

“ACTING LIKE A UNION”:
PROTECTING WORKERS’ FREE CHOICE BY PROMOTING
WORKERS’ COLLECTIVE ACTION

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I. INTRODUCTION

By drawing upon the preference-eliciting default theory of statutory interpretation, and the reversible default theory from corporate law, Professor Benjamin Sachs has “injected new analytical rigor”¹ into the debate over reform of union certification laws. Sachs argues that labor law has no “normative preference” for or against unionization,² but that current rules nevertheless impinge employee choice by creating “asymmetric impediments” to unionization.³ Under our nonunion default, management’s near-inevitable opposition to unionization fosters collective action problems and market failures that can thwart workers’ organizing — yet managers will generally not discourage workers from decertifying an existing union and thus restoring the nonunion default, nor would they discourage departure from an alternative default rule of union representation.⁴ Since setting a default rule of union representation is a political nonstarter, Sachs argues that minimizing or eliminating managerial involvement in union organizing campaigns is justified as a means of minimizing the “stickiness of the nonunion default.”⁵

Yet Sachs rejects “card check,” labor’s preferred reform, which would require employers to recognize a union that collects cards from a majority of workers authorizing it to bargain on their behalf. In his words, card check helps workers overcome labor law’s sticky default by “enabl[ing] employees to conduct union organizing campaigns without giving notice to management that a campaign is underway and thus to limit, or avoid entirely, managerial intervention.”⁶ Yet, he argues, by making workers’ decisional moments public, card check also enables unions (and manage-

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¹ Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 10 (2010).

² Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 658 (2010).

³ *Id.*

⁴ *Id.* at 681–82.

⁵ *Id.* at 685.

⁶ *Id.* at 671.

ment) to coerce workers into signing authorization cards.⁷ Based on this analysis — simplified of course for present purposes — Sachs argues for a new “altering rule” whereby workers would vote on union authorization on a rolling basis, but would do so in secret, protecting them from both management *and* union coercion. Such a system, Sachs argues, should “[m]aximiz[e] employee preferences on the question of unionization.”⁸

I share Sachs’s concerns about union coercion, and my own thinking on these matters is heavily indebted to his analysis. I also share his belief that limiting managerial involvement in union organizing drives would help promote employees’ organizing efforts. But I believe that limiting managerial involvement is only the first step. Effective collective bargaining ultimately requires a worker-led organization capable of exerting countervailing power in the workplace, and to build such an organization workers often must take collective, public, and even disruptive action. Accordingly, I do not view card solicitation as mainly a means to help workers organize in secret, but rather as an important tactic in broader strategies to build such power. In this view, the act of signing a card is a public commitment to act in concert with one’s coworkers to obtain shared goals.

While such disagreements are largely empirical, Sachs and I may also differ over how to effectuate labor law’s goal of protecting employees’ free choice as to bargaining representatives.⁹ In Part II, I argue that we should interpret “free choice” in line with commitments to substantive equality and democratic ideals. I then outline my understanding of organizing drive dynamics in Part III. Finally, in Part IV, I propose alternative labor law reforms that I believe would capture the solidarity building benefits of open card solicitation, while also protecting workers against the possibility of union and management coercion.

II. AUTONOMY AS SUBSTANTIVE EQUALITY

While the National Labor Relations Act¹⁰ (NLRA) is formally neutral toward unionization — it seeks neither to promote nor to deter unionization, but rather to protect employees’ rights to choose whether to unionize,

⁷ *Id.* at 713–18.

⁸ *Id.* at 727.

⁹ See National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449–50 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)) (“It is hereby declared to be the policy of the United States to . . . protect[] 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.”); Sachs, *supra* note 2, at 658 (“[L]abor law neither favors nor disfavors unionization, instead allowing employees to decide which form of bargaining they prefer . . .”).

¹⁰ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

and to prohibit management from interfering with those rights¹¹ — determining when workers’ choices with regard to unionization are autonomous is not a simple task, for two interrelated reasons. First, courses of action that the law views as autonomous may be perceived by relevant actors as no choice at all, as in Robert Hale’s bleak example of a propertyless worker who has no desire to enter into employment, but must do so to avoid starvation.¹² The stakes are rarely quite as high, but workers may want to unionize (or not unionize), yet perceive that they may lose their jobs for doing so, and therefore view the option as foreclosed. Second, and conversely, people may perceive themselves as acting autonomously even as they have unconsciously adapted their preferences to accept what is possible and achievable under current law, as Professor Cynthia Estlund notes in her response to Sachs’s piece.¹³ Based on their beliefs about the rules governing union and employer tactics during organizing drives and bargaining, for example, workers who might otherwise prefer unionization may view it as an exercise in futility, and therefore oppose it. Further complicating matters, such “adaptive preferences” seem pervasive, and some are desirable: civil rights law, for example, may lead some to lose their preferences for segregation or gender inequality.¹⁴

Moreover, ideals of “free choice” are often insufficient to resolve concrete questions in labor law cases. For example, to declare a strike or picket line legal, or to block management from prohibiting union t-shirts on company property, a court must resolve whether workers’ section 7 rights should yield to management claims rooted in property, contract, the First Amendment, and the NLRA itself. This is not a matter of satisfying a particular preference set. Rather, it requires one to balance competing claims to legal entitlements. Ultimately, determining which preferences are desirable or troubling, and which apparently autonomous choices the law should nevertheless disregard, requires a “substantive theory that allows an observer to evaluate the existing distribution of entitlements and existing preferences.”¹⁵ In labor law, it requires a theory explaining when, why, and how workers’ collective action is desirable, and accounting for the values and social goals that workers’ action may advance or inhibit.

¹¹ Section 7 protects workers’ right to organize, to bargain collectively, and to take other concerted actions for “mutual aid or protection,” as well as their rights to refrain from such activities; section 8 forbids employers from “to interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise” of their section 7 rights. 29 U.S.C. §§ 157, 158(a).

¹² Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923).

¹³ Estlund, *supra* note 1, at 13–14. See generally JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109–40 (1983) (defining adaptive preferences); Sachs, *supra* note 2, at 686 n.127 (discussing phenomenon of “adaptive” preferences).

¹⁴ Cf. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1147–52 (1986) (discussing relationship between adaptive preferences and antidiscrimination laws).

¹⁵ *Id.* at 1152.

I would propose that workers' choices on unionization could be truly autonomous only if the background legal regime granted them sufficient freedom of action that they and management stood in a relationship of rough equality.¹⁶ Under such conditions, workers could perceive themselves as choosing freely, and any adaptive preferences would result not from the structural foreclosure of particular options, but rather from individuals' own idiosyncratic conditions. While I cannot fully develop the ideas here, I plan in future work to defend this view of worker autonomy with reference to egalitarian and democratic ideals. Professor Mark Barenberg for example, has argued in a related context that the NLRA's blueprint for collective bargaining embodies ideals and practices of "egalitarian deliberation,"¹⁷ and that "substantive equality" and other "democracy-underpinning values provide normative criteria for evaluating the conditions for group deliberation and choice."¹⁸

More broadly, many have argued that political equality represents an inadequate ideal of autonomy so long as economic and social forces lead to substantial inequalities of power, and that economic as well as political institutions are legitimate only insofar as those affected by them may collectively and consciously shape them and therefore knowingly accede to their authority.¹⁹ Such a view of workplace and economic democracy can add substantive content to the notions of "free choice" that underlie much labor law jurisprudence and writing today; it opposes, meanwhile, the classic policy justification of advancing industrial peace, which courts have often appealed to as grounds for undermining workers' and unions' power.²⁰ To be clear: I do not mean to say that U.S. labor law does, has, or even could place workers and management on an equal footing. As Sachs points out, doing so would likely require rethinking the basic foundations of the employment relationship and even the firm.²¹ I embrace

¹⁶ This is a necessary condition, but not a sufficient condition, since workers under such a regime may still face straightforward physical or emotional coercion from management, coworkers, or unions. But without rules that protect workers' right to collective action and thus grant them power to force management to the bargaining table, decisions on unionization cannot be autonomous.

¹⁷ Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 795 (1994).

¹⁸ *Id.* at 794–95.

¹⁹ See generally SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* (1986); JOSHUA COHEN & JOEL ROGERS, *ON DEMOCRACY* (1983); KARL MARX, *On the Jewish Question*, in *SELECTED ESSAYS* 40 (H.J. Stenning trans., 1926); Barenberg, *supra* note 17, at 794–95 (noting that NLRA reflects ideals of workplace democracy); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, SOC. PHIL. & POL'Y, Spring 1989, at 25 (proposing democratic governance of economy); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988) (presenting proposals for reorganizing U.S. labor law in accord with democratic principles).

²⁰ See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

²¹ Sachs, *supra* note 2, at 660–61, 661 n.16. Noting the breadth of that challenge, Sachs frames his article not as an effort to "creat[e] ideal conditions for fully autonomous and deliberative choice among

substantive equality and autonomy not as goals in themselves, but rather as ideals against which to judge particular laws and law reforms that seek to effectuate employee free choice.

I would also re-envision workplace governance as a form of deliberative democracy, defined as a system in which “justification of the exercise of . . . power is to proceed on the basis of a free public reasoning among equals.”²² We could then understand collective bargaining as a means of ensuring that those subject to a firm’s authority may help determine the conditions under which they labor, and unionization as the process through which workers gain sufficient power to ensure that collective bargaining — and workplace governance more generally — is founded on reason rather than fiat, communicative action rather than strategic action. Democracy is not the only consideration in workplace governance, of course. To state the obvious, workers and management alike share an interest in enterprise survival, and thus in efficiency. A full account of workplace governance in an egalitarian democratic society will need to address the difficult questions of distributive justice raised by such conflicts in order to distinguish legitimate from illegitimate workplace inequalities.

For now, following various democratic theorists, I would note that substantive equality is a precondition for deliberative democratic governance. Indeed, strict adherence to deliberative ideals may have anti-egalitarian implications. Professors Joshua Cohen and Joel Rogers, for example, have criticized other deliberative theorists for being inattentive to “conditions of background power.”²³ Professor Lynn Sanders is even more critical, arguing that “[b]ecause of its connotations of cautiousness and order,” deliberation “establishes a standard to invoke in complaints about unruly or excessive behavior.”²⁴ That standard can have powerful antidemocratic implications, bolstering aristocratic “claim[s] that the many fail to be deliberate: that is, they are too hasty, or insufficiently thoughtful, especially about problems not of immediate concern to them.”²⁵

We can nevertheless accept the deliberative democratic *ideal*, holding that decisions involving distributive stakes within firms should be made

workers,” but rather as an attempt to “point us toward a revised labor law that removes certain impediments to the elicitation of workers’ preferences and that eliminates several forms of interference with employee preference formation.” *Id.* at 660–61.

²² JOSHUA COHEN, *Procedure and Substance in Deliberative Democracy*, in PHILOSOPHY, POLITICS, DEMOCRACY 154, 160 (2009).

²³ Joshua Cohen & Joel Rogers, *Power and Reason*, in DEEPENING DEMOCRACY 237, 241 (Archon Fung & Erik Olin Wright eds., 2003); see also COHEN & ROGERS, *supra* note 19, at 157 (“[T]he absence of material deprivation is a precondition for free and unconstrained deliberation”); SACHS, *supra* note 2, at 661 n.16 (“[D]eliberative democratic theorists agree that an ideal deliberative process requires both formal and substantive equality among the participants in the debate.”).

²⁴ Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 356 (1997).

²⁵ *Id.*

on the basis of reasoned argument among equals, while recognizing that politics inevitably involves battles for power that do not comport with that ideal. The key is to embrace tactical “unruly or excessive behavior” by less powerful groups, at least when undertaken as a means to access the deliberative forum. In an essay written shortly before her death, Professor Iris Marion Young argued that in unequal societies, democratic self-governance requires that individuals be empowered not only to “articulate reasonable appeals to justice” but also to undertake “critical oppositional activity.”²⁶ Such activity may “expose the sources and consequences of structural inequalities” by utilizing forms of communication that are “far more rowdy, disorderly, and decentered.”²⁷ These actions may seem intemperate or irresponsible to their targets, but they can be an essential means of forcing those few to share power.²⁸

Union organizing is such an activity. Organizations of countervailing worker power are a precondition for reasoned democratic workplace governance, and workers’ collective action is legitimate insofar as it tends to equalize power in the workplace by building such organizations.²⁹ But building any such organization, including a union, often requires developing a collective identity and sense of purpose. That in turn often requires some degree of disruption and open conflict with managers. This is all but inevitable, and not regrettable.³⁰ Somewhat paradoxically, then, the law should encourage workers’ oppositional collective action as a means to the end of governing the workplace through reasoned discussion. Workers’ decisions as to unionization can be autonomous in the sense outlined above only insofar as the law enables them to build — or to refuse to build — such organizations.

In my view, and in the view of many other labor law commentators, current doctrines do not meet this standard: while the NLRA is formally neutral toward unionization,³¹ courts have frequently manifested “a grudging attitude toward employee participation in workplace governance.”³² As Sachs and others have emphasized, labor law enables em-

²⁶ Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 *POL. THEORY* 670, 671, 688 (2001).

²⁷ *Id.* at 688.

²⁸ Professor Michael Walzer has made similar arguments in recent work. See MICHAEL WALZER, *POLITICS AND PASSION* 90–130 (2004).

²⁹ For a use of the term “countervailing worker power” similar to mine, see Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 3, 7, 15 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

³⁰ I do not mean that open conflict with managers is a necessary condition for the emergence of a solidaristic collective identity, but rather that such an identity is more likely to arise in situations of open conflict than in situations where workers interact only with one another.

³¹ As revised, section 7 of the Act protects workers’ rights to engage in, or decline to engage in, concerted action. 29 U.S.C. § 157 (2006).

³² Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW* 539, 551 (David Kairys ed., 1998). This is not to say that labor law is one-sided. See *id.* (explaining that labor

ployers to undermine workers' organizing efforts in many ways. Employers can hold one-on-one or workplace-wide meetings where they express their opposition, and can discipline workers who fail to attend, while prohibiting union organizers from company property.³³ They may delay the recognition process — for example, by challenging unions' definitions of the relevant bargaining unit, including which workers should be eligible to vote in an NLRB election — leading workers to doubt whether the union can “deliver the goods.”³⁴ They may “predict” negative financial consequences to the firm, including closure in many circumstances, without liability.³⁵ And even in the event that a union drive is successful, management enjoys wide latitude to “resist meaningful collective bargaining.”³⁶ Moreover, as Sachs and many others have argued, labor law has little power to deter employers from acting *unlawfully*, since the NLRB's powers are limited to issuing cease and desist orders and remedial orders, or, in the context of wrongful discharge or discipline, ordering reinstatement and back pay. It cannot hold employers in contempt and cannot impose punitive penalties.³⁷ Enforcing NLRB orders requires application to a Court of Appeals, adding delays to an already delay-ridden process. Such structural factors help explain why employer illegality seems common during union campaigns.

Courts have also restricted workers' power more directly, cabining their ability to wield economic power through collective action. Early Supreme Court interpretations of the NLRA held that employers could “permanently replace” many striking workers and that workers illegally terminated in retaliation for union activity had a duty to mitigate their damages.³⁸ Courts have also held that employers may terminate or discipline workers engaging in various types of concerted action, including sit-down strikes, actions in violation of no-strike clauses (which may be the most effective — and efficient — means of enforcing an existing collective bargaining agreement), and actions in support of so-called

law reflects “a conception of legitimate collective action that simultaneously *encourages* and *confines* worker self-expression through concerted activity and industrial conflict”.

³³ See Sachs, *supra* note 2, at 666, 682–83.

³⁴ Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 127; accord Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002); Sachs, *supra* note 2, at 666 n.32 (citing Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1777 (1983)).

³⁵ See NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (finding predictions of plant closure acceptable if based on “objective fact”); see also Sachs, *supra* note 2, at 690 (noting that the NLRB has often permitted companies to make such negative predictions even without objective evidence).

³⁶ Estlund, *supra* note 1, at 14; see also Rogers, *supra* note 34, at 120 (explaining that NLRB orders to bargain in good faith are “toothless, and court[] . . . continuation of illegal conduct”).

³⁷ Rogers, *supra* note 34, at 120–21.

³⁸ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (duty to mitigate damages); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (permanent replacement of strikers).

“permissive” subjects of bargaining, which include bargaining unit size, investment decisions, and company decisions to close part of its operations.³⁹ Finally, the prohibition on secondary boycotts⁴⁰ has both limited workers’ abilities to help one another across company boundaries, and made organizing much more difficult in industries characterized by extensive subcontracting.⁴¹

I do not mean to imply that all of labor law restricts workers’ collective action; it of course protects and promotes collective action in many ways.⁴² But the playing field is hardly level, such that workers’ decisions regarding unionization are often not autonomous in either sense outlined at the beginning of this Part. They may want to organize, but (rightly) perceive that they may be fired in retaliation, or they may just “prefer” not to organize because doing so seems futile.

III. COLLECTIVE ACTION AS A STRATEGY TO BUILD POWER

Union organizing tactics, including open card solicitation, are best understood as efforts to build collective power amid such legal restraints. Accordingly, card check’s primary virtue is not that it aggregates workers’ preferences under a veil of secrecy; indeed, according to unions’ own organizing manuals, few organizing efforts can build a majority before management catches wind of them. Management may learn of it from anti-union workers, figure it out when workers’ behavior changes, or just notice union organizers outside the worksite.⁴³ Rather, solicitation of authorization cards helps organizers and workers build collective power.⁴⁴ In the context of such campaigns, individual workers often sign cards as a signal of their commitment to act together with their coworkers to improve their conditions. Organizers call this “acting like a union,” and the literature on organizing strategies demonstrates its importance. For example, a 1997 study of tactics that tended to lead to union success in NLRB elections found that “union success in organizing depends on run-

³⁹ *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (holding partial termination of operations a permissive subject of bargaining); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (holding strike in violation of no-strike clause); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (sit-down strike).

⁴⁰ 29 U.S.C. § 158(b)(4) (2006).

⁴¹ See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1551–53 (1996) (describing how secondary boycott prohibition insulates clients from contractors’ labor disputes); Rogers, *supra* note 34, at 138.

⁴² As Professor Karl Klare has put it, labor law reflects “a conception of legitimate collective action that simultaneously encourages and confines worker self-expression through concerted activity and industrial conflict.” Klare, *supra* note 32, at 551.

⁴³ See *infra* pp. 46–47 (discussing union organizing manuals).

⁴⁴ See INT’L BHD. OF TEAMSTERS, ORGANIZING GUIDE 38 (on file with the Harvard Law School Library) (“[If organizers and leaders can] build a strong effective organization in the workplace that can take on the employer . . . you can get a majority of signed cards, participation in actions, and get recognition and a good contract. But first you have to build an organization.”).

ning campaigns with a focus on representative leadership, personal contact [with workers], dignity and justice, and building an active union presence in the workplace from the very beginning of the campaign.”⁴⁵ Indeed, building such an organization is important not just to obtaining certification, but also to winning a good contract.⁴⁶ A union whose members have not been tested through an organizing drive may be weaker at the bargaining table: they may be less able to take collective action, including striking, and therefore less able to instill fear in management.

Unions therefore build campaigns around escalating and “increasingly visible public activities demonstrating support for the union.”⁴⁷ For example, their own organizing manuals advise organizers to keep campaigns secret only through the early stages,⁴⁸ when they are deciding whether to organize, identifying leaders, and building a committee of workplace leaders who are prepared to lead the campaign.⁴⁹ Once such a committee is in place, unions generally “launch” a campaign with a “visible action by the committee (signed leaflet or letter, march on boss, mass leaflet), followed quickly by a massive house-calling operation (blitz) to contact all of the workers in the bargaining unit in a very short time”⁵⁰ and assess whether they support the union. While organizers and pro-union workers continue building support through such house calls over subsequent weeks, they will also organize various other public activities. Workers might, for example, pass out leaflets in front of the worksite, all wear t-shirts or union buttons on a particular day, meet collectively with supervisors to raise complaints about the worksite, and hold rallies, marches, or other similar events.⁵¹

Such a visible pro-union campaign functions as an ideological counterweight to the employer’s anti-union campaign. Union and management campaigns are a struggle for workers’ “hearts and minds” in which each side seeks to establish as dominant its own normative vision of the workplace.⁵² Management and consultants “try to transform local workplaces into cultures of corporate paternalism that validate total man-

⁴⁵ Kate Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections*, 50 INDUS. & LAB. REL. REV. 195, 198 (1997).

⁴⁶ See Estlund, *supra* note 1, at 14.

⁴⁷ AM. FED’N OF STATE, CNTY. & MUN. EMPS. (AFSCME), ORGANIZING MODEL & MANUAL 1-22 (1999) (on file with the Harvard Law School Library). More generally, unions break campaigns into roughly five stages: (i) targeting and first contacts with workers, (ii) identifying leaders, (iii) building an organizing committee, (iv) building majority support, and (v) recognition or election. See *id.* at 1-4 to 1-5 (listing stages of campaign); INT’L BHD. OF TEAMSTERS, *supra* note 44, at 5-6.

⁴⁸ See INT’L BHD. OF TEAMSTERS, *supra* note 44, at 14.

⁴⁹ See AFSCME, *supra* note 47, at 1-10.

⁵⁰ *Id.* at 1-12.

⁵¹ *Id.* at 1-22; see also Bronfenbrenner, *supra* note 45.

⁵² Karen Brodtkin & Cynthia Strathmann, *The Struggle for Hearts and Minds: Organizing, Ideology, and Emotion*, LAB. STUD. J., Fall 2004, at 1, 3.

agement control.”⁵³ They may also try to portray unions as “outsiders” who will harm working relationships, that unionization will harm the company’s bottom line, and, somewhat paradoxically, that unionization is futile because unions cannot possibly counter management power.⁵⁴

Organizers and activists, in contrast, “struggle to build cultures where worker solidarity . . . becomes emotional and conceptual ‘common sense,’”⁵⁵ and workers develop a collective identity rooted in such solidarity.⁵⁶ A successful series of worker-led concerted actions can build such a culture and undermine each of management’s central messages by making workers “the agents of their victory.”⁵⁷ By winning small concessions, or even just acting collectively and challenging management, workers learn that collective action *can* help matters, that management *can* change terms and conditions without going under, and that the “union” is not some outside force, but the workers’ own organization.⁵⁸ Union avoidance consultants’ own writings reflect this understanding.⁵⁹ As one wrote: “The enemy was the collective spirit . . . I got hold of that spirit while it was still a seedling; I poisoned it, choked it, bludgeoned it if I had to, anything to be sure it would never blossom into a united work force”⁶⁰

Public campaign actions are key for another reason as well: seeing them, individual workers learn that they are not alone in wanting change, making it more likely that they will support unionization.⁶¹ The dynam-

⁵³ *Id.*

⁵⁴ See *id.* at 4–11 (summarizing various management tactics and messages); Gordon Lafer, *What’s More Democratic than a Secret Ballot? The Case for Majority Sign-up*, 11 WORKINGUSA 71, 86–87 (2008) (emphasizing importance of argument that unions are futile). Professor Gordon Lafer recounts what one management journal called “an excellent campaign tactic” in which the employer held a mass meeting where employees viewed a “mock negotiation” where the union representative was unable to obtain anything but a fifty-cent *annual* pay increase. *Id.* at 86 (quoting *Mock Negotiations: An Excellent Campaign Tactic*, MGMT. REP., Feb. 2000, at 5).

⁵⁵ Brodtkin & Strathmann, *supra* note 52, at 3.

⁵⁶ See, e.g., Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, in WAVES OF PROTEST 169, 187 (Jo Freeman & Victoria Johnson eds., 1999) (“[Three factors] contribute to the formation of collective identity: (1) the creation of boundaries that insulate and differentiate a category of persons from the dominant society; (2) the development of consciousness that presumes the existence of socially constituted criteria that account for a group’s structural position; and (3) the valorization of a groups ‘essential differences’ through the politicization of everyday life.”).

⁵⁷ Brodtkin & Strathmann, *supra* note 52, at 3. Sachs himself has made similar arguments in earlier work. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2733–44 (2008) (discussing roles of efficacy and reciprocity in workers’ collective action).

⁵⁸ RICK FANTASIA, CULTURES OF SOLIDARITY 88, 109–10 (1988) (discussing an example of the emergence of solidarity through collective action).

⁵⁹ Lafer, *supra* note 54, at 85.

⁶⁰ *Id.* at 85–86 (quoting union-buster Marty Levitt).

⁶¹ AFS-CME, *supra* note 47, at 1–22 (“Building power is at the heart of organizing,” *id.* at 1–23, and public actions “show the workers and the boss the strength of the union support, build the self-confidence of the union supporters, and help evaluate and assess each worker’s commitment to the union,” *id.* at 1–22.); see also Bronfenbrenner, *supra* note 45, at 200 (noting public activities during

ics of collective action within social movements can be modeled as an “assurance game,” a game theory scenario in which the best outcome for both players is to match strategies, but where one matched strategy is more lucrative than the other.⁶² Within a social movement or organizing drive, “[e]veryone understands that joint action would benefit them all and would like to participate in the creation of this public good, but no one is inclined to participate unless everyone else (or a specified portion of the group) is also participating or is expected to participate.”⁶³ Public campaigns, by creating social space in which workers can discuss and display their preferences, can solve the “coordination problem” that may otherwise prevent workers from supporting unionization.⁶⁴ Simply eliminating managerial interference would not have the same effect.

Reflecting their commitment to building power in the workplace, unions’ organizing manuals urge organizers not to solicit cards until after the workers’ organization has already begun to take shape. The American Federation of State, County, and Municipal Employees manual instructs organizers not to distribute or collect authorization cards before they have built a strong organizing committee, and the International Brotherhood of Teamsters manual encourages the organizer to wait until the workers “already have worked with each other and the organizers, and feel a strong ownership of the campaign.”⁶⁵ At that point, “[s]igning cards becomes a way to confirm a strong commitment to being represented by the Teamsters and a badge of honor, not something to be done in secret.”⁶⁶ While Sachs notes that such “public manifestations of mutual support and lived solidaristic experience are crucial for union success,”⁶⁷ they increase the

campaigns “aid the union’s efforts by reinforcing commitment among pro-union workers and by helping to convince undecided voters that they can safely support the union”).

⁶² See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 220 (2009). This can be represented as follows:

		Player 2	
		Strategy A	Strategy B
Player 1	Strategy A	4, 4	0, 3
	Strategy B	3, 0	2, 2

Players need to announce their moves simultaneously, and selecting Strategy A is risky: it may lead to a payoff of 0, versus a guaranteed payoff of at least 2 under Strategy B. The table above is a slightly modified version of that appearing in McAdams, *supra*, at 220. In that version, the B/B payoff was 3, 3 instead of 2, 2. *Id.*

⁶³ William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 451 (2001).

⁶⁴ See McAdams, *supra* note 62, at 219 (defining “coordination games,” including assurance games, and distinguishing them from prisoners’ dilemma).

⁶⁵ INT’L BHD. OF TEAMSTERS, *supra* note 44, at 37.

⁶⁶ *Id.*; see also AFSCME, *supra* note 47, at 1-14 (“The purpose of having workers sign authorization cards or a public petition is to get a commitment to the union.”).

⁶⁷ Sachs, *supra* note 2, at 714.

likelihood that management will discover and oppose the campaign.⁶⁸ A certification regime that enables and encourages “under the radar” organizing thus might have the perverse effect of discouraging collective discussion and debate among workers, as well as collective action.⁶⁹ Paradoxically, then, while limiting managerial involvement through secrecy might help workers build majority support, it might inhibit them from building the sort of organization that can ensure certification, force management to bargain in good faith, and lead to a strong first contract.

To promote democratic and egalitarian workplace governance, the law would need to promote speech and actions that help workers build a powerful collective identity. That often involves what Estlund calls “cajoling,” efforts by worker-leaders or union organizers to convince their coworkers to support a union through emotional appeals to solidarity or arguments that unionization is in a targeted worker’s true best interests. Such “energetic and persistent solicitation of union support among coworkers” is protected by the NLRA,⁷⁰ and is a common aspect of organizing drives and other concerted action. For example, one ethnographic account of the internal dynamics of a wildcat, or unauthorized, strike found that many workers were initially noncommittal, and only decided to walk off the job after emotional appeals by strike leaders. After the strike succeeded, however, many workers within the shop felt a new sense of empowerment, and they waged a second successful strike a few months later.⁷¹ The workers’ sense of solidarity apparent during and after the strike “was not an a priori ‘fact’ but grew out of [the] interactive process of negotiation between workers in their confrontations with authority.”⁷² In other

⁶⁸ For example, the AFCSME manual recommends that organizers not hold meetings until an organizing committee is in place and the campaign is ready to go public and to counter management’s campaign. AFCSME, *supra* note 47, at 1-9 (“We must resist the tendency to tell a worker to get some friends together ‘so we can talk about joining a union’ because once this is done the employer will be tipped off to our plans.”).

⁶⁹ There are other practical issues with efforts to organize in secret. Opposition from some employees, employers’ vigilance about union organizing, and the sheer size of the workforce in many establishments mean that employers will generally learn that a drive is afoot well before the union reaches majority support. Employers may also be able to anticipate organizing activity because a union has targeted multiple other employers in their area, as Service Employees International Union does in its “Justice for Janitors” campaigns. Moreover, as the Supreme Court noted in *NLRB v. Gissel Packing*, 395 U.S. 575 (1969), unions customarily notify management once a drive picks up steam, since doing so better protects workers against an employer’s potential unfair labor practices by preventing employers from pleading ignorance about union support. *Id.* at 603.

⁷⁰ Estlund, *supra* note 1, at 17.

⁷¹ FANTASIA, *supra* note 58, at 110 (explaining that the strikes created “a locus of oppositional sentiment . . . which remained solidly rooted in the day-to-day culture of the department,” and later led to a second successful strike).

⁷² *Id.* at 88. Professor Rick Fantasia also notes that such solidarity can lead workers to make decisions based on second-order considerations. *See id.* at 113 (“Fellow workers may support the walkout of one small group because they recognize that to fail to do so may subject the few who do leave the plant” to termination, but that “management cannot easily discharge the entire department or plant.” (quoting Leonard R. Sayles, *Wildcat Strikes*, HARV. BUS. REV., Nov.–Dec. 1954, at 42, 49)).

words, emotional appeals may help workers solve collective action problems, just as public tactics help them solve coordination problems.

Yet judges in labor law cases, perhaps demonstrating some of the risks of strict adherence to deliberative ideals, often seem to fear unruly behavior by workers.⁷³ This is true both in the law surrounding union certification and in other areas of labor law. For example, the Supreme Court has granted less First Amendment protection to labor picketing than to virtually identical picketing by civil rights organizations.⁷⁴ Professor Laurence Tribe, among others, has criticized the Court's apparent belief that "by triggering deeply held sentiments, picketing bypasses viewers' faculties of reason and, thus, in a sense brainwashes them into compliance with the boycott."⁷⁵ Similarly, in a 1954 case considering the proper procedure for decertifying a union,⁷⁶ Justice Frankfurter seemed to endorse secret ballot elections on the grounds that workers may otherwise act capriciously or that the ballot serve what we might call a "cautionary" function.⁷⁷ An election, he wrote, "is a solemn and costly occasion, conducted under safeguards to voluntary choice."⁷⁸ The fact that "the choice of the voters in an election binds them for a fixed time," he added, "promotes a sense of responsibility in the electorate."⁷⁹

Similarly, the laws requiring employer recognition and bargaining only after a secret ballot may reflect an assumption that preferences expressed through collective action are not fully autonomous. For example, since employers may "permanently replace" workers who strike for recognition, workers generally cannot "force" an employer to recognize them by going on strike, but rather must access the NLRB's secret ballot process. And

⁷³ See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 9–10 (1983) (noting that labor law doctrine often reflects an assumption, rooted in pre-NLRA common law doctrines "that employees, unless controlled, will act irresponsibly," *id.* at 7).

⁷⁴ Compare *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part and concurring in the result) (finding union picketing "calls for an automatic response to a signal, rather than a reasoned response to an idea"), and *Int'l Longshorem'n's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 n.26 (1982) (endorsing Justice Stevens's reasoning in *Safeco*), with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 (1982) (overturning the convictions of civil rights boycotters in Claiborne County, Mississippi, despite threats and acts of violence by the boycotters, and "[e]vidence that fear of reprisals caused some black citizens to withhold their patronage" from businesses targeted by the boycotters, but not citing the "signal" theory). See also LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 200 (1985) (discussing and criticizing "signal" doctrine).

⁷⁵ TRIBE, *supra* note 74, at 200; see also Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 19–20 (1984) ("The cases . . . manifest a common, stereotyped, and paternalistic vision of workers as people whose decisions are not made on the basis of ideas and persuasion but on the basis of fear, coercion, and discipline.").

⁷⁶ *Brooks v. NLRB*, 348 U.S. 96 (1954).

⁷⁷ See *id.* at 99; Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 635 (1982) (noting "cautionary" function of consideration doctrine and other contractual formalities).

⁷⁸ *Brooks*, 348 U.S. at 99.

⁷⁹ *Id.*

while labor law protects nonunion workers against retaliation for strikes over unfair labor practices, it does not — except in rare circumstances⁸⁰ — require recognition even if a majority of workers have struck. The law, in effect, ignores workers' preferences unless expressed through a secret ballot. While such restrictions may help prevent union coercion, they also enable management to use the delay between presentation of cards and the casting of ballots to erode wholly *uncoerced* majorities, where a majority of workers signed willingly and do not regret their decisions. If we understand emotional appeals as a necessary step in building collective power and therefore autonomy, such appeals should be tolerated or even encouraged.

IV. AN ALTERNATIVE PROPOSAL

While I agree with Sachs that protecting workers' autonomy requires *enabling* them to vote in private, I am not sure that we should *require* them to do so. "Even without exerting physical pressure," Sachs argues, natural workplace leaders "may be able to exercise more subtle but perhaps equally effective forms of influence — if the decisional moment is a public one."⁸¹ While that is certainly true, cajoling and other emotional appeals by workplace leaders will not always threaten workers' autonomy. Many workers will be more than happy to sign cards in public. Others might act only after an emotional appeal, but not later regret their decisions. I therefore worry that prohibiting card solicitation is an overbroad solution to this problem. Doing so will deprive unions and pro-union workers of a powerful organizing tactic, and may impose disproportionate costs on legitimate unions and pro-union workers.

Similar issues arise with regard to card check provisions in voluntary recognition agreements. As Estlund points out, Sachs's arguments against open decisionmaking may delegitimize such agreements, eliminating an important modern organizing tactic.⁸² Yet when workers are happy to sign cards in public, such agreements do not threaten their autonomy. Moreover, not all such agreements are created alike. In a typical effort, workers and unions will fight to obtain voluntary recognition based on card check. They will take collective action and mobilize community and political pressure to convince an employer that the costs of fighting the

⁸⁰ See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁸¹ Sachs, *supra* note 2, at 716. This latter point strikes me as more powerful than Sachs's argument that union organizers may have epistemological authority. Many unions, especially in low-wage industries, train members to become organizers, and some have even negotiated provisions into collective bargaining agreements under which current members can take several weeks off from their positions to work on union organizing drives or political activities. Such efforts reflect the fact that low-wage workers may be less likely to trust organizers from quite different racial, ethnic, and class backgrounds.

⁸² See Estlund, *supra* note 1, at 18–19 (discussing voluntary recognition agreements).

union exceed the costs of bargaining. At other times, however, management will cooperate with a union that promises a “sweetheart” deal, failing to provide any real representation to workers, and exploiting the NLRA’s exclusive representation provisions to “profit” from union dues.⁸³ Within the labor movement, these are known as “company unions.” Since voluntary recognition prevents decertification for a period of time, and since management’s support for a particular union will make decertification difficult, companies often partner with a company union to avoid representation by a legitimate union. The threat of union coercion is acute in such situations. A certification procedure should promote voluntary recognition agreements resulting from legitimate worker and community mobilization — so long as workers actually desire unionization — while discouraging agreements with company unions.

To capture the benefits of open card solicitation while protecting workers against coercion, the law could require recognition based on card check, but only if the union maintains its majority over a “cooling off period,” during which time workers could disavow their support for the union — in secret — via telephone, internet, or other means.⁸⁴ Cooling off periods are a common legislative tactic to protect individuals from the negative consequences of decisions made while in “transient emotionally or biologically ‘hot’ states.”⁸⁵ They may either force a delay in action until after a defined term, as when a couple may not marry until they have had a marriage license for some period, or they may render such decisions reversible during some period, as when new car buyers can renege on a deal for three days.⁸⁶ Such provisions seem justifiable insofar as they have asymmetric effects on parties based on whether they regret prior decisions: a longtime couple that decides to marry will not suffer by waiting a few days, for example, while a consumer who realizes he can’t afford a new car will benefit.⁸⁷

In fact, current labor law imposes a cooling-off period of the delay-before-consummation type: workers wait weeks or even months between gaining majority support on cards and winning an NLRB election. That delay may reflect a concern that unions or coworkers will coerce workers into signing cards, or convince them to sign through persistent emotional appeals, and thus may reveal whether a union ever enjoyed a true majori-

⁸³ While Sachs notes that open decisionmaking is particularly dangerous where management supports unions, he does not point out the particular hazards posed by company unions. See Sachs, *supra* note 2, at 693 n.160.

⁸⁴ Likewise, during that period, workers who previously had not signed cards could use the same means to vote either for or against the union.

⁸⁵ Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism,’* 151 U. PA. L. REV. 1211, 1238 (2003).

⁸⁶ See *id.* at 1239–43 (discussing various laws with cooling-off periods).

⁸⁷ *Id.* at 1240, 1242; see also Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 793 (1983).

ty. But since delays between majority card collection and certification generally work to management's advantage, and can undermine even a legitimate majority, existing law imposes disproportionate costs on unions and pro-union workers *who do not regret their decisions*. In contrast, a shorter cooling-off period that enables workers to opt-out of prior commitments to union representation rather than requiring them to reiterate their union support would impose the highest costs on unions that build majority "support" through questionable means.

While reasonable people may disagree about the length of such a period, given that management will often have begun campaigning against a union well before it reaches a majority, I'd argue for a short period of forty-eight to seventy-two hours. During that time, management would be permitted to argue against unionization, while the organizing committee and union would seek to maintain their majority. If the majority held, then the union would be certified as those workers' exclusive bargaining agent. At that point, management could challenge the union's definition of the bargaining unit, as well as various workers' eligibility to unionize, and the parties could begin the bargaining process.

My hope is that such a rule would help protect employee free choice in various ways. By establishing an opt-out rather than an opt-in procedure, it would correct for the market failures and collective action problems Sachs identifies in current certification law.⁸⁸ By encouraging open and public organizing, it would help workers solve coordination problems and build power and therefore autonomy. It would also correct for coercion as well as social or other pressures that lead workers to sign cards then regret having done so. This would reduce unions' incentives to coerce or pressure workers,⁸⁹ while imposing few costs upon workers who signed freely.⁹⁰ Finally, it would allow workers the option of secrecy in decisionmaking, while not falling victim to the near inevitability of delay that Sachs predicts would beset even the best-designed rapid elections proce-

⁸⁸ Class action litigation provides a nice parallel here: the use of opt-out rather than opt-in procedures helps litigants solve their collective action problem while still respecting individual rights to sue.

⁸⁹ See, e.g., Camerer et al., *supra* note 85, at 1240 (noting that sellers subject to cooling-off periods "may actually take pains to ensure that the consumer is not only cool, but has deliberated about the costs and benefits of the purchase"). Of course, unions would have the same incentives under current law.

⁹⁰ Of course, workers who prefer not to express their preferences in public would bear some costs under this rule. Conversely, there is nothing stopping workers in a secret ballot regime from revealing their votes to coworkers. But actions speak louder than words: given the assurance game dynamics outlined above, I believe workers will find it much more reassuring to see a coworker sign a card or petition than to hear a coworker verbally commit to vote yes. A secret ballot regime would also not, standing alone, prevent workers from demonstrating solidarity through collective actions such as wearing union paraphernalia, marching, or even striking. But given the significant risks to one's livelihood involved, workers who did so would likely be happy to sign cards publicly as well.

dure.⁹¹ It would also, of course, require various new NLRB procedures and rules, which I plan to outline in subsequent work.

Whether such a proposal is politically palatable is a separate question, though I do think there is reason for optimism. Regardless, those who support expanding the scope of workers' section 7 rights owe Sachs a real debt. By bringing analytical clarity to questions at the core of the card check debate, he has moved that debate forward immensely.

⁹¹ Sachs, *supra* note 2, at 719 (noting that “there is nothing ‘rapid’ about the NLRB”).