyengar et al., *supra* note 113, at 134.

130 Mason, *supra* note 127, at 353. The sorting effect is aggravated by people's tendency to think about the members of political parties in terms of long-term associations. For instance, while this may have changed during President Donald Trump's time in office, the association between the working class and Democrats on the one hand, and the wealthy and Republicans on the other, has tended to endure over the

research indicates that polarization regarding views of the social groups associated with a political party is linked over time to increases in affective polarization.[131]

Research also indicates that the advent of partisan news sources (e.g., Fox News and MSNBC) might have also increased affective polarization.[132] The development of what has been referred to as the "outrage industry,"[133] and its reliance on incendiary and extreme language, are believed to activate affective polarization by making political identities more salient and generating negative feelings toward the "out group."[134] By framing politics as a contest between two groups with irreconcilable views, partisan media emphasizes the differing identities and is believed to increase polarization.[135]

Similarly, increased access to news via the internet and increased access to different sources of news (e.g., Twitter or X, Facebook) have been identified as possible sources of increased affective polarization.[136] The explosion in the use of social media in the first two decades of the twenty-first century is also believed to have contributed to the increase in affective polarization.[137] Professor Robert Putnam's research in his seminal book "Bowling Alone," documented that in recent

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years. Douglas Ahler & Gaurav Sood, *The Parties in Our Heads: Misperceptions About Party Composition and Their Consequences*, 80 J. POL. 964, 965 (2018).

131 *See* Robinson & Moskowitz, *supra* note 115, at 1078–79.

132 *See* Yphtach Lelkes, *Affective Polarization and Ideological Sorting: A Reciprocal, Albeit Weak, Relationship*, 16 FORUM 67, 69 (2018).

133 Sarah Sobieraj & Jeffrey Berry, *From Incivility to Outrage: Political Discourse in Blogs, Talk Radio, and Cable News*, 28 POL. COMM. 19, 20, 22 (2011).

134 *See* Iyengar et al., *supra* note 113, at 134. *See generally* JOSHUA TUCKER ET AL., HEWLETT FOUND., SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE, (2018), https://hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf [https://perma.cc/6QGZ-YPBH] (exploring the relationship between polarization and misinformation in the era of social media).

135 TUCKER ET AL., *supra* note 134, at 40. To be sure, there is debate regarding the causal relationship between partisan news sources and increased affective polarization, as it is possible for the causation to flow both ways. That is, increase in the use of extreme language leads to affective polarization, or alternatively, those who are polarized might tend to lean toward partisan news outlets. Recent research suggests that there are limits or perhaps marginal diminishing returns regarding the effect of incivility. While incivility coming from out-party media sources tends to polarize respondents, incivility from in-party sources reduces trust in one's own party. James Druckman et al., *How Incivility on Partisan Media (De)Polarizes the Electorate*, 81 J. POL. 291, 291–93 (2018). Research has also found that polarization is the strongest among groups least likely to rely on the internet for news consumption, suggesting that "the [i]nternet explains a small share of the recent growth in polarization." Levi Boxell, et al., *Greater Internet Use Is Not Associated With Faster Growth in Political Polarization Among US Demographic Groups*, 114 PROC. NAT'L ACAD. SCIS. 10612, 10616 (2017).

136 Christopher Bail et al., *Exposure to Opposing Views on Social Media can Increase Political Polarization*, 115 PROC. NAT'L ACAD. SCIS. 9216, 9217–9218 (2018).

137 Increasing numbers of Americans now list social media as their primary source of news. *See id.* at 9216.

decades, Americans have become less likely to get involved in community activities requiring physical interaction.[138] Although not free from causing problems, those community activities (e.g. churches, bowling leagues, civic organizations) brought together people from different backgrounds, allowing participants an opportunity to build trust across various dimensions.[139] Citizens' participation in these organizations has decreased over time, reducing in turn the dimensionality of interactions among different groups in society.[140] At the same time, and perhaps as a substitute, Americans have been increasingly spending more time connecting through social media.[141] Social media networks tend to be increasingly homogenous, as social media makes it easier to find groups of peers who share similar preferences.[142] Research shows that individuals who share similar world perspectives are likely to look at similar sources of information, a phenomenon that is easily replicated in social media, and thus has the potential effect of increasing affective polarization.[143] Research even shows that when individuals who rely on social media as their main form of information are confronted with a diverse and wide range of opinions, they tend to discount those differing opinions because they come from the "out-group."[144] As Professor Cass Sunstein has forcefully observed, social media tends to create viewpoint "echo chambers."[145]

Thus, the extant literature indicates that political polarization is driven by a variety of causes, including sorting, the proliferation of partisan media, and the increased use of social media as a way of sharing news. While there is an ongoing debate regarding the extent to which each of these factors have contributed to political polarization, there is widespread

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[138] ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND THE REVIVAL OF AMERICAN COMMUNITY 16, 27 (2000).

[139] Samuel Wang et al., *A Systems Framework for Remedying Dysfunction in U.S. Democracy*, 118 PROC. NAT'L ACAD. SCIS., Dec. 6, 2021, 1, 2, https://www.pnas.org/doi/epdf/10.1073/pnas.2102154118 (last visited Nov. 26, 2023).

[140] *Id.* at 2–3.

[141] Zeynep Tufekci, *How Social Media Took Us From Tahrir Square to Donald Trump*, MIT TECH. REV. (Aug. 14, 2018), https://www.technologyreview.com/2018/08/14/240325/how-social-media-took-us-from-tahrir-square-to-donald-trump/ [https://perma.cc/2WMX-2UC3] (noting that, while digital platforms allowed communities to connect in new ways, "they also dispersed existing communities . . . [e]ven living on the same street meant less when information was disseminated through algorithms designed to maximize revenue by keeping people glued to screens").

[142] Eytan Bakshy, Solomon Messing, & Lada Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCI. 1130, 1131 (2015).

[143] *See* Bail et al., *supra* note 136, at 9216.

[144] *See* Tufekci, *supra* note 141, at 11–12.

[145] CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 9–11 (2017).

agreement that the country has become more politically polarized. For the purposes of this article, the most notable aspect of this discussion is that the factors that are believed to cause the increase in polarization in the political arena are otherwise ubiquitous, and are thus likely to affect the behavior of individuals in other realms of their lives.

C. *Effects of Affective Polarization*

As one would expect, increased affective polarization has been found to affect the political behavior of individuals.[146] Thus, research indicates that individuals with high levels of polarization are more likely to engage in political activities and engage in behaviors (such as taunting) that are not conducive to compromise.[147] For instance, researchers have found evidence that, when evaluating the tradeoffs inherent in every policy proposal, polarized partisans engage in what has been dubbed a "Partisan Trade-Off Bias."[148] This bias results in partisans viewing the side effects of policies proposed by partisans on the other side as intentional and the positive main impacts (the reason why the policy is proposed in the first place) as insincere.[149] The existence of this bias makes compromise unlikely, as it reduces the willingness to accept policy deals from the other side.[150]

For the purposes of this article, however, the more interesting finding is that affective polarization has been shown to influence behavior *outside* the realm of politics, which is sometimes referred to as "lifestyle politics." This happens "when ideas and behaviors not inherently political become politically aligned through their connections with explicitly political things."[151] Research has shown that individuals have become

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146 *See generally* James Druckman et al., *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28 (2021) (showing how political polarization affects policy differences among the parties).

147 *See* Iyengar & Westwood, *supra* note 112, at 705 (describing the tendency of candidates from safe political districts to engage in taunting, such as using language that devalues opponents and their ideas). Similarly, Strickler finds that polarization results in less receptivity toward the arguments made by the opposite party across a variety of issues and concludes that "polarization is making good faith discussion and honest engagement with divergent perspectives more difficult." Strickler, *supra* note 112, at 15.

148 Daniella Goya-Tocchetto et al., *The Partisan Trade-Off Bias: When Political Polarization Meets Policy*, 98 J. EXPERIMENTAL SOC. PSYCH., Jan. 2022, at 1, https://www.sciencedirect.com/science/article/pii/S0022103121001347.

149 *Id.* at 15.

150 *Id.* at 2.

151 Alexander Ruch, Ari Decter-Frain & Raghav Batra, *Millions of Co-purchases and Reviews Reveal the Spread of Polarization and Lifestyle Politics Across Online*

increasingly less likely to establish romantic and nonromantic social relationships with individuals from the "out-party" group.[152] Survey data shows that respondents are less likely to date members of the other political party.[153] Although the data are inconclusive, there is evidence that affective polarization affects an individual's choice of residence.[154] Recently analyzed data show that the decision by individuals to wear masks and get vaccines during the COVID-19 pandemic was strongly associated with various measures of political polarization.[155] In particular, researchers found that the manner in which Republican leaders downplayed the dangers of the COVID-19 pandemic resulted in Republicans becoming less concerned about the virus and less willing to support mitigation policies.[156]

Affective polarization has also been shown to influence choices regarding economic decisions. Research shows strong positive effects for "in group" preferences regarding exchanges of gift cards[157] and labor market transactions.[158] In a study covering economic transactions in the labor and consumer markets, researchers found that employees demand a lower reservation wage from copartisan employers, and that consumers are almost twice as likely to engage in a transaction when the seller's partisanship matches their own.[159] Another study found that job

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Markets, ARXIV, Jan. 17, 2022, at 1, https://arxiv.org/pdf/2201.06556.pdf [https://perma.cc/HS8T-J2XL].

[152] THE PARTISAN DIVIDE ON POLITICAL VALUE GROWS, *supra* note 11, at 65–66.

[153] *See* Druckman et al., *supra* note 146, at 28–29. *But see* Lilla V. Orr & Gregory A. Huber, *The Policy Basis of Measured Partisan Animosity in the United States*, 64 AM. J. POL. SCI. 569, 584 (2019) (finding that policy positions are more important to interpersonal evaluation than political affiliation).

[154] James G. Gimpel & Iris S. Hui, *Seeking Politically Compatible Neighbors? The Role of Neighborhood Partisan Composition in Residential Sorting*, 48 POL. GEOGRAPHY 130, 130 (2015). *But see* Philip Klinkner, *Red and Blue Scare: The Continuing Diversity of the American Electoral Landscape*, 2 FORUM (2004).

[155] *See* Wright et al., *supra* note 6.

[156] *Id.* This effect is attributed to the fact that, in processing information and forming attitudes, partisans have the goal of confirming their identities and the dimensions of those identities that differentiate them from their counterparts. *Id.*

[157] Christopher McConnell et al., *The Economic Consequences of Partisanship in a Polarized Era*, 62 AM. J. POL. SCI. 5, 11 (2018).

[158] Karen Gift & Thomas Gift, *Do Politics Influence Hiring? Evidence from a Randomized Experiment*, 37 POL. BEHAV. 653, 654–55 (2015).

[159] *See* McConnell et al., *supra* note 157, at 8–11. In one experiment, for example, McConnell and others acted as employers and offered workers a contracting editing job. *Id.* Experimental conditions were manipulated so as to signal the political identity of the employer. *Id.* The study found that respondents agreed to perform the task at a lower price for copartisan employers, although there was no evidence that contractors demanded a premium for working with an employer from opposing partisans. *Id.* at 9. In a second experiment, the authors offered a sample group the opportunity of buying a heavily discounted gift card. *Id.* at 11. Again, the political preferences of the person offering the card were manipulated. *Id.* The findings (which did not reach statistical significance) indicated that subjects were more likely to respond to the offer

applicants from a different party than the potential employer (i.e., "out partisan" job applicants) are significantly less likely to receive a callback as compared to politically neutral candidates.[160]

Although the causational direction is unclear, there is some evidence that affective polarization makes it more likely for individuals to believe and transmit misinformation.[161] Not surprisingly, hostility between the "in party" and the "out party" breeds distrust, which in turn makes it easier for misinformation to spread.[162] When facing what they perceive to be hostility from others, individuals seek reassurances in the form of information that affirms the us-versus-them mentality.[163] Affective polarization has also been linked to the "[c]ompression of the information," a situation where, in the interest of maximizing cohesion within a group, diverse points of views are discouraged.[164]

III. LABOR ORGANIZING RULES AND POLARIZATION

Thus, the extant literature indicates that political polarization is driven by a variety of causes. For the purpose of this article, the most notable aspect of this discussion is that this polarization is likely to affect the behavior of individuals in nonpolitical areas of their lives. This section explores more closely the effect that the increase in affective polarization can have in the implementation of the carefully balanced rules regarding union organizing that Congress, the courts, and the Board have developed over the last several decades.

The increase in affective polarization suggests that the deepened political divide in the United States plays a role in how

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where it was made by a copartisan. *Id.* at 12; *see also* Iyengar & Westwood, *supra* note 112, at 701–02 (showing party discrimination in application of trust and dictator games).

[160] *See* Gift & Gift, *supra* note 158, at 654. The study attributes the effect to three reasons associated with affective polarization: (1) that partisan employers are more likely to hire people like themselves, (2) that employers use jobs to reward members of the same political team, and (3) that employers believe that members of the same political team are more competent than those from the opposite party. *Id.* at 657–58.

[161] Max Fisher, *'Belonging is Stronger than Facts': The Age of Misinformation*, N.Y. TIMES (May 7, 2021), https://www.nytimes.com/2021/05/07/world/asia/misinformation-disinformation-fake-news.html [https://perma.cc/3RUR-5PFF] (summarizing research that shows that people become more likely to believe misinformation when (1) conditions such as conflict or social change make people increase their need for being seen as part of a group, (2) a political figure emerges who encourages the consumption of "identity-affirming misinformation," and (3) social media becomes a more salient means of communication).

[162] *Id.*

[163] *Id.*

[164] *See* Bednar, *supra* note 13, at 3.

individuals process information in a wide variety of contexts. Thus, it is entirely possible that the increase in affective polarization affects the way employees process information in the context of a union organizing campaign.[165] While there are varying levels of partisan intensity among employees, and thus the effect of affective polarization will be stronger in some employees than others, it is likely that some employees will process information in an organizing campaign based on whether they believe the information comes from the "in party" or "out party" group. For instance, as previously noted, individuals make a variety of assumptions about the composition of an "out group."[166] In particular, Republicans overestimate the percentage of working class/union members who belong to the Democratic Party.[167] It is thus not unreasonable to assume that employees who belong to the Republican Party will see anyone pushing the union's message as a member of the "out group" and discount and disbelieve any information they might provide. Similarly, members of the "in group" (Republicans in our example) will be more susceptible to consume and share misinformation that validates their worldview. One would expect that they will be more likely to both believe and share information that comports to their prior beliefs without much concern for the information's accuracy. Similar dynamics are likely to affect employees who identify as Democrats and thus who will see Republicans as the "out group."

Further, there is empirical evidence indicating that Republican and Democrat members of the public have very different views with regards to the value of union representation. A recent survey conducted by the Pew Research Center asked respondents whether they considered the decline in the share of workers who are represented by a union as a bad thing for the country and for working people.[168] While the majority of Americans believed that the decline in union representation was "somewhat" or "very" bad for the country and

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[165] In fact, there is clear evidence that workplaces are segregated among political preferences. "The academy increasingly skews to the left, especially so in liberal arts departments and among staff. Cattle ranchers, loggers, dentists, and surgeons skew right." Delia Baldassarri & Scott Page, *The Emergence and Perils of Polarization*, PROC. NAT'L ACAD. SCIS., Dec. 6, 2021, at 6, https://www.pnas.org/doi/epdf/10.1073/pnas.2116863118 (last visited Nov. 26, 2023).

[166] *See supra* Part II-A.

[167] Douglas Ahler & Gaurav Sood, *The Parties in Our Heads: Misperceptions About Party Composition and Their Consequences*, 80 J. POL. 964, 966–67 (2018).

[168] Ted Van Green, *Majorities of Adults See Decline of Union Membership as Bad for the U.S. and Working People*, PEW RSCH. CTR. (Apr. 15, 2021), https://www.pewresearch.org/fact-tank/2022/02/18/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-u-s-and-working-people/ [https://perma.cc/3QYP-FU4L].

for working people, the responses also showed strong partisan differences.[169] Democrats and Democratic-leaning independents viewed the decline in union representation as negative by a rate of over 70 percent, while the figure for Republicans and Republican-leaning independents was about 40 percent, a significant thirty-point difference.[170]

If the current state of affective polarization in the country is likely to impact the way employees consume and process information during the course of an organizing campaign, one must question whether the current legal framework—which seeks to balance the availability of information and let employees sort out what the information is—is insufficient in achieving the Act's purpose to provide employees the opportunity to make informed and free decisions regarding union representation. The current rules might simply not achieve their goals in a world where individuals find it increasingly difficult to process information due to the polarization of views.

Consequently, attempts in recent legislative efforts to increase union access to employees might not only be ineffective, but might actually make things worse. Consider the neutrality mandate under the recent, pandemic-enacted COVID-19 CARES Act.[171] The CARES Act's mandate that fund-recipient employers must remain "neutral" and not give captive audience or indeed any speeches opposing union activities made perfect sense from the perspective of US labor unions.[172] Arguably, this mandate required employers covered under the NLRA not to participate in an organizing campaign. In addition to being of dubious constitutional[173] and statutory[174] validity, this provision

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169 *Id.*

170 *Id.*

171 15 U.S.C. § 9042(c)(3)(D)(i)(X).

172 The legislation enacted in 2020 to address the economic dislocations caused by the COVID-19 pandemic included a provision that made neutrality agreements a condition for obtaining low-interest rate loans. Coronavirus Aid, Relief, and Economic Security Act of 2020, § 4003(c)(3)(D)(i)(X), 15 U.S.C. § 9042(c)(3)(D)(i)(X).

173 The First Amendment to the US Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Of course, the proscriptions of the First Amendment are not absolute in nature, and Supreme Court precedents in cases such as *Central Hudson Gas & Electric Corp. v. Public Service Commission* have permitted governmental regulation of business speech in certain contexts. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980). The CARES Act's labor neutrality provision, however, appears to directly contradict prior congressional action and Supreme Court precedent with respect to affording employers free speech rights in union organizing and related labor representation situations.

174 Courts upholding the legality of labor neutrality agreements have emphasized the NLRA's fundamental policies favoring the practice and procedure of collective negotiation/bargaining and the enforceability of labor agreements, as

meant that the only message that employees would hear throughout the campaign would be the union's message. While this message would be reassuring for those in the "in group" (those who identify at some broader level with pro-union policies), the research on polarization discussed earlier suggests that such a message would be unlikely to change the minds of those in the "out group," and, in fact, would likely harden their views. Thus, in a sense, taking such an approach is similar to expecting avid Fox News viewers to become less conservative just because they are required to watch MSNBC. Neutrality mandates of this kind might have the potential ironic effect of "backfiring" on and hurting union organizing efforts. As the late Justice Henry A. Blackmun more generally opined, "people will perceive their own best interests if only they are well informed, and . . . the best means to that end is to open the channels of communication rather than to close them."[175] While labor neutrality agreements work to offset employer "captive audience" and other free speech organizational advantages, they do so by directly closing "channels of communication." Is this the most effective way to promote "industrial democracy" and employee representational/collective bargaining rights in the twenty-first century?

A similar—although more nuanced—critique could be made of the Protecting the Right to Organize (PRO) Act's banning of captive audience speeches. President Joseph R. Biden has stated his support for the PRO Act, which was passed by the Democratic US House of Representatives in the last Congress and is strongly supported by labor unions.[176] The PRO Act specifically calls for the outlawing of employer captive audience speeches.[177] A different provision of the proposed PRO Act also

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enunciated by the Supreme Court in *Auciello Iron Works v. NLRB*. Auciello Iron Works v. NLRB, 517 U.S. 781, 785 (1996). Attacks on the legality of neutrality provisions have centered, as in *Unite Here Local 355 v. Mulhall*, on the fact that they can be seen as representing an arguably prohibited exchange of a "thing of value" by the employer to the union as a quid pro quo for receiving something of benefit. Unite Here Loc. 355 v. Mulhall, 571 U.S. 83, 84–85 (2013) (Breyer, J., dissenting) (quoting 29 U.S.C. § 186(a)(2)).

[175] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[176] Protecting the Right to Organize Act, H.R. 2474, 116th Cong. (2020); *see, e.g.*, *What is the PRO Act?*, AFL-CIO, https://aflcio.org/pro-act [https://perma.cc/P6AV-Y8VQ] (referring to the PRO Act as "the most significant worker empowerment legislation since the Great Depression"); Press Release, President Joe Biden, Statement by President Joe Biden on the House Taking Up the PRO Act (Mar. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/09/statement-by-president-joe-biden-on-the-house-taking-up-the-pro-act/ [https://perma.cc/75K8-56JD].

[177] Protecting the Right to Organize Act of 2019, H.R. 2474, § 2(d)(3), 116th Cong. (2020).

requires that employees be allowed to use, during union organizing drives, normally-used employer "electronic communication devices and systems (including computers, laptops, tablets, internet access, email, cellular telephones, or other company equipment)" unless the employer can show a "compelling business rationale[]" to prevent such use.[178]

The PRO Act's provision allowing for access to the employer's electronic communications systems is certainly a welcome development from the perspective of unions, as it somewhat equalizes the advantage that employers have in communicating with employees at work. On the other hand, polarization literature strongly suggests that online communications appear to have been one of the many factors apparently related to the increase in polarization.[179] Social media and other online communications have made it easier for individuals to ignore information that challenges their world view and also easier to transmit misinformation, in that way accelerating dislike for the out-group. Making it easier for employees to communicate electronically might aggravate, not reduce, polarization.

In short, in an era of increased political polarization where partisanship influences many choices individuals make, the underlying assumptions in which American labor law is based might not hold. In particular, a set of rules that just seeks to provide somewhat equal access to information might not be sufficient to fulfill the Act's goal of providing employees the opportunity to make a free and informed choice regarding the question of union representation. Attempts to address what unions see as shortcomings in the rules concerning organizing, such as those in the CARES Act and the PRO Act, might be

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[178] *Id.* § 2(h)(2)(i); *see* Erik Loomis, Opinion, *Why the Amazon Workers Never Stood a Chance: Our System of Labor Law and Regulations Has too Strongly Tilted the Playing Field in Favor of Companies and Against Unions*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/amazon-union-alabama.html [https://perma.cc/QT7M-LPAW] (discussing an attempt to settle the back-and-forth debate between Republican and Democratic controlled boards). In 2007, the Bush NLRB concluded that prohibiting employees from using an employer's email system for all "nonjob-related solicitations," was not a violation of the Act. Guard Publ'g Co., 351 N.L.R.B. 1110, 1119 (2007). In 2014, the Obama Board framed the issue differently and held that, where the employees have rightful access to their employer's email system in the course of their work, a rebuttable presumption arises that the employees could use the email system to engage in Section 7 activity. Purple Commc'ns, 361 N.L.R.B. 1050, 1066 (2014). The Trump Board reversed the Obama Board, holding that employers do not violate the Act by restricting the nonbusiness use of its email system "absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination." Caesars Ent., 368 N.L.R.B. 143, 143 (2019).

[179] *See* FELDACKER & HAYES, *supra* note 55; *supra* note 137–145 and accompanying text.

insufficient. To be sure, these are not easy policy choices, and it is certainly not obvious what types of policies will be most effective in countering the effect of polarization in the labor law sphere. However, sufficient evidence suggests that there is a need to rethink the entire approach to communications during organizing campaigns. What is needed is an approach that recognizes the existence of affective polarization and also responds to it by adopting interventions that have been found effective in countering its negative effects.

IV. POSSIBLE INTERVENTIONS FOR MORE EFFECTIVE CAMPAIGN RULES IN A POLARIZED ENVIRONMENT

If neither the CARES Act's neutrality mandate nor the PRO Act's ban on captive audience speeches are solutions that meet the challenges presented by a polarized citizenry, alternative options are available. This article proposes a new approach that takes into account the polarized context of today's polity and relies on evidence-based interventions intended to minimize polarization, facilitate the exchange of information, and improve the decision-making abilities of the public. Research indicates three types of interventions have been found to be effective in dealing with information exchanges in a polarized environment: (1) interventions that seek to focus the parties' attention on a shared identify, (2) interventions that use intermediaries (individuals that both groups see as legitimate) to help convey information, and (3) interventions that focus on constructive engagement. The focus of this article is on the first two of these interventions, as they can be more readily applied to the labor organizing context.

It is true that not all of these interventions are applicable in the context of union organizing campaigns and that an organizing campaign is not necessarily the appropriate context to address the broader issues created by increased trends in affective political polarization. But the goal of this article is more modest; it seeks to make the point that there may be interventions that can be taken in order to protect the right of employees to make a free and informed choice regarding the decision about whether to organize and bargain collectively.

A. Interventions Designed to Focus on Shared Identities

Focusing the attention of individuals on traits or identities that cross over groupings is believed to be helpful in improving communications in a polarized environment. To the

extent that polarization is driven in part by associations that the "in group" makes about the "out group's" identities, deemphasizing those identities and instead emphasizing identities that are shared by both groups seems to help to reduce polarization and improve communication. For example, research shows that exposure to common American identity cues decreases the salience of partisan identity and reduces hostility toward the "out group."[180] A real life example of this approach can potentially be seen in the messaging from the Biden Administration regarding policies to combat the COVID-19 pandemic. Messages regarding the use of masks, following social distancing guidelines, and vaccination clearly emphasize values such as community, caring for the elderly, and civic duty—messages that incentivize individuals to rely on cross-party identities.[181]

There might be little room for application of this intervention in the aspects of the organizing process that involve NLRB involvement. However, unions clearly have been long using this approach during organizing drives.[182] In seeking support at the early stages of an organizing campaign, union organizers focus exclusively on contexts that all the workers share and on issues that bring them together. Whether the organizing campaign involves a "hot shop"[183] or a site chosen by the union strategically, initial conversations are all about the circumstances shared by all employees at the specific workplace—staffing problems, compensation, benefits, or abusive employment practices. For example, the organizing training manual of the International Brotherhood of Teamsters advises organizers to start all conversations with employees by listening to what the employee has to say about conditions of work before beginning any conversation about the role the union

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[180] Matthew Levendusky, *Americans Not Partisans: Can Priming American National Identity Reduce Affective Polarization?*, 80 J. POL. 59, 60–61 (2018).

[181] Sara Brown, *A Checklist for Effective COVID-19 Public Health Messaging*, MIT SLOAN SCH. MGMT (May 8, 2020), https://mitsloan.mit.edu/ideas-made-to-matter/a-checklist-effective-covid-19-public-health-messaging [https://perma.cc/T895-C7PH]; Xiaoli Nan, et al., *Public Health Messaging During the COVID-19 Pandemic and Beyond: Lessons From Communication Science*, 37 HEALTH COMMC'N 1, 3–6 (2022).

[182] *See* Hamilton Nolan, *A Bunch of Union Organizers Explain What's Wrong With Unions*, WORKPLACE FAIRNESS (Oct. 8, 2020) https://www.workplacefairness.org/blog/2020/10/08/a-bunch-of-union-organizers-explain-whats-wrong-with-unions/ [https://perma.cc/A392-3DGR]; *see generally* William B. Gould IV, *Beyond Labor Law: Private Initiatives to Promote employee Freedom of Association in the Obama Era*, 87 IND. L. J. 69 (2012) (discussing the importance of the role of unions' activities in the organizing process).

[183] Jane McAlevey, *Why Unions Must Recommit to Expanding Their Base*, NATION (Jan. 4, 2021), https://www.thenation.com/article/politics/biden-labor-unions-organizing/ [https://perma.cc/922W-W9C8].

could play in representing employees.[184] Similarly, during organizing drives, unions seek to involve employees early in the process in order to counter the view that the union is an "outsider." For instance, the training manual of the Laborers' International Union of North America, states that "[m]ember involvement keeps workers from seeing 'the union' as something separate from them . . . [i]nstead of sitting back and waiting for service from the union, workers begin to realize that they share the responsibility for both the union's victories and defeats."[185]

B. Interventions Using a Credible Intervenor

As previously noted, research on polarization has shown that contrary to what one might expect, exposing individuals to opposing views is likely to be an ineffective approach to overcome polarization.[186] In fact, such an approach has been found to accentuate and increase political polarization.[187] For information about opposing views to be heard amidst a polarized environment, the information must come from a trusted source. This is a potentially fruitful approach in the labor representation context.

Various scholars have recommended incorporating "labor debates" into the organizing process. For instance, the NLRB could be legislatively ordered to schedule a series of debates to be held between the competing parties prior to voting in any NLRB-regulated labor representation election.[188] These election debates would potentially be held at the employer's workplace during working hours and on paid working time.

However, in light of the polarization research, this article recommends modifying the labor debates proposal as follows.[189] With regards to content, the debates should be structured to include an initial training/educational session in which employees are provided general information about the organizing process, collective bargaining, and the law. The

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[184] TRAINING & DEV. DEP'T, INT'L BROTHERHOOD TEAMSTERS, A GUIDE TO ORGANIZING FOR TEAMSTER MEMBER ORGANIZERS 9 (2018), https://teamster.org/wp-content/uploads/2018/12/72717memberorganizermanual.pdf [https://perma.cc/SM73-QWVN].

[185] LIUNA, AN INTERNAL ORGANIZING DRIVE FOR LIUNA PUBLIC SECTOR LOCAL UNIONS 7 (2017), https://www.liuna.org/_service/downloadFile.ashx?fileid=cddc615d-0367-42c7-b2ed-3c59a55842f7 [https://perma.cc/F9QF-PFKS].

[186] *See* Bail et al., *supra* note 136, at 9216–17.

[187] *Id.* at 9217.

[188] *See* Bierman, *supra* note 95, at 531.

[189] *See* Leonard Bierman, Rafael Gely, & William B. Gould IV, *Achieving the Achievable: Realistic Labor Law Reform*, 88 MO. L. REV. 311, 348–49 (2023) (outlining a similar proposal). The proposal advanced here takes into account the polarization concerns addressed earlier. *See supra* Part II.

rationale for proposing this initial step relates to the concern that, in a polarized environment, individuals are more susceptible to misinformation and while not necessarily more likely to receive information from "out party" sources, are more likely to believe *any* information provided by "in party" sources. Thus, there is a need to provide some basic set of facts which, if delivered by a trusted source, might be able to provide a baseline for continuing discussions.

This proposal could impact the rules regarding the so-called "*Excelsior* Doctrine." Under the current NLRB holding in *Excelsior Underwear, Inc.*,[190] once the NLRB formally schedules a labor representation election, employers are required to, within seven calendar days, turn over a list of the names and addresses of the employees in the relevant election unit to the union participating in said election. The PRO Act, in section 2(h)(1)(2)(i)(2), slightly shortens the timing of this requirement to "[two] business days," and expands the requirement to also include phone numbers and email addresses.[191] The PRO Act approach seems reasonable in light of the proposed abolition of the home visits doctrine, and the development of new societal communication methods (e.g., email and cell phones) in the years since the *Excelsior* case was decided over half a century ago. However, to the extent that our proposal provides an opportunity for all employees to obtain the information they need to make an informed and unimpeded choice regarding their preference for union representation, the need for the union to contact employees outside of the labor debate context could be minimized. Contacting employees outside the workplace requires more resources from the union and is likely to be a less effective form of communication. Unions currently rely on communications outside of the workplace because it is their main option.

In this article's proposal, following an initial information session, there should be a second session where employees themselves, without the presence of union or management representatives, will be guided in a conversation about their perspectives and concerns on workplace issues. This second session will be modeled along the lines of what is referred to as dialogue processes, in particular "deliberative polling."

Deliberative polling is a based on deliberative democracy principles. Deliberative democracy involves the principle that

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[190] Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1239–40 (1966).

[191] Protecting the Right to Organize Act, H.R. 2474, 116th Cong. § 2(h)(1)(2)(2020).

people should make reasoned choices after weighing the arguments on each side of an issue.[192] However, data shows that elected officials and members of the public are increasingly poorly informed and less likely to engage in debate before forming opinions on public policy issues.[193] The deliberative democracy movement seeks to reverse these trends by creating spaces that encourage participants to become informed on important issues. The basic idea is to provide meaningful incentives for citizens to become better informed and to create a space where they have access to reliable information, evaluate the merits of competing arguments, and make reasoned decisions.[194] Normally used in the context of broad public policy debates (e.g., climate policies), the process encourages participants to become better informed in policy debates before expressing an opinion on a particular matter. Deliberative polling is one of the designs used in this context. At its core, deliberative polling involves administering a questionnaire to a random and representative segment of the public, bringing a selected sample of participants to small group discussions, providing participants with briefing materials on the topics to be discussed, allowing the small groups to develop a set of questions to be presented to a panel of experts, and administering another questionnaire to capture the participant's more informed decisions.[195]

The second meeting of the labor debate process could involve a meeting designed along the lines of the deliberative polling process. In particular, at the proposed second session, participants would have the opportunity to generate questions to be addressed not by the union nor by the employer, but by experts that could include the organization running the debate series. With the background provided by the informational

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[192] *See* James Fishkin, Alice Siu, Larry Diamond, & Norman Bradburn, *Is Deliberation an Antidote to Extreme Partisan Polarization? Reflections on "America in One Room,"* 115 AM. POL. SCI. REV. 1464, 1464–65 (2021); *see also* James S. Fishkin & Robert Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 285 (2005).

[193] MICHAEL DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 89–92 (1996). A number of explanations exist for this tendency, including the concept of "rational ignorance," which holds that realizing that one's vote is unlikely to make a difference in an election outcome where large numbers of citizens vote, and that therefore there is an incentive not to spend time and effort informing oneself about the issues. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 245 (1957).

[194] JAMES FISHKIN, DEMOCRACY WHEN THE PEOPLE ARE THINKING 2 (2018).

[195] *Id.* at 8–9; *see also Deliberative Democracy Lab: Center on Democracy, Development and the Rule of Law*, STANFORD UNIV., https://deliberation.stanford.edu/ [https://perma.cc/9G88-Z4HY]. The Deliberative Democracy Lab is "devoted to research about democracy and public opinion obtained through Deliberative Polling." *Id.*

meeting and having had the opportunity to get questions answered by an independent and trusted source, a third meeting/debate would allow both the employer and the union to make presentations directly to the employees. This last meeting could be structured as a traditional debate or as a series of presentations followed by a questions-and-answers period. The literature on deliberative polling indicates that after experiencing the deliberative process, partisans recorded more positive feelings toward the other party.[196]

With regards to process, one of the components of the current state of polarization is that conservative ideology believes that government intervention should be avoided and that government agencies cannot be trusted.[197] Therefore, having the NLRB involved in the type of debates suggested herein runs the risk of actually defeating the purpose of the debates, as the NLRB might not be seen as a trusted source.[198]

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[196] *See* FISHKIN, *supra* note 194, at 43–46.

[197] *See Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 2, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ [https://perma.cc/HAY9-EBUZ] (study showing that Republicans are significantly more likely to be less trusting of the government).

[198] *See* William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Process*, 64 EMORY L. J. 1501, 1522–25 (2015) [hereinafter *Politics & the NLRB*] (showing how the NLRB is a politically motivated agency by discussing NLRB decisions over the course of several presidential administrations); William B. Gould IV, Former Chairman of the NLRB in the Clinton Administration (1994–1998), Keynote Address at the State Bar of California Labor and Employment Section Annual Meeting, The Decline and Irrelevance of the NLRB and What Can Be Sone About It: Some Reflections on Privately Devised Alternatives, at 7–8 (Oct. 31, 2008) (on file with the authors) (arguing for amendments to the NLRA in order to depolarize and depoliticize the NLRB); William B. Gould IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB – A MEMOIR 144–66 (2000); *see also* William B. Gould IV, *Too Much Politics in Labor Law*, ST. LOUIS TODAY (Sept. 7, 2016), http://search.proquest.com.ezp-prod1.hul.harvard.edu/newspapers/too-much-politics-labor-law/docview/1817109410/se-2?accountid=11311 [https://perma.cc/M3RW-YR2A] (describing how the overturning of a Republican-appointed NLRB decision by a Democratic-appointed NLRB highlights the politicization in labor law); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 99 (1954) (arguing that, though the NLRB is supposed to be politically neutral, it cannot escape "follow[ing] the election returns"); W. Willard Wirtz, *The New National Labor Relations Board: Herein of "Employer Persuasion,"* 49 NW. U. L. REV. 594 (1954) (discussing how the presidential election of 1952 resulted in a "new NLRB" that "'reinterpret[ed]' the [Taft-Harley] Act"). A similar concern was raised in 2015, when the California Agricultural Labor Relations Board (California ALRB) considered adopting a rule that would have allowed it to provide worker education on employer property. *See* William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 UC DAVIS L. REV. 1243, 1258–61 (2017). To address the concern of the dual role played by the California ALRB, the proposed rule provided for the creation of a special unit within the agency that would oversee providing the education, and that it would be "walled off" and take no part in the investigation or prosecution of unfair labor practice complaints that might arise during the organizing campaign. Memorandum from Thomas Sobel, Admin. Law Judge, & Eduardo Blanco, Special Legal Advisor to the Bd., at 23, 37–38 (Nov. 23. 2015), https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/Staff RecommendationWorksiteAccess.pdf [https://perma.cc/CFN8-LU5V].

To address this concern, the responsibility for running the debate should be delegated to some other organization not directly involved in the administration of the organizing process.

One possible candidate might be the Federal Mediation and Conciliation Services (FMCS). The FMCS (whose origins can be traced back to 1908 with the establishment of the US Conciliation Service) was officially created in 1947 by amendments to the NLRA as an independent federal agency with the mission of "preserv[ing] and promot[ing] labor-management peace and cooperation."[199] The agency is headquartered in Washington, DC, with regional, district, and field offices all over the country.[200] The FMCS provides a variety of services, including "mediation and conflict resolution services to industry, government agencies[,] and communities."[201] The FMCS employs a staff of highly trained mediators who seek to prevent or minimize interruptions to commerce caused by labor disputes.[202] While the core activity of the FMCS is collective bargaining mediation, the agency provides relationship-building training programs designed to improve labor-management relationships by helping labor and management develop collaborative problem-solving approaches.[203] In a recent annual report, the agency director noted that "[t]he 21st century workplace, in both the private and public sectors, requires not only dispute resolution assistance, but also assistance to help labor and management develop trust over time and collaborate and innovate together based on that trust."[204]

In addition to the FMCS, there are other entities that could be tapped to help organize and run the labor debates. Labor and management education programs at universities across the United States could play such a role,[205] as could the

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[199] *About Us*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/ [https://perma.cc/WJ76-D4JD].

[200] *Id.*

[201] *Id.*; *Services*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/ [https://perma.cc/4232-R94W].

[202] *See About Us*, *supra* note 199 (FMCS mission statement detailing how the agency "achieves its mission"); *see also Collective Bargaining Mediation*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/resolving-labor-management-disputes/collective-bargaining-mediation/ [https://perma.cc/58AC-SY2B] (FMCS page describing the agency's collective bargaining mediation service).

[203] *Labor-Management Relationships*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/building-labor-management-relationships/ [https://perma.cc/T8DK-JJBH].

[204] FED. MEDIATION & CONCILIATION SERV., ANNUAL REPORT 2 (2018), https://www.fmcs.gov/wp-content/uploads/2019/08/2018-FMCS-Annual-Report.pdf [https://perma.cc/VMV4-Y7L6].

[205] *Labor Education Program*, UNIV. ILL. URBANA-CHAMPAIGN: SCH. LAB. & EMP. RELS., https://ler.illinois.edu/labor-education/ [https://perma.cc/Z33V-4TVM].

many dispute resolution programs that currently exist at a variety of law schools in the country.[206] Finally, the American Arbitration Association could also have a role in this process.[207]

The labor debates proposal advised in this article will require a revision, at least partially, of the Supreme Court's 1992 decision in *Lechmere, Inc. v. NLRB*.[208] This roughly three-decades-old decision cited the ability of labor unions to reach workers via home visits and other "alternative" methods as the rationale for prohibiting union organizing in shopping mall parking lots and other areas that are essentially freely accessible to the general public.[209] Given the reconsideration of the home-visit doctrine and an obligation to allow union representatives to participate in the debates, there will be a need to give union organizers access to the workplace. This would be particularly true if Congress were to also outlaw the advantages unions can obtain pursuant to labor neutrality provisions/agreements. It is unlikely that the Supreme Court will make changes to *Lechmere*. If anything, the trend runs in the direction of further limiting access to organizing activities in the workplace, as evidenced by the Court's decision in *Cedar Point Nursery v. Hassid*.[210]

Finally, the proposal advanced here is not in and of itself a solution to the political polarization problem in the United States. The labor organizing process is a competition in which one party will win and the other will lose. There is a silent or hidden stage of the organizing process during which the union assesses the landscape, evaluates whether the conditions are conducive to a campaign, and identifies potential leaders for the campaign. It is clearly the case that during this phase of the campaign, unions will be delivering a "partisan" message that could be seen as polarizing. It is also true that before an organizing campaign is initiated, employers have the ability to convey a preemptive antiunion message in a manner that is equally polarizing. That said, these proposals represent a positive acknowledgment that today's union organizing

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[206] *See generally Best Dispute Resolution Law Programs*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/top-law-schools/dispute-resolution-rankings [https://perma.cc/EB2J-CS9Q].

[207] *See Practice Areas*, AM. ARB. ASS'N., https://www.adr.org/labor [https://perma.cc/9HXE-Z6B5].

[208] Lechmere, Inc. v. NLRB., 502 U.S. 527, 540–41 (1992).

[209] *Id.* at 539–40.

[210] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); *see also* William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: Déjà Vu All Over Again?*, 2014 S. CT. REV. 133, 172–73 (2014) (articulating that predictions about this Supreme Court's future rulings must be made with great caution).

landscape is a far different one than existed in previous years. As such, a new regulatory paradigm is needed, one that recognizes the dynamic of "affective polarization" in today's society.

C. *Possible Path to Implementation: The Laboratory Conditions Doctrine*

The proposals advanced in this article face major hurdles with respect to implementation. This section discusses a possible doctrinal path that will require little or no congressional or judicial approval and could serve to implement them. In particular, this article argues that the role that Congress and the courts have given the Board, under the laboratory conditions doctrine, provides it some discretion in implementing some of these proposals.[211]

The NLRB's laboratory-conditions regulatory scheme is based on the principle that labor organizing drives must be conducted in a pure and clean environment—like a scientist's "laboratory."[212] This doctrine provides that representation elections should be "conducted, under conditions as nearly ideal as possible, to determine the inhibited desires of the employees."[213] The laboratory conditions test is applied on a case-by-case basis. The Board considers a series of factors pursuant to this doctrine, including the severity of the conduct and the quantity of incidents, the number of employees affected by the

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[211] We understand there are alternative ways for implementing our suggestions. In particular, as we have argued elsewhere, it is beneficial when employers are willing to voluntarily adopt some of the measures we are proposing through neutrality agreements. *See* Bierman, Gely & Gould, *supra* note 189, at 354–65. Thus, a decade or two ago, for example, when the Teamsters Union conducted a US organizing drive with respect to the US operations of the multibillion dollar UK bus company, FirstGroup, it contacted British members of Parliament and other UK government officials in support of its efforts to ensure it was able to conduct a free and fair organizing drive. *See* William B. Gould IV, *Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: the FirstGroup Experience*, 66 DISP. RESOL. J. 46, 50 (2011). In response, the company developed and adopted explicit Freedom of Association (FOA) guidelines with respect to said organizing and engaged a prominent US law professor to serve as an independent monitor with respect to enforcing these guidelines. *Id.* at 50–51. During the course of the organizing drive, the independent monitor received 372 alleged FOA violation complaints, issued 143 written reports with respect to these complaints, and ultimately found sixty-seven FOA violations. *Id.* at 53. While widespread adoption of a unique alternative dispute resolution mechanism of this kind with respect to US labor organizing activities is rather unlikely, it does represent a potentially positive way to help cooperatively ameliorate polarization during union organizing campaigns. From a broader perspective, it also points to the need to look more broadly internationally for paradigms where labor/management relations tend to be more cooperative and less polarized and inflammatory in nature than in the United States.

[212] Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[213] *Id.*

conduct and the impact that the conduct might have had on those employees, and the timing of the misconduct in relation to the election.[214] Specifically, the NLRB has held that representation elections must be held in an "atmosphere" where employees have clear, "free choice."[215] Thus, for example, the Board has, pursuant to this doctrine, postponed or set aside elections where one side or the other has made intentionally fraudulent statements to potential voters.[216] The Board has also set aside elections where employers have announced or granted wage or benefit increases shortly before a scheduled election,[217] promised favored treatment to employees who vote against the union,[218] or threatened economic reprisals or refusal to bargain in the event of a union victory.[219] Additionally, the Board has applied this doctrine based on union misconduct, including a union's agents buying drinks for voters before an election,[220] union electioneering only ten feet from the polling place,[221] and union threats of future strike violence.[222]

The NLRB's jurisdiction in this regard has been specifically upheld in the seminal case of *Bausch & Lomb v. NLRB*.[223] In this case, Judge Irving R. Kaufman, writing for the Second Circuit and relying on the Supreme Court precedent of *Linn v. United Plant Guard Workers*, directly held that the NLRB's laboratory conditions regulatory framework did not illegally transgress on either the First Amendment or the "freedom of speech" provision of the NLRA in Section 8(c).[224] Judge Kaufman noted that, because of the unique relationship between and among the various parties in the labor

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214 *See* ManorCare of Kingston PA, LLC v. NLRB, 823 F.3d 81, 86 (D.C. Cir. 2016) (listing six factors that courts consider when evaluating "whether a threat is serious and likely to intimidate voters"); *see also* GADecatur SNF LLC v. NLRB, No. 20-1435, 2021 WL 6055067 at *2 (D.C. Cir. Nov. 30, 2021) (listing eight factors that courts consider when deciding "whether objected-to conduct tended to interfere with employees' free choice").

215 *Gen. Shoe Corp.*, 77 N.L.R.B. at 127.

216 Lasalle Ambulance, Inc., 327 N.L.R.B. 49, 52 (1998) (ordering a new election where the employer announced that a union victory will prevent employer from granting yearly merit raises).

217 *See* Evergreen Am. Corp. v. NLRB, 531 F.3d 321, 327 (4th Cir. 2008) (affirming an administrative law judge decision that found wage increases, given two days before a union election, were meant to undermine union support); *see also* NLRB v. DPM of Kan., Inc., 744 F.2d 83, 85 (10th Cir. 1984) (affirming that an employer announcing two unscheduled benefits increases eleven days before a union election is an attempt to undermine the election).

218 Keystone Auto. Indus. Inc., 365 N.L.R.B. 2, 3 (2017).

219 Larson Tool & Stamping Co., 296 N.L.R.B. 895, 896 (1989).

220 Labor Serv., Inc., 274 N.L.R.B. 479, 485 (1985).

221 Southeastern Mills, Inc., 227 N.L.R.B. 57, 58 (1976).

222 Home & Indus. Disposal Serv., 266 N.L.R.B. 100, 101 (1983).

223 Bausch & Lomb Inc. v. NLRB, 451 F.2d 873, 875 (2d Cir. 1971).

224 *Id.*

representation context, it was very important to prevent "free-for-all-anything-goes conduct." [225]

Judge Kaufman's reasoning, it could be argued, provides the foundation for allowing the Board to establish election rules within the parameters of the laboratory conditions standard that positively tone down the highly polarized, "highly charged" atmosphere of labor organizing drives/labor representation elections. The Board could treat polarization trends as a factor that is interfering with elections and therefore take steps to minimize the impact of polarization in the election process.

It is important to note that the NLRB has historically demonstrated the ability to be careful and targeted in applying the laboratory conditions doctrine to situations that clearly have polarized an election atmosphere. For example, union or employer campaign discussions of racial issues have not per se been held violative of laboratory conditions standards to the extent said discussions have been directly germane to the given employment relationship and conducted in a relatively noninflammatory manner.[226] However, when one side or the other has made racial statements not directly relevant to the given workplace and that are inflammatorily filled with racial hatred, pitting minority employees against white employees, the NLRB has been willing to step in and regulate this speech pursuant to the laboratory conditions paradigm.[227] Thus, in sum, the laboratory conditions test may potentially represent a very viable avenue for possible administrative reform in this area of the law.

The proposals advanced here will require addressing a number of logistical issues. For instance, it will have to be decided at what point in the organizing process the debates will be conducted. One would expect that the debates would be scheduled only after the union has filed a petition for an election, which itself requires a showing of at least 30 percent support from the employees in the appropriate bargaining unit. Second, if the debates occur offsite and on nonworking times, there will be some administrative costs, which will require a minor governmental budget.

In exchange, these debates would foster the type of uninhibited, robust, and wide-open conversation that is necessary in the labor organizing context, while not in any way directly impinging on employer property rights, which the

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[225] *Id.* at 879.

[226] Shepard Tissue, Inc., 326 N.L.R.B. 369, 370 (1998) (Gould, Chairman, concurring).

[227] Sewell Mfg. Co., 138 N.L.R.B. 66, 68–71 (1962).

Supreme Court recently gave elevated status in *Cedar Point Nursery*. Board sponsored debates would represent a positive reform that is both realistic and likely not to be subject to any meaningful judicial challenges.

CONCLUSION

This article proposes a new regulatory model for labor organizing in today's polarized political environment. More specifically, it proposes interventions designed to increase focus on shared identities, as well as interventions using a credible intervener. It advances the idea that information that flows in labor organizational contests should not be cut off (along the lines of neutrality provisions), but instead that it must be communicated in a more trustworthy manner. It suggests the NLRB's existing "laboratory conditions" regulatory authority may be one avenue to explore this proposal. The overall goal would be to tone down "polarization" in the labor representation context, and thus better advance industrial democracy as established by Congress in the NLRA.