The Labor Gerrymander

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The foundational metaphor of federal labor law is "industrial democracy." But like any good metaphor, it is subject to overuse. The National Labor Relations Act (NLRA) grants employees the right to have a say in the decisions that govern their working lives through union representation and collective bargaining. Parties and policymakers often invoke the language of American political democracy when describing and debating that right. Democracy is not a unitary concept, however, and not all norms and concepts from the political sphere can or should translate into the labor sphere.

This Article interrogates the political-model analogy through the lens of one particular political concept that has found its way into labor-law discourse: the gerrymander. From the earliest days of the NLRA to today's organizing campaign at Starbucks, employers have accused unions of "gerrymandering" the workplace by seeking to represent groups of employees—in labor-law terms, a bargaining unit—who are likely to choose union representation. The gerrymander analogy has not before faced critical evaluation, and it breaks down upon closer inspection. Legislative redistricting and bargaining-unit determinations are distinct exercises with different stakes. Unit determinations treat self-interest as a feature rather than a bug, are not part of a broader political process, and are unlikely to produce harms like entrenchment and excessive partisanship associated with gerrymanders in the political context.

By calling attention to this conceptual mismatch, the Article also identifies how overreliance on the political model is detrimental to the promise of industrial democracy. Delegitimizing union organizing as gerrymandering may lead to fewer votes for unionization. This means less worker voice, which both perpetuates the workplace as an essentially autocratic environment and robs society more broadly of the democracy-enhancing spillover effects of unionization. The irony of the analogy is that it uses the pro-democracy concept of fighting gerrymandering to achieve anti-democratic ends. Importing the gerrymander concept into labor law thus harms democracy, in both its industrial and political manifestations.

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INTRODUCTION

There are 9,265 Starbucks stores in the United States.[1] There are 643 stores in New York state,[2] and 21 in Buffalo.[3] In August 2021, the union Workers United filed petitions with the National Labor Relations Board ("NLRB" or "Board") seeking to represent employees at three of those stores.[4] The petitions set the stage for an election where employees at the three stores would vote on whether to become the first Starbucks stores to unionize.[5] If they did, Workers United would represent employees at each store in collective bargaining with Starbucks regarding their terms and conditions of employment.[6] In labor-law terms, each store would be a separate bargaining unit.[7]

Faster than it takes to pour a grande macchiato, the coffee giant objected. It argued to the NLRB that any vote had to include employees

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1. *Number of Starbucks Stores in the United States from 2005 to 2022*, STATISTA, https://www.statista.com/statistics/218360/number-of-starbucks-stores-in-the-us/ (last visited Feb. 7, 2024) [https://perma.cc/2N22-RL5R]. That figure includes only company-operated locations. There are another 6,608 licensed stores in the United States, in places like supermarkets, hotel lobbies, and airports. *Id.*

2. Steven John, *This State Is the Most Obsessed with Starbucks, Data Reveals*, YAHOO! (Sept. 12, 2021, 7:02 AM), https://www.yahoo.com/video/state-most-obsessed-starbucks-data-110245848.html [https://perma.cc/587Q-MEJS].

3. *Starbucks in Buffalo*, STARBUCKS EVERYWHERE, http://www.starbuckseverywhere.net/Buffalo.htm (last visited Feb. 7, 2024) [https://perma.cc/BDF2-8B6H]. Yes, there is a website that documents the number of Starbucks (with pictures!) in every city.

4. *See* Jerry Zremski & Harold McNeil, *Starbucks Workers Launch Organizing Effort in Buffalo with National Backing*, BUFF. NEWS (Aug. 31, 2021), https://buffalonews.com/news/local/starbucks-workers-launch-organizing-effort-in-buffalo-with-national-backing/article_9e784ee6-0a66-11ec-9da7-631e5f74e419.html [https://perma.cc/Z5NJ-BH2E].

5. Noam Scheiber, *Starbucks Faces Rare Union Challenge as Buffalo Workers Seek Vote*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/08/30/business/starbucks-coffee-buffalo-union.html [https://perma.cc/6BWR-6BJD]. The Buffalo Starbucks unions would not be wholly unprecedented. The United Food and Commercial Workers represented employees at several Starbucks stores in the 1980s, but those unions disbanded shortly after Howard Schultz took over as CEO. *See* Dave Jamieson, *Howard Schultz and Starbucks' Long History of Fending Off Unions*, HUFFPOST (Jan. 31, 2019, 7:00 PM), https://www.huffpost.com/entry/howard-schultz-and-starbucks-long-history-of-fending-off-unions_n_5c535aa1e4b01d3c1f11b1f5 [https://perma.cc/JUD4-LQLY]. In addition, employees at some of the licensed stores are unionized, though they are not employed by Starbucks itself. *See* Nelson Lichtenstein, *The Unionized Starbucks in Your Neighborhood*, AM. PROSPECT (Dec. 22, 2021), https://prospect.org/labor/unionized-starbucks-in-your-neighborhood/ [https://perma.cc/SC9Z-XQ9G].

6. Under the National Labor Relations Act ("NLRA"), employees have the right "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. A union chosen by employees becomes their "exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* § 159(a).

7. If a union is selected by "the majority of the employees in a unit appropriate for such purposes," it becomes "the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." *Id.* § 159(a).

at all Buffalo locations, not just the three stores.[8] Such disputes are common in union-representation elections, as the scope of the bargaining unit is often a key factor in the election result.[9] Starbucks followed a familiar employer playbook by pushing to include more employees in a proposed bargaining unit, and thus in the vote.[10] Larger units are typically more difficult for unions to organize, especially when the additional voters are employees that the union has not sought to represent.[11]

In making its argument as to who should vote in the election, Starbucks borrowed a phrase from election law. Anything less than a vote of all Buffalo-area stores, it contended, would amount to "gerrymandering" the workforce.[12] Starbucks accused Workers United of identifying a unit of employees that it was likely to win and described the petition as an instance of "the Union . . . seeking to choose its voters" instead of "partners . . . choosing whether to be represented."[13] Thus, part of Starbucks' strategy in response to the organizing drive was to compare it to the much maligned practice of legislators drawing districts that favor one group of voters over another to secure their preferred result. The NLRB rejected Starbucks' argument for a broader

8. Starbucks Corp.'s Request for Review of the Acting Regional Director's Decision & Direction of Election at 5, Starbucks Corp., No. 03-RC-282115 (N.L.R.B. Nov. 8, 2021) ("Starbucks further requests that the Board . . . dismiss the instant single-location petitions as the record evidence properly analyzed under current Board precedent mandates a multilocation unit for the Buffalo Market.").

9. *See* Local 1325, Retail Clerks Int'l Ass'n v. NLRB, 414 F.2d 1194, 1199 (D.C. Cir. 1969) ("[T]he boundaries of the unit . . . will often have a substantial impact on whether a union's organizing efforts prove successful."); Thomas J. Zamadics, *Toward the "Fullest Freedom": Defining Section 7 Stakeholders in NLRB Unit Determinations*, 97 N.C. L. REV. 464, 466 (2019) ("Because both the union and the employer know that the size of the unit can determine the outcome of an election, unit determination is a heavily litigated and contentious issue.").

10. *See* Zamadics, *supra* note 9, at 466 ("[T]he employer traditionally argues for larger units.").

11. *See* ARCHIBALD COX & DEREK CURTIS BOK, CASES AND MATERIALS ON LABOR LAW 333 (6th ed. 1965) (explaining that "a narrowly defined unit may markedly influence the success of an organizing drive" and "the employer may favor a broader unit . . . because it will make the job of the union organizer more difficult"); Zamadics, *supra* note 9, at 466:

> When petitioning the NLRB, the union usually proposes small bargaining units because it is easier to build majority support for a union among fewer, more similarly situated employees. In contrast, the employer traditionally argues for larger units . . . because a larger unit is less likely to produce a consensus for unionization.

As discussed in more detail below, regardless of its size, a bargaining unit must be "appropriate" for the purpose of collective bargaining. 29 U.S.C. § 159(a); *see infra* Subsection I.B.2.

12. Starbucks Corp.'s Request for Review of the Acting Regional Director's Decision & Direction of Election, *supra* note 8, at 8.

13. *Id.*

bargaining unit and held separate elections at each store,[14] with employees at two locations voting for union representation and employees at the third voting no.[15] Nonetheless, this pattern repeated as the organizing effort spread to other cities. Employees at one store or some subset of stores in a geographic area would petition for an election, and Starbucks would argue that all stores in the area had to be included and accuse the petitioning union of gerrymandering.[16]

Starbucks was not alone in invoking language and concepts from the political sphere in the labor-law context. The law itself is awash in such analogies. The foundational metaphor of federal labor law is "industrial democracy."[17] The National Labor Relations Act ("NLRA")

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14. *See* Starbucks Corp., No. 03-RC-282115, 2021 WL 5848184, at *1 n.2 (N.L.R.B. Dec. 7, 2021) (emphasizing that Starbucks did not meet its burden "to overcome the presumption that the single-store units sought by the [union] are appropriate"). Under the NLRA, the NLRB "shall decide . . . the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b).

15. *See* Matt Glynn, *Starbucks Workers in Buffalo Vote to Join Union*, BUFF. NEWS (Dec. 9, 2021), https://buffalonews.com/news/local/starbucks-workers-in-buffalo-vote-to-join-union/article_e7c2029e-5855-11ec-a69f-8fbe8e269cc9.html [https://perma.cc/H74P-6CNQ] (employees at the Cheektowaga and Elmwood stores voted in favor, and the Hamburg store voted against). The results at the third store are the subject of ongoing litigation, with NLRB prosecutors alleging that Starbucks committed labor-law violations that tainted the election. *See* Noam Scheiber, *Labor Board Seeks Unionization at Starbucks Where Union Lost Election*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/business/starbucks-union-buffalo.html [https://perma.cc/8XEC-F68T] (reporting that NLRB regional office issued complaint "accusing Starbucks of firing employees because they supported the union; promising benefits to workers as a way to discourage them from unionizing; intimidating workers who sought to unionize by subjecting them to surveillance; and other illegal behavior"); *Starbucks Corporation*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/case/03-CA-285671 (last visited Feb. 7, 2024) [https://perma.cc/ F7RT-STJA] (showing status of case No. 03-CA-285671 as open).

16. *See, e.g.*, Starbucks Corp.'s Request for Review of the Regional Director's Decision & Direction of Election at 7, Starbucks Corp., No. 01-RC-287618 (N.L.R.B. Mar. 17, 2022) (Boston, Massachusetts) ("The Union's approach to filing petitions at two stores within the District is effectively gerrymandering."); Petitioner's Post-Hearing Brief at 2, Starbucks Corp., No. 19-RC-289455 (N.L.R.B. Mar. 4, 2022) (Seattle, Washington) ("[T]he Region must not reward Workers United for using the NLRB's process to effectively gerrymander voters . . . ."); Starbucks Corp.'s Request for Review of the Regional Director's Decision & Direction of Election at 6, Starbucks Corp., No. 10-RC-288098 (N.L.R.B. Mar. 10, 2022) (Knoxville, Tennessee) ("The Union's approach to filing a single-store petition is effectively gerrymandering."). The NLRB typically has rejected those arguments and held separate elections at each store. *See, e.g.*, Starbucks Corp., 371 N.L.R.B. No. 71, slip op. at 1–2 (Feb. 23, 2022) (explaining that Starbucks did not meet its burden to rebut presumption in favor of petitioned-for single-store units, "particularly with respect to the factors of interchange and local autonomy over certain personnel functions"). As of February 2024, employees at 319 Starbucks locations had voted to unionize. *Starbucks Unionization Tracker*, LAW360, https://www.law360.com/employment-authority/starbucks-tracker (last updated Feb. 2, 2023) [https://perma.cc/UK4T-B723].

17. *E.g.*, Steven L. Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. REV. 725, 725 (1984) ("Industrial democracy is a central promise of the National Labor Relations Act."). The association has been with the NLRA since its inception, with the bill's lead congressional sponsor declaring that "the very purpose of this legislation [is] to provide industrial democracy." *Hearings on S. 1958 Before the S. Comm. on Educ. & Lab.*, 74th Cong. 642 (1935) [hereinafter *1935 Senate Hearings*] (statement of Sen. Robert Wagner), *reprinted*

gives employees the right to choose representatives to help shape the policies that govern their working lives.[18] The mechanism by which employees typically make that choice is an election.[19] In practice, too, union-representation elections in some ways resemble American political elections. Unions and employers campaign for support.[20] Voting occurs by secret ballot, typically cast on a set day at a particular location.[21] Unsurprisingly, then, litigation and policy debates regarding industrial democracy often feature the language of political democracy—specifically, the American electoral system—on topics ranging from the mechanics of elections to campaign regulations to the scope of bargaining units.[22] Parties and policymakers use analogies to political democracy as a means of legitimizing their arguments by connecting them with venerable national ideals, and also by implicitly (or sometimes expressly) portraying opposing views as antidemocratic.[23]

Although some of these analogies drawn from the political sphere are fitting, others obscure more than they reveal. The gerrymander is a prime example. Starbucks was far from the first to describe a proposed bargaining unit as a gerrymander. The phrase has been invoked by policymakers, courts, employers, and unions since the earliest days of the NLRA.[24] For decades, employers have accused unions of proposing "arbitrary gerrymandered unit[s] evolved . . . for

in 2 NAT'L LAB. RELS. BD., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2028 (1949) [hereinafter 2 NLRA LEGISLATIVE HISTORY]. The history of the metaphor is discussed in Subsection I.A.1, *infra*.

18. *See* 29 U.S.C. § 151 (protecting employees' "full freedom" to "designat[e] . . . representatives of their own choosing"); *id.* § 157 (granting employees the "right to . . . bargain collectively through representatives of their own choosing").

19. *See id.* § 159(c)(1) (identifying "election by secret ballot" as the process for determining questions regarding representation).

20. *See* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 67 (1964) (stating that representation elections often feature "partisan messages" that resemble election campaigns).

21. *See* NAT'L LAB. RELS. BD., CASEHANDLING MANUAL PART II: REPRESENTATION PROCEEDINGS § 11804 (2020) [hereinafter CASEHANDLING MANUAL] ("The ultimate device by the Board in resolving a valid question concerning representation is the election by secret ballot."); Bok, *supra* note 20, at 68 ("[R]epresentation elections are closely akin to political contests."). By "political elections," this Article means contests to select government officials; the phrasing is not to suggest that union-representation elections are not "political" in a broad sense of the term.

22. *See infra* Section I.C.

23. *See infra* Subsection I.A.2. This tactic is not limited to labor law, of course. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1738 (2021) (arguing that "[d]emocracy myths" will "often end arguments"); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 715 (2001) (describing democracy as "the temple at which all modern political leaders worship" and positing that "[c]urrent debate tends to focus on who is defiling this edifice").

24. *See infra* Section II.B.

the purpose of this proceeding."[25] Courts likewise have warned that "[i]mplicit in the power to determine the unit appropriate for the purposes of collective bargaining is the power to gerrymander."[26] On the surface, the analogy makes sense. Bargaining-unit determinations and legislative redistricting both involve defining an electorate. As with politicians drawing districts, the specter of self-interest surrounds employer or union arguments regarding the scope of the unit because the size and composition of a unit often determine the result of the election.[27]

A simple thought experiment shows why the comparison is inapt, however. Gerrymandering works in the political context because all voters must be part of some legislative district, such that line drawers can manipulate the process wholesale through a zero-sum game of divvying up the electorate.[28] But this is not the case with bargaining-unit determinations. Not all employees in a workplace must be placed in a bargaining unit.[29] Representation elections are held only for a particular group of employees that a union seeks to represent and only if a sufficient number of those employees express interest in representation.[30] For the gerrymander analogy to make sense in the labor context, industrial democracy would have to look quite different, and much more like political democracy. Rather than the NLRB holding an election only upon request for a specifically identified group of employees, all employees periodically would vote on whether to unionize. Or union representation would be the default, with elections held only to determine which union would serve as representative.[31]

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25. S. Cal. Gas Co., 10 N.L.R.B. 1123, 1137 (1939); *see also* Stormont-Vail Healthcare, Inc., 340 N.L.R.B. 1205, 1210 (2003) (describing employer's claim that "the Union is trying to gerrymander the unit").

26. Bendix Prods. Corp. v. Beman, 14 F. Supp. 58, 66 (N.D. Ill. 1936), *rev'd*, 89 F.2d 661 (7th Cir. 1937); *see also* Nestle Dreyer's Ice Cream Co. v. NLRB, 821 F.3d 489, 499 (4th Cir. 2016) (describing petitioned-for bargaining unit as "an apparent union gerrymander").

27. *See* Zamadics, *supra* note 9, at 466.

28. *See* Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. PUB. POL'Y 443, 451 & n.38 (2005) (describing redistricting as "a zero-sum game" in which "the majority party hopes to achieve an efficient distribution of its voters across districts").

29. *See* Michael M. Oswalt, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801, 807–08 (2014) (explaining that "[t]he NLRB's election apparatus . . . lies dormant unless affirmatively activated by employees," only at which point "the Board conducts a hearing to look into matters like whether the 'unit' or subset of workers seeking representation is legally 'appropriate' ").

30. 29 U.S.C. § 159(c)(1)(A). The process is detailed in Subsection I.B.2, *infra*.

31. Some commentators and advocates have proposed such alternative frameworks for industrial democracy. *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 282 (1990) (proposing union representation as the default and holding elections only to decide which union would serve as representative); Oswalt, *supra* note 29, at 804. This Article largely takes the existing model as is and does not weigh in on the benefits of those approaches or on what, if any, impact they would have on the appropriateness of the gerrymander analogy.

The problem with the gerrymander analogy is not just a matter of misplaced rhetoric. It can actually do harm to industrial democracy. The core promise of industrial democracy under the NLRA is workers' right to have a say in the decisions that govern their working lives through union representation and collective bargaining. [32] By delegitimizing efforts to craft bargaining units consisting of employees that desire union representation, the gerrymander label may lead to fewer votes for unionization and less collective bargaining.[33] Tarring a proposed bargaining unit with the disfavored practice of gerrymandering makes it both less attractive to employees and more likely to face scrutiny from the NLRB and courts. Indeed, that is often the point: employers typically use the gerrymander analogy to expand the union's proposed bargaining unit and thus make organizing more difficult.[34] For employers like Starbucks, democracy rhetoric serves as just another union-avoidance tool. An irony of this tactic is that, although positioning oneself as a crusader against gerrymandering rings of a pro-democracy motive, it actually has antidemocratic consequences. It results in less worker voice, which leaves employees subject to the whims of employer control.[35] The damage extends beyond the workplace and strikes at political democracy itself. Unionization and collective bargaining are good for democracy.[36] They are "training ground[s] for political democracy," [37] both by inculcating norms like voice and equality of decisionmaking and by encouraging and enabling civic participation like voting, campaigning for political candidates, and running for office.[38] These benefits are lost when organizing efforts are

32. As the NLRA's lead sponsor, Senator Robert Wagner explained, "[D]emocracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood." Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 34 (1979) (internal quotation marks omitted) (citation omitted).

33. Others could argue that industrial democracy refers to the opportunity to choose whether or not to have union representation and thus focus on the election itself, rather than bargaining, as the metaphor's key promise. *But see* Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 45 (2012) (refuting this view). Even under this conception, the gerrymander analogy poses a threat. One result of convincing the NLRB that a petitioned-for unit should be rejected as a gerrymander could be that the Board would find the petitioned-for unit inappropriate and refuse to hold an election at all.

34. *See* Starbucks Corp.'s Request for Review of the Regional Director's Decision & Direction of Election, *supra* note 8, at 8 (evoking "gerrymandering" language to advocate for multilocation unit over single-store units); Zamadics, *supra* note 9, at 466 (noting that employers argue for larger units because they are less likely to produce a consensus for unionization).

35. *See, e.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 39–40 (2017) (describing employer's degree of control over employees).

36. *See infra* Subsection I.A.2.

37. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 77 (2016).

38. *See infra* Subsection I.A.2.

cast as gerrymandering. Using democracy rhetoric to fight against unionization thus undermines the democracy-enhancing social goods that follow from it. Moreover, this outcome exacerbates the already longstanding problem of historically low union density—currently just six percent of the private sector.[39]

The danger of the gerrymander analogy is not limited to one phrase but is part of a larger conceptual flaw in how we think and talk about industrial democracy. Analogies to the political model like the gerrymander charge presuppose that industrial democracy and political democracy are analogues. This is not the only way to envision industrial democracy, however. Calling something a democracy does not give a full picture of what it is and how it works. Not every democracy is the same.[40] What works in one context may not apply in another. Likewise, the use of an election does not dictate every rule and procedure that the process will follow.[41] Such analogies are also premised on the idea that what makes industrial democracy democratic is that it resembles the political model. But this conflates democratic processes with democratic principles. Industrial democracy is democratic not because it looks like political democracy, but because the alternative is autocracy.[42] Collective bargaining and worker voice replace what is essentially an authoritarian environment in the workplace, where employers have largely unfettered control over employees' lives.[43]

Nor should the two democracies necessarily resemble one another. They are different exercises with different stakes. While political elections are choices between candidates or political parties,

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39. *Union Membership (Annual) News Release*, U.S. BUREAU OF LAB. STAT. 1 (Jan. 23, 2024, 10:00 AM), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/CB5E-UE7K]. The overall unionization rate in 2023, including public sector employees, was ten percent, also the lowest on record. *Id.*

40. *See, e.g.*, Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 168 (2021) (describing competing and contested notions of democracy and noting that "democracy is not synonymous with majority rule or any other procedure"); *id.* at 164 ("Even among theorists whose profession requires them to define democracy, there are competing definitions."); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 864 (2021) (describing democracy as an "exemplary essentially contested concept").

41. Even within the political context, not all elections are the same. For example, "[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015).

42. *See* ANDERSON, *supra* note 35, at 37–41 (analogizing private workplaces to authoritarian governments).

43. *See id.* at 37–41 (noting that employers may make arbitrary rules changeable at any time, are unaccountable to employees, and are neither elected nor removable by employees). Although outside the scope of this Article, this discussion also relates to the debate over what public-law norms should adhere in the workplace outside the context of union representation and collective bargaining. *See, e.g.*, Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 102–04 (1995) (advocating for a "just cause" requirement for discharge to remedy workplace restrictions on employees' freedom of expression).

the choice in a union-representation election is whether employees will have a voice in the workplace at all—that is, between democracy or no democracy. And again, unlike in political contests, one of the parties involved in a representation election (the employer) has nearly complete control over the voters.[44] In light of those distinctions, parties' and policymakers' reliance on the political model as the benchmark for workplace democracy may be both misplaced and counterproductive. Although "[d]emocracy myths . . . sell well,"[45] they are not necessarily the best means of advancing a goal, even one grounded in concepts of voice and representation like union elections.

This Article examines the extent to which concepts and norms from the political sphere can or should translate to the labor sphere.[46] It undertakes this inquiry through the lens of the gerrymander—one particular election-law concept that has found its way into labor-law discourse. Though the term is commonly used, its applicability has gone largely unexplored.[47]

Part I begins by tracing the origin and evolution of the industrial-democracy metaphor, from New Deal–era debates over the NLRA to contemporary disputes over labor policy. It examines the uses of democracy rhetoric in labor law and how they represent differing conceptual visions of industrial democracy, as well as the limits of the metaphor. This Part also describes the mechanics of union-representation elections. Part II explains the concept of the

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44. *See* ANDERSON, *supra* note 35, at 39–40 (detailing employer control over employees).

45. Seifter, *supra* note 23, at 1738.

46. Labor law is not the only area of the law to borrow language and concepts from the political sphere. Similar questions arise, for example, in corporate law, including in regard to shareholder elections. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 463–64 (2008) (stating that the political election mantra of "one person, one vote" has created "one share, one vote" into a "rallying cry in corporate law"). In addition to union-representation elections, the political model has been invoked in internal union leadership elections overseen by the Department of Labor under the Labor Management Reporting and Disclosure Act. *See* Wirtz v. Hotel, Motel & Club Emps. Union, Local 6, 391 U.S. 492, 504 (1968) ("Congress' model of democratic elections was political elections in this country.").

47. Some scholars have discussed the disconnect between the political model and union-representation elections, and the potential harms that overreliance on the former can impose on the latter. *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 497, 505–06 (1993) (arguing that "the conception of the union election as a contest between employers and unions . . . has subverted labor's right to representation"); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1809–10 (1983) (describing the analogy of political and union-representation elections as "misleading insofar as it equates the limited role of the union with the role of a legislative body," and noting that "[u]nlike an elected legislature, the union does not have the authority to prescribe conditions in the workplace"). Other than mentioning that the phrase has been invoked, *see* Becker, *supra*, at 520–21, these prior works have not explored the role that the gerrymander concept has played in labor law.

gerrymander, starting with its meaning in the political context. It describes the popular and legal understandings of the practice and the harms that it inflicts. It then chronicles how that concept has been used in labor law.

With that background established, Part III questions whether those uses make sense in the labor-law context. Unlike its amphibious namesake, the gerrymander does not live comfortably in both environments. It is an imperfect fit in at least three critical respects. First, the self-interest that is the basis for the concern with gerrymandering in the political context is, in some ways, a feature of representation elections. Unlike legislative districts, bargaining units are drawn for a particular purpose—to be appropriate for collective bargaining. And labor law affirmatively encourages that result. Bargaining units that are likely to result in votes in favor of collective bargaining thus are not really gerrymanders at all, as that concept refers to line drawing based on *improper* criteria. Second is the point introduced in the thought experiment described earlier. Representation elections are not part of a broader political process in the same way as redistricting. In light of that distinction, any particular unit determination has less of an impact beyond the unit than a gerrymandered district has outside of the district. Third, some aspects of gerrymandering that are viewed as harms in the political context are less likely to occur in the labor context, such as entrenchment, excessive partisanship, or unaccountable representatives.

Part IV examines the doctrinal and normative harms that can follow from this conceptual mismatch. Specifically, it suggests that the gerrymander label may lead to fewer votes for unionization and less collective bargaining by damning them by association with a deeply unpopular practice. It situates this discussion within existing critiques of how the uses and abuses of the democracy metaphor have undermined its promise.[48] This Part also identifies the damage that this result could inflict outside of the workplace, including in the political sphere, by engaging with other conversations about the democracy-promoting benefits of robust worker voice for society more broadly in a moment of increased political and economic inequality.[49]

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48. *See, e.g.*, Becker, *supra* note 47, at 497 (arguing that the political-model analogy is based on a "fiction" and has "subverted labor's right to representation"); Weiler, *supra* note 47, at 1773–74, 1809–10 (arguing that the political-model analogy is "misleading" and results in a system that "provides employers with the opportunity to coerce employees in their choice about unionization").

49. *See, e.g.*, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 556, 562 (2021) (arguing that "countervailing, mass-membership organizations" like unions may "encourage the growth of and the exercise of power by social-movement organizations of the poor and working class").

A critical analysis of the gerrymander analogy both reveals some of the fissures between the political and industrial versions of democracy and suggests why recognizing those distinctions is important to the continued health of the right to representation. These lessons have implications for other concepts imported to labor law from the political sphere, such as the campaign process, debates over voting methods and ballot integrity, the majority-rule requirement, and the electoral model itself.[50] A true industrial democracy need not fully resemble a political democracy. Recognizing the fault lines between the two is essential to maintaining the promise of industrial democracy.

I. INDUSTRIAL DEMOCRACY IN AMERICA

Industrial democracy is the foundational metaphor of federal labor law. It describes the NLRA's animating principle of promoting worker voice in the affairs that govern their working lives, as well as employees' core substantive right to representation in the workplace.[51] The metaphor also served as the doctrinal basis for that right at a time when it was not only novel but radical. And it continues to play a role in labor-law discourse before the NLRB and courts, in the halls of Congress, and in the works of advocates and commentators. This Part details the origin of the industrial-democracy metaphor and surveys some of the theoretical and practical links between unionization and democracy. It also describes the statutory and regulatory procedures that give effect to the right to representation in practice, and how those rules have been influenced by political elections. It discusses the use of analogies to the political model as a weapon in policy debates and litigation within labor law. Finally, it covers some of the limits of the democracy metaphor, introducing a few of the ways in which the political model is an imperfect fit for the right to representation in the workplace.

50. Other commentators have questioned the legitimacy of some of these concepts in the labor -law context. *See, e.g.*, CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 1–2, 8 (2005) (arguing that unions should be able to represent employees on a members-only basis even if they comprise a minority of the workplace); James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IND. L.J. 147, 161–62 (2012) (advocating that employers should be required to recognize unions based on a majority of employees signing authorization cards, even without an election); Becker, *supra* note 47, at 497, 546–47 (questioning the campaign structure of representation elections).

51. *See* 29 U.S.C. § 151.

A. The Industrial-Democracy Metaphor

The connection between workplace democracy and political democracy is present in law, theory, and practice. Democracy rhetoric abounds in each of those realms.

1. The NLRA and the Origins of the Metaphor

The primary legislative embodiment of the industrial-democracy metaphor in American labor law is the NLRA. This New Deal–era statute embodies the democratic concepts of voice, representation, and political equality.[52] It guarantees to employees "the right to . . . bargain collectively through representatives of their own choosing" regarding their terms and conditions of employment.[53] It ensures that employees who make that choice will have their voice heard by requiring employers to bargain with their employees' chosen representative.[54] And it frames those rights and obligations as a means to overcome "inequality of bargaining power" concerning decisions that govern the workplace.[55]

Given the law's focus on democratic principles, the language of democracy has been part of labor-law discourse since the earliest years of the NLRA. The analogy to political democracy was invoked by supporters of the legislation to situate employees' right to representation—a novel and controversial proposition—within established national ideals. Senator Robert Wagner, the sponsor of the NLRA, explained that "the very purpose of this legislation [is] to provide industrial democracy."[56] Employees should have the ability to "go into a booth, and secretly vote, as they do for their political representatives"

52. *See, e.g.*, Bowie, *supra* note 40, at 160 (observing that democracy exists "whenever people treat one another as political equals, allowing everyone in the community, or *demos,* to share in exercising power, or *kratos*"); Andrew Elmore, *Labor's New Localism*, 95 S. CAL. L. REV. 253, 263 (2021) ("[A] democratic polity requires political systems that encourage the broad participation of society in decision-making over matters of everyday life.").

53. 29 U.S.C. § 157.

54. *See id.* § 158(d) (describing employers' "duty to bargain collectively" and "obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"). Failure to bargain in good faith is a violation of the NLRA. *Id.* § 158(a)(5), (d).

55. *Id.* § 151. In this way, collective bargaining can be characterized as a form of "political equality," the principle that "views everyone as social equals who should have the same power to control community decisions as everyone else." Bowie, *supra* note 40, at 167. Of course, "[d]emocracy under collective bargaining . . . is primarily representative democracy" rather than direct democracy, but so are "most democratic forms of government." MORRIS, *supra* note 50, at 224.

56. *1935 Senate Hearings*, *supra* note 17, at 642 (statement of Sen. Robert Wagner), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 17, at 2028.

and choose who will represent them in the workplace.[57] Secretary of Labor Frances Perkins testified that holding representation elections would "carr[y] over into this field principles well established in American democracy."[58] Representative James Mead argued on the House floor that the NLRA "creates a democracy within industry which gives to our industrial workers the same general idea of freedom which the founding fathers conferred upon citizens of the United States."[59]

Other supporters argued that the law was needed because workers were "disfranchised."[60] Their situation was anomalous in a country otherwise grounded in democratic principles. "In the midst of a political democracy . . . you have an industrial autocracy," one proponent told Congress.[61] Another witness drew a comparison between wage earners in the present day and colonists prior to the American Revolution.[62] The latter "had to live under conditions without having any voice in the government" and "in the industrial field it is just about this way with us workers in Detroit now."[63]

The link went beyond the rhetorical. In debates over the constitutionality of the proposed legislation, some advocates argued that Congress's authority to enact the law came through the Guarantee Clause, the constitutional assurance that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[64] The president of the American Federation of Labor promoted this argument by contending that "industrial democracy is essential to the preservation of a republican form of government."[65] As support, he pointed to the "complete destruction of labor unions and the rights of laborers" under dictatorships in Russia, Germany, and Italy.[66]

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57. *Id.*

58. *To Create a National Labor Board: Hearings on S. 2926 Before the S. Comm. on Educ. & Lab.*, 73d Cong. 20 (1934) [hereinafter *1934 Senate Hearings*] (statement of Frances Perkins, Sec'y of Lab.), *reprinted in* 1 NAT'L LAB. RELS. BD., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 50 (1949) [hereinafter 1 NLRA LEGISLATIVE HISTORY].

59. 79 CONG. REC. 9710 (1935) (statement of Rep. James Mead).

60. *1934 Senate Hearings*, *supra* note 58, at 302 (statement of Richard W. Hogue), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 58, at 332.

61. *Id.* at 300, *reprinted in* 1 NLRA LEGISLATIVE History, *supra* note 58, at 332.

62. *Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. on Lab.*, 74th Cong. 96 (1935) [hereinafter *Hearings on Labor Disputes Act*] (statement of William E. Dennison, Soc'y of Designing Eng'rs), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 17, at 2570.

63. *Id.*

64. U.S. CONST. art. IV, § 4.

65. *1934 Senate Hearings*, *supra* note 58, at 109–10 (statement of William Green, President, AFL), *reprinted in* 1 NLRA LEGISLATIVE History, *supra* note 58, at 139–40.

66. *Id.*, *reprinted in* 1 NLRA LEGISLATIVE History, *supra* note 58, at 139–40. The government did not rely on the Guarantee Clause but argued instead that the NLRA was constitutional under the Commerce Clause, an argument the Supreme Court accepted in *NLRB v. Jones & Laughlin*

Supporters of the NLRA were not the first to draw the connection between democracy and workers' rights. In the late eighteenth century, Congressman (and later Treasury Secretary) Albert Gallatin stated that "[t]he democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well."[67] The phrase "industrial democracy" originated in the 1890s and had a variety of meanings in addition to the collective bargaining model ultimately adopted in the NLRA.[68] It was a rallying cry of the Industrial Workers of the World, for example, who advanced a more radical version of the concept that advocated for worker control over industry.[69] Prior to his appointment to the Supreme Court, Louis Brandeis argued that national principles demanded a role for employees in decisionmaking because "we are a democracy," and therefore, "the end to which we must move is a recognition of industrial democracy."[70] Against the backdrop of the First World War, the final report of the U.S. Commission on Industrial Relations proposed "the rapid extension of the principles of democracy to industry," positing that "[p]olitical freedom can exist only where there is industrial freedom; political democracy only where there is industrial democracy."[71] The report explained that worker voice was crucial not just to attain better working conditions but also as a forward step in "the age-long struggle for liberty."[72]

Steel Corp., 301 U.S. 1, 30–31 (1937). For an account of the government's construction of the successful Commerce Clause defense, *see* Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1119–24.

67. MILTON DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 6 (1970) (quoting *Profit Sharing Trends*, CHICAGO: COUNCIL OF PROFIT SHARING INDUSTRIES, Mar.–Apr. 1959, at 3).

68. *See* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 3–6 (Nelson Lichtenstein & Howell John Harris eds., 1993) (delineating the various meanings that Americans gave to this term). Across the Atlantic, the phrase was also the title of British intellectuals Sidney and Beatrice Webb's influential study of trade unionism in the late nineteenth century. 2 SIDNEY WEBB & BEATRICE WEBB, INDUSTRIAL DEMOCRACY (London, Longmans, Green & Co. 1897).

69. Bowie, *supra* note 40, at 181–82; Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2029–32 (2019) (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)).

70. COMM'N ON INDUS. RELS., FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS 83 (1915); *see also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 208 (1914) ("If industrial democracy—true cooperation—should be substituted for industrial absolutism, there would be no lack of industrial leaders.").

71. COMM'N ON INDUS. RELS., *supra* note 70, at 1–2.

72. *Id.* at 80; *see also* Summers, *supra* note 32, at 29–34 (chronicling the early history of the industrial democracy concept).

2. Applying the Metaphor: The Democratic Benefits of Unionization

Contemporary labor-law discourse likewise associates union representation and collective bargaining with democracy on the grounds that they advance democratic principles like voice, participation, and equality of decisionmaking power.[73] Commentators and policymakers use the rhetoric of democracy to speak in aspirational terms about the importance of employee voice, both for the workplace and civil society more broadly.

Recalling the early advocates of the NLRA, they praise workers' right to have a say in the policies that govern their working lives as crucial to a fair and just society.[74] In this narrative, unionization serves as a corrective to the anomaly of citizens in a democratic society spending so many hours of their lives in what is essentially an autocratic environment, where employers have nearly complete control

73. *See, e.g.*, Bowie, *supra* note 40, at 167–68 ("Democracy therefore demands the elimination of economic and social inequalities to the extent that no one can dominate anyone else and everyone can equally exercise power."); Elmore, *supra* note 52, at 263–64 (discussing the value of participation in democratic theory and labor law); Joseph Fishkin & William E. Forbath, *The Anti-oligarchy Constitution*, 94 B.U. L. REV. 669, 685 (2014) ("[Unions and collective bargaining] brought employees' civil and political rights as citizens, all the expectations of living under the Constitution—the freedom to associate and voice grievances, deliberate over common concerns, share authority, choose representatives, and be heard before suffering loss—into industrial life.").

74. *See, e.g.*, ANDERSON, *supra* note 35, at 69 (contending that "recognizing workers' voice in their government" incorporates "respect for workers' freedom, interests, and dignity"); Summers, *supra* note 32, at 34 ("Through collective bargaining employees would have an effective voice, would be able to protect their own interests, and would achieve human dignity."). Voice is the most effective way for workers to influence their employer. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30–43 (1970) ("To resort to voice, rather than exit, is for the customer or member to make an attempt at changing the practices, policies, and outputs of the firm from which one buys or of the organization to which one belongs."). Although a classically liberal account would contend that employees also could exercise control through the mechanism of exit—leaving jobs when terms and conditions of employment are not satisfactory—this is not a practical option for a large component of American workers. *See* ANDERSON, *supra* note 35, at 130 ("Those consigned to the status of wage worker for life have no real way out: while they can quit any given employer, often at great cost and risk, they cannot opt out of the wage labor system that structurally degrades and demeans them."). Economic dependence on their employer often makes exit too risky a proposition. *See, e.g.*, Bowie, *supra* note 40, at 179–80 (articulating the inequality of power in the labor system given how employees are often unable to adequately respond to unfair labor practices and " 'exit' [is] an extremely unattractive option for most workers"). Employers also can make it more difficult by, for example, requiring that all employees sign noncompete "agreements" as a condition of employment; an employee in that situation may have nowhere else to go if she leaves her current job. *See* ANDERSON, *supra* note 35, at 66 (describing how the use of noncompete agreements have become more common throughout various industries and professions); *see also* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 750–55 (2021) (discussing employer-imposed limits on worker mobility, such as noncompetes and training repayment agreements).

over what employees do and say.[75] As Elizabeth Anderson has posited, employer control is a form of "private government."[76] Industrial democracy is crucial because arbitrary or unaccountable private government is as troubling as arbitrary or unaccountable power in any other form of government.[77]

In addition to creating fairer workplaces, some commentators have argued that unionization is democratic because it has beneficial spillover effects on political democracy. They have argued that giving workers a voice in the workplace can model a concrete example of democratic principles in action and thus promote participation in the civic and political spheres.[78] Along with creating a representative democracy for the purpose of bargaining with the employer, unions themselves are democratic membership organizations. Members vote for union officers and stewards (or run for such positions themselves) and sometimes on whether to ratify a collective bargaining agreement.[79] Union representation and collective bargaining thus "serve as an

75. *See, e.g.*, ANDERSON, *supra* note 35, at 39–40, 69 (comparing employer control with an employer dictatorship and discussing unionization as a potential fix); Bowie, *supra* note 40, at 162, 176 (noting that "the vast majority of American workplaces function not as democracies, but as dictatorships" and referring to the workplace as "profoundly undemocratic"); Moore & Bales, *supra* note 50, at 149 (observing that collective bargaining frees employees "from the dictatorships established by the lords of industry").

76. ANDERSON, *supra* note 35, at 41.

77. *See id.* at 69–71; *see also* Elmore, *supra* note 52, at 260 & n.35 (quoting Professor Guy Dadidov's work as asserting that "labor law addresses employer domination of employees by correcting the 'democratic deficit' in workplaces" to support the proposition that labor law "raise[s] questions about . . . the allocation of power to prevent domination" (quoting GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 35, 38–40 (2016))). For similar reasons, Nikolas Bowie and Charlotte Garden have described recent Supreme Court decisions that have made organizing more difficult and curtailed union strength—*Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2019)—as antidemocratic. Bowie, *supra* note 40, at 161–63; Charlotte Garden, *Is There an Anti-democracy Principle in the Post*-Janus v. AFSCME *First Amendment?*, 2020 U. CHI. LEGAL F. 77, 78. *Cedar Point* struck down provisions of California law granting union organizers access to farmworkers on employer property under certain circumstances, 141 S. Ct. at 2072–74, and *Janus* invalidated state laws requiring union-represented public employees to pay union dues, 138 S. Ct. at 2460.

78. *See, e.g.*, Bowie, *supra* note 40, at 163 (arguing that "for democracy to exist anywhere, it must exist everywhere," including "in our workplaces"); Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 968 (1990) ("[P]olitical thinkers have promoted the establishment of industrial democracy as a means of advancing political democracy."); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 8 (1988) ("[D]emocratic involvement in employment also contributes to civic democracy by enhancing peoples' inherent capacities to participate in politics.").

79. DAVID MADLAND, MALKIE WALL, DANIELLE ROOT & SAM BERGER, CTR. FOR AM. PROGRESS, UNIONS ARE DEMOCRATICALLY ORGANIZED, CORPORATIONS ARE NOT 2–3 (2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/10/DemocraticUnioins-brief2.pdf [https://perma.cc/4USG-H66X]. Some of these democratic attributes are required by the Labor-Management Reporting and Disclosure Act. 29 U.S.C. § 401.

important training ground for political democracy."[80] Conversely, a workplace where employee voice is absent can serve to undermine confidence in political democracy by giving workers the impression that they lack control over any aspect of their lives.[81]

The correlation between unionization and democratic well-being is borne out on the ground. For example, unionized employees are more likely than their nonunionized counterparts to vote in political elections.[82] Similarly, states with higher union density tend to have higher voter turnout overall.[83] Those states are also less likely to enact laws that make voting more difficult, such as restrictions on early voting or vote-by-mail, barriers to registration, or stricter voter-identification laws.[84] Unions also mobilize represented employees to participate in the electoral process in other ways, such as campaigning for political candidates, phone banking or canvassing, and lobbying.[85] In addition, some of the benefits that can come from a unionized workplace with a collective bargaining agreement, such as increased wages and predictability in scheduling, permit greater civic participation by providing employees with the necessary time and resources for such participation.[86] Unionization can also facilitate employees running for political office themselves by providing both leadership opportunities at work that can translate to other spheres and a network that can be drawn upon as a base of electoral support.[87]

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80. Andrias, *supra* note 37, at 77; *see also* CLAYTON SINYAI, SCHOOLS OF DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN LABOR MOVEMENT 2 (2006) (describing "educating working people for democratic citizenship" as "the central and enduring political concern[ ] of the American labor movement").

81. Nikolas Bowie has chronicled this phenomenon using the example of farmworkers, who are excluded from the NLRA and also generally lack representation rights under state law. Bowie, *supra* note 40, at 161. In his view, "democracy on Election Day means very little when antidemocracy suppresses political equality elsewhere." *Id.*

82. *See* Andrias & Sachs, *supra* note 49, at 567 (describing how unions are successful at driving up voter turnout); Sean McElwee, *How Unions Boost Democratic Participation*, AM. PROSPECT (Sept. 16, 2015), https://prospect.org/labor/unions-boost-democratic-participation [https://perma.cc/W7KM-M2BM] ("While only 39 percent of non-union workers voted in 2014, fully 52 percent of union workers d*id*."). Studies have shown that union members are between four and ten percent more likely to vote in political elections. McElwee, *supra* (citing studies).

83. ECON. POL'Y INST., UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY 8 (2021), https://files.epi.org/uploads/226030.pdf [https://perma.cc/M59Z-S4LZ].

84. ASHA BANERJEE, MARGARET POYDOCK, CELINE MCNICHOLAS, IHNA MANGUNDAYAO & ALI SAIT, ECON. POL'Y INST., UNIONS ARE NOT ONLY GOOD FOR WORKERS, THEY'RE GOOD FOR COMMUNITIES AND FOR DEMOCRACY 16–18 (2021), https://files.epi.org/uploads/236748.pdf [https://perma.cc/Z9K9-AT6A].

85. Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 SOC. FORCES 895, 898–900 (2013).

86. Garden, *supra* note 77, at 92.

87. Michael Wasser & J. Ryan Lamare, *Unions as Conduits of Democratic Voice for Non-elites: Worker Politicization from the Shop Floor to the Halls of Congress*, 14 NEV. L.J. 396, 402–05

By educating and mobilizing members to become a force in the political process, unions also increase the chances that policymakers will listen.[88] Through aggregating and amplifying workers' voices in the political arena, unions operate as a source of countervailing power to entrenched interests. Such efforts promote democracy by making government more responsive to a broader range of citizens, rather than just the wealthy and well-connected.[89]

B. The Metaphor in Practice: Labor Law's Election Law

Although the NLRA empowers employees to select "representatives of their own choosing," it offers little direction on how employees are to make this choice in practice.[90] As the agency tasked with enforcing the statute, the NLRB has filled in the gaps.[91] In many ways, the Board has relied on the political analogy in establishing policies and processes to implement the NLRA's guarantees. What developed has been an NLRA-specific body of election law. But the path has not been smooth. NLRB policy has shifted over the years, alternatively hewing closer to and deviating from the political model.

1. The Early Years—Democracy Without Elections?

Despite the democracy rhetoric that accompanied it, the NLRA initially did not mandate secret ballot elections as the means by which employees selected union representation.[92] Although the statute provided that a union must have majority support within a unit of employees to serve as their collective bargaining representative, it did not dictate any particular method for measuring such support.[93]

(2014); Aaron J. Sojourner, *Do Unions Promote Members' Electoral Office Holding? Evidence from Correlates of State Legislatures' Occupational Shares*, 66 INDUS. & LAB. RELS. REV. 467, 468–69 (2013).

88. *See, e.g.*, Michael Becher & Daniel Stegmueller, *Reducing Unequal Representation: The Impact of Labor Unions on Legislative Responsiveness in the U.S. Congress*, 19 PERSPS. ON POL. 92, 93–94 (2021) (tracing "the causal role labor unions play in increasing legislative responsiveness to low income constituents" and finding that "a standard deviation increase in unionization increases legislative responsiveness towards the poor by about 6 to 8 percentage points").

89. *See id.* at 92 ("Democratic theory holds that people's preferences should be equally represented in collective decision making regardless of their income and wealth.").

90. 29 U.S.C. § 157.

91. The Supreme Court has explained that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946).

92. *See* National Labor Relations Act, ch. 372, § 9, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 159) (no secret ballot requirement).

93. *Id.*

Elections were an option, but the law also provided for NLRB certification of a union as a collective bargaining representative based on "any other suitable method to ascertain such representatives."[94] For the first several years after the NLRA's passage, the NLRB relied on a variety of other evidence of majority support besides an election. It looked, for example, to whether a majority of employees in the proposed bargaining unit had signed cards authorizing the union to represent them, testified to their support at an NLRB hearing, or participated in strikes called by the union (with participation serving as a proxy for support).[95] During the first five years of the NLRA, nearly a quarter of the Board's certifications did not follow from a representation election.[96]

The NLRB changed course in 1939, announcing that it henceforth would rely only on elections to certify a union.[97] The Board offered little explanation for its change in position, other than that it was "persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot."[98] Congress later codified this choice in the Taft-Hartley Act of 1947, which amended the NLRA to provide that "if . . . a question of representation exists, [the NLRB] shall direct an election by secret ballot."[99] Accordingly, an employer faced with a request for recognition, even if supported by evidence of majority support within the proposed bargaining unit, can refuse to bargain and

94. *Id.* § 9(c), 49 Stat. at 453.

95. *See, e.g.*, Combustion Eng'g Co., 5 N.L.R.B. 344, 349 (1938) (participation in strike); Wilmington Transp. Co., 4 N.L.R.B. 750, 753–54 (1937) (hearing testimony); Seas Shipping Co., 2 N.L.R.B. 398, 401 (1936) (authorization cards).

96. Becker, *supra* note 47, at 507.

97. Cudahy Packing Co., 13 N.L.R.B. 526, 531–32 (1939).

98. *Id.*

99. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 9(c), 61 Stat. 136, 144 (1947) (codified at 29 U.S.C. § 159(c)). The Taft-Hartley Act was pushed by business interests to cut back on what was perceived as the pro-union tilt of the NLRA as originally enacted. *See* Jack Barbash, *Chapter 6: Unions and Rights in the Space Age*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/history/chapter6 (last visited Feb. 7, 2024) [https://perma.cc/Q7FQ-7F7B] ("[T]he Act reflected the ebbing of union political influence and the corresponding rise of business influence in the first Republican Congress since 1930. The underlying philosophy of Taft-Hartley was to balance off the Wagner Act restrictions on employers with restrictions against unions."). In addition to mandating elections, it added unfair labor practice liability for unions and guaranteed employees' "right to refrain" from the activities that the NLRA protects. 29 U.S.C. § 157; *see also id.* § 158(b). Taft-Hartley passed over President Truman's veto. *Veto of the Taft-Hartley Labor Bill*, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/public-papers/120/veto-taft-hartley-labor-bill (last visited Feb. 7, 2024) [https://perma.cc/7LKF-RGWM].

insist on an election.[100] An employer can voluntarily recognize a union based on a showing of majority support other than an election but, except in unusual situations, is under no legal obligation to do so.[101] The Board will sometimes order an employer to bargain with a union absent an election as a remedial matter when employer unfair labor practices have rendered a fair election impossible.[102]

The lesson gleaned from this early history is that, although the industrial-democracy metaphor provided a doctrinal basis for employees' right to representation in the workplace, it did not necessarily offer a practical guide for the process of selecting and recognizing a representative. Even at the outset, industrial democracy was not intended as a jot-for-jot adaptation of political democracy. Once the election was singled out as the method for selecting union representation, however, the task of establishing procedures for such events became even more important. The next Subsection provides an overview of this process.

2. This Is What Industrial Democracy Looks Like

The Board proceeding for determining whether employees have chosen a union as their collective bargaining representative is known as a representation case.[103] A representation case begins when a union

100. The NLRB recently held that an employer must file for an election "promptly" (typically within two weeks) after receiving a request for recognition accompanied by evidence of majority support. Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, slip op. at 24–26, 25 & n.139 (Aug. 25, 2023), *petition for review pending*, No. 23-2081 (9th Cir. Sept. 26, 2023). If the employer fails to do so, its continued refusal to bargain violates the NLRA. *Id.* Previously, an employer could refuse to bargain without legal consequence and wait for the union to file for an election. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 305, 309–10 (1974) (finding that the burden was on the union to invoke election procedure if the employer had not engaged in an unfair labor practice that undermined the electoral process).

101. United Mine Workers v. Ark. Oak Flooring Co., 351 U.S. 62, 71–72 (1956).

102. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610–14 (1969) (holding that "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority" the "Board . . . has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status"); *Cemex*, slip op. at 26 & n.142 (finding coercive conduct occurred during election and requiring the employer to bargain with employees as a result).

103. *See NLRB Representation Case-Procedures Fact Sheet*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/news-publications/publications/fact-sheets/nlrb-representation-case-procedures-fact-sheet (last visited Feb. 7, 2024) [https://perma.cc/2KY4-HD3U] (describing the NLRB's representation-case procedures). Representation cases are one of two types of NLRB proceedings. The Board also conducts unfair labor practice cases, where the agency investigates, adjudicates, and remedies violations of the NLRA. *See* 29 U.S.C. § 160 (giving the Board remedial power over unfair labor practices). Such violations include employer actions that "interfere with, restrain, or coerce" employees in the exercise of their rights under the statute, *id.* § 158(a)(1), discrimination against employees for union support or activity, *id.* § 158(a)(3), and failure to bargain with the union representing its employees, *id.* § 158(a)(5). The NLRA also proscribes unfair labor practices by unions. *Id.* § 158(b).

or an employee files a representation petition with one of the NLRB's regional offices.[104] The petition describes the unit of employees that the union wishes to represent or that is seeking representation.[105] Proof that a "substantial number of employees" in the petitioned-for unit support representation must accompany the petition.[106] After receiving a petition, an NLRB Regional Director will hold a hearing to determine whether a "question of representation" exists, thus creating the need for an election.[107]

One issue covered in a representation hearing, and the focus of this Article, is the scope of the bargaining unit. The NLRA provides that a unit must be "appropriate" for the purpose of collective bargaining but otherwise sets few parameters.[108] Bargaining units must include at least two employees.[109] They can consist of an "employer unit, craft unit, plant unit, or subdivision thereof."[110] But the statute otherwise offers little guidance on whether a proposed unit is appropriate. The Board has established a framework for such decisions under which a unit is appropriate if the employees therein share a "community of interest."[111] Relevant factors include common skills and duties, terms and conditions of employment, and supervision, as well as the extent of functional integration or interchange among the employees, geographic proximity, and the employer's administrative groupings.[112] When evaluating appropriateness, the Board first looks at the unit that the union has petitioned to represent. If it concludes that the petitioned-for

104. 29 U.S.C. § 159(c)(1)(A). An employer also can file an election petition. 29 C.F.R. § 102.60(a) (2023). If a union claims to represent the employer's employees and requests that the employer recognize it, the employer can put that claim to the test by petitioning the NLRB to hold an election. *Id.* § 102.61(b). The procedures for employer-initiated elections are the same as when a union or employee files the petition. 29 U.S.C. § 159(c)(1)-(2).

105. 29 C.F.R. § 102.61(a)(4) (2023).

106. 29 U.S.C. § 159(c)(1)(A). The NLRB typically requires a showing of interest from at least thirty percent of the employees in the petitioned-for unit to process the petition, though this number is not statutorily required. *See* River City Elevator Co., 339 N.L.R.B. 616, 617 (2003) ("[T]he 30 percent showing of interest requirement is a purely administrative matter, designed to determine whether enough employees want an election to warrant expenditure of Board's resources. It is not statutorily required . . . .").

107. 29 U.S.C. § 159(c)(1). Under NLRB regulations, "[a] question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining." 29 C.F.R. § 102.64(a) (2023).

108. *See* 29 U.S.C. § 159(b).

109. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 943 n.24 (2011) (explaining that "the [NLRA] permits the Board to find a unit appropriate so long as it contains more than one eligible employee"), *enforced sub nom.* Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013).

110. 29 U.S.C. § 159(b).

111. *See* NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985) ("[I]in defining bargaining units, [the NLRB's] focus is on whether the employees share a 'community of interest.' ").

112. *E.g.*, United Operations, Inc., 338 N.L.R.B. 123, 123 (2002).

unit is appropriate, "then the inquiry . . . ends" and the Board will direct an election in that unit.[113] If the petitioned-for unit is not appropriate, the NLRB will consider any alternatives presented by the petitioning party or the employer.[114] It also has discretion to select a different unit not identified by any party.[115]

The representation hearing also touches on the mechanics of the election. The Regional Director will seek the parties' views on the time[116] and place[117] of the election, for example. She also will solicit their positions on whether employees will vote in person or by mail.[118] Although the parties' preferences are taken into account, such matters are not litigated and are ultimately within the discretion of the NLRB.[119]

Following the hearing, an NLRB Regional Director will issue either a Decision and Direction of Election setting forth the details of the election or an order dismissing the petition if the proposed unit is

113. Boeing Co., 337 N.L.R.B. 152, 153 (2001).

114. *Id.*

115. *Id.* The framework described above applies in the typical representation case involving a new bargaining unit. The analysis is sometimes overlaid with presumptions and context-specific rules. For example, a single-facility unit is presumptively appropriate as compared to a multi-facility unit, as are units consisting of all employees in a particular craft. *See, e.g.*, Kroger Ltd. P'ship, 348 N.L.R.B. 1200, 1200 (2006) (single-facility presumption); Mallinckrodt Chem. Works, 162 N.L.R.B. 387, 401 (1966) (craft-unit presumption). An existing bargaining unit with a history of successful collective bargaining is presumptively appropriate and will not be disturbed absent "compelling circumstances." *See, e.g.*, ADT Sec. Servs., Inc., 355 N.L.R.B. 1388, 1396 (2010), *enforced*, 689 F.3d 628 (6th Cir. 2012). By regulation, only certain specified units in the acute-care hospital context will be found appropriate. 29 C.F.R. § 103.30 (2023).

116. Elections often are held at break times or shift changes. *See* CASEHANDLING MANUAL, *supra* note 21, § 11302.3. Depending on the circumstances of the workplace, voting sometimes occurs in multiple blocs on the same day, and sometimes over the course of several days. *See id.* § 11302.1.

117. Elections generally are held at the employer's facility. *Id.* § 11302.2. This is convenient for employees, but the possibility of undue employer influence over the election is clear. *See, e.g.*, 2 Sisters Food Grp., Inc., 357 N.L.R.B. 1816, 1820–22 (2011) (discussing how an election held on the employer's facility allowed the employer to influence the results).

118. The NLRB's general practice is to order manual elections. *See* CASEHANDLING MANUAL, *supra* note 21, § 11301.2. A mail-ballot election is appropriate if employees are "scattered," either geographically or because their work schedules vary significantly, or if the employees currently are on strike or locked out. *Id.*; *see also* San Diego Gas & Elec., 325 N.L.R.B. 1143, 1145–46 (1998) (applying these considerations to determine that Regional Director acted appropriately in conducting election via mail ballot). As in the political arena, the use of mail-in ballots increased during the COVID-19 pandemic era. The NLRB established COVID-specific guidelines for ordering a mail-ballot election in November 2020, which largely remain in place as of this writing. Aspirus Keweenaw, 370 N.L.R.B. No. 45, slip op. at 4–8 (Nov. 9, 2020); *see also* Starbucks Corp., 371 N.L.R.B. No. 154, slip op. at 2–3 (Sept. 29, 2022) (adjusting *Aspirus* factors in light of new CDC metrics).

119. *See* 29 C.F.R. § 102.66(g)(1) (2023).

inappropriate or the petition is otherwise faulty.[120] If the former, the election will be held on the "earliest date practicable."[121]

The period between the filing of the petition and the election is known as the "critical period."[122] During this period, "laboratory conditions" must be maintained for the vote to represent an accurate measure of employee support for unionization—that is, conditions free from "[c]onduct that creates an atmosphere which renders improbable a free choice," such as threats of job loss if employees vote to unionize or retaliation against union supporters.[123] If not, the Board can order a rerun election.[124] Nonetheless, some aspects of campaigning are largely unregulated.[125]

Next comes the main event—the election itself. The election is run by NLRB agents, who bring a portable voting booth and a ballot box to the voting site.[126] The petitioning union and the employer can select employees to represent them as election observers.[127] Voting is done by secret ballot.[128] Typically, the ballot contains a single question—whether employees wish to be represented for the purpose of collective bargaining by the petitioning union—and two options for response, yes or no.[129] Once the polls close, the Board agent counts the votes and provides a tally of ballots to all parties.[130] If employees vote in favor of representation, the NLRB will certify the union as their collective bargaining representative.[131]

120. *Id.* § 102.67(a).

121. *Id.* § 102.67(b).

122. Goodyear Tire & Rubber Co., 138 N.L.R.B. 453, 454 n.2 (1962).

123. Gen. Shoe Corp., 77 N.L.R.B. 124, 126–27 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951); *see also* Lucky Cab Co., 360 N.L.R.B. 271, 277 (2014) (setting aside election due to employee discharges); Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786–87 (1962) (threats).

124. *See* CASEHANDLING MANUAL, *supra* note 21, §§ 11450, 11452.4 (discussing the circumstances for a rerun election); Daniel H. Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C. L. REV. 209, 210 (1963) ("When the standard of electioneering falls too low, the results are set aside and a re-run election is ordered.").

125. For example, the NLRB will not police against factual misrepresentations in campaign material. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 131–33 (1982).

126. CASEHANDLING MANUAL, *supra* note 21, §§ 11304.3, 11304.4.

127. *See* 29 C.F.R. § 102.69(a)(5) (2023).

128. *Id.* § 102.69(a)(2).

129. If more than one union has petitioned to represent the unit, the employees have the choice to vote for any of the unions, "neither," or "none." CASEHANDLING MANUAL, *supra* note 21, § 11306.4.

130. 29 C.F.R. § 102.69(a)(7) (2023).

131. *Id.* § 102.69(b).

C. The Metaphor as Weapon

As the above overview demonstrates, labor law's election processes resemble the political model in many ways but depart from it in others. Nonetheless, that model often serves as the rhetorical baseline for discussing and evaluating industrial democracy, both at the policy level and in case-by-case litigation. As with the gerrymander analogy that is the focus of this Article, the democracy metaphor is frequently wielded as a weapon to criticize labor-law policies and procedures that purportedly depart from the political-model framework, with the party using such language seizing the mantle of democracy to legitimize its argument and discredit opposing views.

For example, any efforts to use methods other than elections to measure majority support have faced full-throated opposition grounded in the language of democracy. During debate in the early 2000s over the Employee Free Choice Act, which would have required employers to recognize a union upon receiving signed authorization cards from a majority of employees, business groups and their allies attacked the proposed legislation as "undemocratic"[132] and argued that it would "strip workers of their fundamental right" to vote.[133] Similar attacks have met current NLRB General Counsel Jennifer Abruzzo's recent proposal to reintroduce the *Joy Silk* doctrine, under which an employer would have to bargain with a union that claimed majority support based on authorization cards unless the employer could show it had good-faith doubt about the union's claim.[134]

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132. H.R. REP. NO. 110-23, at 56–57 (2007) (minority views).

133. Paul Kersey & James Sherk, *How the Employee Free Choice Act Takes Away Workers' Rights*, HERITAGE FOUND., https://www.heritage.org/jobs-and-labor/report/how-the-employee-free-choice-act-takes-away-workers-rights (last updated Mar. 4, 2009) [perma.cc/G53E-R6CN]. The legislation passed the House in the 110th Congress but failed in the Senate. H.R. 800, 110th Cong. (2007). Although reintroduced several times, it never again passed either chamber. *See, e.g.*, Employee Free Choice Act, S. 560, 111th Cong. (2009).

134. *See, e.g.*, Mark Mix, Opinion, *Jennifer Abruzzo's Plan to Abolish Union Elections*, WALL ST. J. (Apr. 18, 2022, 6:24 PM), https://www.wsj.com/articles/jennifer-abruzzo-biden-administration-abolish-union-unionization-elections-nlrb-labor-force-voting-right-to-work-11650315608 [https://perma.cc/7LFK-2RKL] ("One of President Biden's top labor appointees wants to 'protect the integrity' of union elections by stopping workers from ever voting in them."). The doctrine originated in *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), and was the law in some form or another for about two decades. Brian J. Petruska, *Adding* Joy Silk *to Labor's Reform Agenda*, 57 SANTA CLARA L. REV. 97, 102–04 (2017). The Board ultimately adopted a modified version of *Joy Silk*, under which an employer that received evidence of majority support must either recognize the union or file for an election within two weeks. Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, slip op. at 25–26, 25 n.139 (Aug. 25, 2023). *Cemex* also expanded the type of circumstances when the NLRB would order an employer to bargain with a union without an election as a remedial matter, which now include the commission of any unfair labor practice that would require setting aside an election. *Id.* at 25–26, 25 n.142. Democracy rhetoric infused

The question of whether or when representation elections should be held in person or by mail ballot has also prompted arguments borrowed from the political context. Parties, commentators, and Board members have debated whether a special reason should be needed for mail-in voting[135] and whether the practice is somehow suspect.[136] Employers and their allies have warned of the "potential party fraud and coercion that is characteristic of mail-ballot elections."[137] In both substance and rhetoric, these debates recall arguments made in the run-up to the 2020 presidential election and the shift to mail voting as a result of the COVID-19 pandemic.[138] Starbucks got into the game in this area as well, warning that "mail ballot elections have created new opportunities for parties to undermine election integrity by soliciting ballots and engaging in impermissible ballot-harvesting,"[139] and citing a case involving mail-ballot fraud in a Pennsylvania state senate election.[140]

The political model has also been invoked in debates regarding the campaign process. Commentators have questioned the "laboratory conditions" approach to representation elections by noting its wide deviation from the largely unregulated world of political

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criticism of the decision. *See id.* at 45 (Member Kaplan, dissenting in part) (criticizing decision because "[t]he right of citizens to vote in a secret-ballot election is the very cornerstone of American democracy").

135. *See* San Diego Gas & Elec., 325 N.L.R.B. 1143, 1145–46 (1998) (setting out guidelines for the Regional Director to consider in deciding whether to conduct a mail ballot election).

136. KMS Com. Painting, LLC, 371 N.L.R.B. No. 69, slip op. at 1–2, 2 n.4 (Feb. 16, 2022) (Member Ring, concurring) (arguing that "the greater use of mail ballots has revealed problems with existing mail ballot procedures" which "reinforce the Board's long-standing policy in favor of manual elections"); *San Diego Gas*, 325 N.L.R.B. at 1149–53 (Members Hurtgen & Brame, dissenting) (arguing for the importance of manual elections to the election process and the Board's traditions, despite the potential benefits of a mail-in ballot).

137. Employer's Request for Review of the Acting Regional Director's Decision & Direction of Election at 41, Amazon.com Servs., LLC, No. 10-RC-269250 (N.L.R.B. Jan. 21, 2021).

138. *See, e.g.*, Alex Seitz-Wald & Sahil Kapur, *Coronavirus Has Ignited a Battle over Voting by Mail. Here's Why It's So Controversial.*, NBC NEWS, https://www.nbcnews.com/politics/2020-election/coronavirus-has-ignited-battle-over-voting-my-mail-here-s-n1178531 (last updated Apr. 10, 2020, 12:17 PM) [https://perma.cc/D4Q9-5995].

139. Starbucks Corp.'s Request for Review of the Regional Director's Decision & Direction of Election at 14–15, Starbucks Corp., No. 19-RC-297142 (N.L.R.B. July 25, 2022) (citing Fessler & Bowman, Inc., 341 N.L.R.B. 932 (2004)).

140. *Id.* at 13 (citing Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994)). Indeed, the first Board decision involving the recent wave of Starbucks organizing to reach the courts of appeals involved a challenge to the use of mail ballots rather than a manual election. Siren Retail Corp., 372 N.L.R.B. No. 10, slip op. at 1 (Nov. 30, 2022), *application for enforcement pending*, No. 22-1969 (9th Cir. Dec. 5, 2022). Starbucks has pushed these arguments even though its home state of Washington has had universal vote-by-mail since 2011. *See* WASH. REV. CODE § 29A.40.010 (2022); Colin Rigley, *A Brief Legal History of Washington's Vote-by-Mail System*, NWSIDEBAR (Sept. 28, 2020), https://nwsidebar.wsba.org/2020/09/28/a-brief-legal-history-of-washingtons-vote-by-mail-system/ [https://perma.cc/V678-JULB].

campaigning.[141] Other examples have come in response to efforts to speed up the process for holding representation elections. The NLRB amended its election procedures in 2014 to require that an election be held at the "earliest date practicable" after the Regional Director's direction of election.[142] Opponents of the new regulations argued that a shorter timeline for scheduling the election was inconsistent with "American democratic principles," [143] would "limit pre-election campaigning," [144] and was invalid because it would not fly in the political context.[145] Similar attacks helped sink the proposed Labor Reform Act of 1977, which would have established fixed deadlines for holding an election.[146] The Chamber of Commerce bemoaned that legislation's impact on employers' "campaign rights,"[147] and one witness asked the House committee considering the bill to view it as akin to "a candidate from a rival political party . . . campaigning in your home district" being "able to file a petition and trigger an election within fifteen days thereafter."[148] These examples show that parties opposing

141. *See* Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1469–70 (1975) (questioning the approach that, "[w]hile a campaign preceding a political election is generally free of restrictions on campaign tactics, the Board, explicitly rejecting this aspect of the political analogy, has opted for stringent regulation of campaign conduct").

142. Representation—Case Procedures, 79 Fed. Reg. 74308, 74485 (Dec. 15, 2014) (codified at 29 C.F.R. § 102.67). Previously, Board regulations instructed that the Regional Director normally would not schedule an election until twenty-five to thirty days after the date of the decision. 29 C.F.R. § 101.21(d) (2015).

143. Brief for Retail Litigation Center, Inc. as Amicus Curiae at 21–22, Associated Builders & Contractors of Tex., Inc. v. NLRB, 826 F.3d 215 (5th Cir. 2016) (No. 15-50497).

144. Representation—Case Procedures, 79 Fed. Reg. at 74439 (Members Johnson & Miscimarra, dissenting).

145. NLRB Members Johnson and Miscimarra made this argument in their dissent from the new rule, insisting that "[t]he substantial body of judicial precedent that governs campaigning in political elections is also relevant here" and noting that "all but the most narrowly drawn durational limitations on political electioneering are impermissible." *Id.* at 74439–40; *see also* Ian Kullgren, *Union Elections Took Longer in 2020, but Virus Not Only Factor*, BLOOMBERG L. (Jan. 4, 2021, 5:55 AM), https://news.bloomberglaw.com/daily-labor-report/union-elections-took-longer-in-2020-but-virus-not-only-factor [https://perma.cc/M7FN-9S9P] (quoting management-side attorney comparing shorter election periods to "a political debate where one of the candidates gets up and speaks, the other one sits down, and the moderator says that's the end of the debate" (internal quotation marks omitted)). Such arguments may have proven successful, at least temporarily, because the Board amended its regulations again in 2019 to add that elections should not be held fewer than twenty business days after a Regional Director's decision. Representation-Case Procedures, 84 Fed. Reg. 69524, 69546 (Dec. 18, 2019) (to be codified at 29 C.F.R. pt. 102). The Board rescinded the twenty-day waiting period in 2023. Representation-Case Procedures, 88 Fed. Reg. 58076, 58090–91 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102).

146. *See* Becker, *supra* note 47, at 520 & nn.105–06 (chronicling debates over the bill).

147. *Hearings on H.R. 8410 Before the Subcomm. on Lab.-Mgmt. Rels. of the H. Comm. on Educ. & Lab.*, 95th Cong. 536 (1977) (statement of the Chamber of Com. of the U.S.).

148. *Id.* at 219 (1978) (statement of James W. Shields, Vice Chairman, Gov't Affs. Comm'n of Printing Indus. of Am.).

representation-election matters are likely to find it useful to frame their pushback in terms of deviance from the political model.

The political-model variant of the democracy metaphor is not wielded only by anti-union forces. For example, commentators and union advocates have criticized the law on union access to the worksite as a deviation from the model of the political election.[149] Employers have access to employees throughout the workday and also, under current law, can require them to attend anti-union campaign speeches.[150] At the same time, they can exclude unions from employer property in all but the narrowest of circumstances.[151] This presents an "asymmetry [that] would not be tolerated in politics" if imposed on competing candidates in an election.[152]

D. Limits of the Metaphor

The political-model analogy is not without its critics. They contend that the fit between political and industrial democracy is not so neat as to warrant importing the political model into the workplace[153] and assert that attempting to do so demonstrates a fundamental misunderstanding of industrial democracy under the NLRA. Critics of

149. *See, e.g.*, Moore & Bales, *supra* note 50, at 162.

150. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 430 (1953) (holding that the employer cannot make an election speech with required employee attendance within twenty-four hours of the election, but that the Board does not prohibit requiring attendance at such speeches before this time period). The NLRB's current General Counsel has advocated banning such mandatory captive-audience meetings as unfair labor practices. Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 45–66, Cemex Constr. Materials Pac., LLC, No. 28-CA-230115 (N.L.R.B. Apr. 11, 2022).

151. The only limits are that employers cannot discriminatorily exclude unions while allowing other parties, and employers must allow union access if no reasonable other means exist for the union to contact employees. Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992).

152. Moore & Bales, *supra* note 50, at 162. AFL Associate General Counsel Nancy Schiffer (later a Board member) colorfully illustrated this chasm by explaining:

> If general political elections were run like NLRB elections, only the incumbent officeholder, would have access to a list of registered voters . . . . Only the incumbent, and not the challenger, would be able to talk to voters, in person, every single day. The challenger, meanwhile, would have to remain outside the boundaries of the state or district involved and try to meet voters by flagging them down as they drive past.

Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ. & Labor, 110th Cong. 63–64 (2007).

153. *See, e.g.*, ANDERSON, *supra* note 35, at 130–31 ("[T]here are enough disanalogies between state and workplace governance that our experience with democratic states do not give us enough information about what arrangements are likely to make sense for the workplace."); Becker, *supra* note 47, at 498 (noting "the fundamental legal tensions created by transposing the device of the representation election from the political realm into the workplace"); Weiler, *supra* note 47, at 1810 ("This view is misleading insofar as it equates the limited role of the union with the role of a legislative body.").

the analogy argue that industrial democracy is not just about the trappings of political democracy but about its heart. The principles are primary, and the processes secondary. As Charles Morris has explained, "[T]he Act's primary emphasis is on the collective-bargaining process, not on elections."[154] Instead, "industrial democracy," as Wagner perceived it, is "the joint control of working conditions by employers and unionized employees acting within the context of collective-bargaining."[155] The point is self-government in the workplace, made possible through collective bargaining. The election—the basis for the analogy to the political model—is a means to that end, not the end itself.[156] As discussed below, some critics have gone further and argued that overreliance on the political model in shaping labor policy has undermined employees' right to representation guaranteed by the NLRA.[157]

A further ground for questioning the political model is that, notwithstanding its provenance and longevity, the industrial-democracy metaphor itself only goes so far. Industrial democracy under the NLRA is not a piece-by-piece replica of political democracy. It is a partial version of democracy.[158] Employees' electoral power is much more cabined than voters' in the political sphere. Employees are able to select "representatives of their own choosing," but only "for the purpose of collective bargaining" with their employer.[159] They have no ability to elect, or vote out, the head of the company, or even their supervisors.[160] Further, unlike a legislature, a union does not govern. It can demand that an employer negotiate but cannot force the employer to agree to

154. Morris, *supra* note 33, at 45; *see also id.* ("[T]he industrial democracy that the Act was meant to foster . . . involves much more than occasional less-than-democratic elections between employers and unions . . . .").

155. *Id.* at 44.

156. *See* Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. SOC. JUST. 819, 819, 838 (2007) (criticizing the political-model approach as "fetishizing [the] electoral process at the expense of employee free choice").

157. *See infra* Part IV.

158. *See* Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 808 (2018) (reviewing ANDERSON, *supra* note 35) ("[M]ainstream aspirations for workers' participation in workplace governance have fallen far short of anything we would ordinarily call 'democracy.' "); Willborn, *supra* note 17, at 726 (describing the NLRA as a "quasi-democracy"); Katherine Van Wezel Stone, *The Post-war Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1566 (1981) (deeming "the industrial pluralist metaphor of the plant as a mini-democracy" as "myth" and "mere illusion").

159. 29 U.S.C. § 157.

160. *See* Estlund, *supra* note 158, at 808 ("The right to elect or depose one's rulers is a right that we take as given in the polity, but that is not a right that the mainstream labor movement seeks in the workplace . . . .").

any given policy.[161] If contract negotiations are unsuccessful, the employer can unilaterally impose terms and conditions of employment.[162]

Even within the realm of collective bargaining, an employee representative's role is limited. Certain aspects of employees' working lives are mandatory subjects of bargaining, but others are only permissive.[163] Employers must bargain over wages, hours, or other matters that can be characterized as "terms and conditions of employment."[164] But no such duty exists over other topics that impact employees in similarly critical ways, including some that go to whether employees have a job at all. For example, courts and the NLRB have held that employers have no obligation to bargain over "managerial decisions[ ] which lie at the core of entrepreneurial control," such as plant closures or capital investments.[165] According to the Supreme Court, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[166]

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161. *See* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 704 (2010) ("Unlike an elected legislature, the union does not have the authority to prescribe conditions in the workplace." (internal quotation marks omitted) (quoting Weiler, *supra* note 47, at 1810)); Weiler, *supra* note 47, at 1809–10 (describing as "misleading" the idea that "equates the limited role of the union with the role of a legislative body"). In light of that disconnect between metaphor and practice, Professor Weiler questioned whether the representation process "requires a procedure comparable to that by which a government is chosen." Weiler, *supra* note 47, at 1809. Despite this obvious distinction, both the NLRB and the Supreme Court have analogized unions to legislatures. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . ."); Serv. Emps. Int'l Union, Local 579, 229 N.L.R.B. 692, 692 n.2 (1977) ("The nature of the relation between a labor organization and an individual employee is more nearly that of a legislator to a constituent.").

162. *See* Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967) (explaining that employers can impose their last, best, and final offer if negotiations have reached impasse), *enforced sub nom.* Am. Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

163. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (describing "wages, hours, and other terms and conditions of employment" as "subjects of mandatory bargaining" and emphasizing that there are nonmandatory subjects).

164. 29 U.S.C. § 158(d).

165. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). The Court later cited Justice Stewart's *Fibreboard* concurrence approvingly in *First National Maintenance Corp. v. NLRB*. *See* 452 U.S. 666, 677 (1981); *see also* Gen. Motors Corp., 191 N.L.R.B. 951, 952 (1971) (declining to order bargaining over "matters essentially financial and managerial in nature"), *enforced sub nom.* UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972); Summers, *supra* note 32, at 41 (listing additional examples). Indeed, the Court has gone so far as to say that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." First Nat'l Maint., 452 U.S. at 678–79.

166. *First Nat'l Maint.*, 452 U.S. at 676. Commentators have criticized the Court's view of the bargaining relationship as contrary to the spirit of the NLRA's promise of a democratic workplace. *See* Summers, *supra* note 32, at 41 ("Even where collective bargaining exists, the promise of industrial democracy has only been partially fulfilled, for neither the law nor the practice has

That approach to governance is not how political democracy works. Such a cabined role for unions is more akin to a system in which the people's representatives make decisions, unless those decisions are really important.

* * *

Because the democracy metaphor is both fundamental and imperfect, the question arises of what aspects of the political model apply to the labor context. What concepts and norms from political elections translate to representation elections? What aspects of election law should govern that process? The next Part engages that question through the lens of one particular example—the gerrymander.

II. THE LABOR GERRYMANDER

The ways in which the industrial-democracy metaphor has been invoked in labor-law discourse, and its consequences for labor policy, can be examined by tracing the career of the gerrymander. This much maligned concept of politicians drawing electoral districts to produce their preferred outcome has been a source of complaint and derision—yet enduringly popular among politicians themselves—in the political sphere. It has also found its way into the realm of union-representation elections. Before examining whether this political creature should find a home in labor law, this Part traces the gerrymander's journey from the statehouse to the union hall, and how it ended up at that Buffalo Starbucks.

A. The Gerrymander in Its Natural Habitat

States redraw their congressional and state legislative districts at least once every ten years to ensure that the districts are of equal

accepted employees as full partners in the enterprise."). Other critics have decried these decisions as a misreading of the NLRA that imposes limits on the bargaining obligation not found in the statute. They argue that the Court's holdings import common-law understandings of the employment relationship that predate the NLRA and are premised on ideas of employer control and prerogative. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 2–7, 121–24 (1983) ("[M]any judicial and administrative decisions are based upon other, often unarticulated, values and assumptions that are not to be found or inferred from the language of the statute or its legislative history."); Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 87–90, 96–98 (2022) (discussing how the judicially created "employer prerogative" expands employer authority in the workplace with minimal statutory basis).

population.[167] Redistricting is a highly manipulable exercise. The drawer of the districts can do so in such a way to maximize the ability of certain groups of voters to elect their preferred candidate and correspondingly minimize the chances of other groups of voters.[168] Partisan figures have an incentive to draw districts that maximize the voting strength of their supporters and entrench their party's hold on power. When the legislative line drawers are also legislators themselves, the self-interest at stake is even more direct because they can draw their own districts to aid their reelection prospects.[169]

This phenomenon has long existed.[170] And in the early nineteenth century, it got a name. In 1812, Governor Elbridge Gerry of Massachusetts approved a map of state senate districts drawn to advantage the Democratic-Republican Party at the expense of the Federalists.[171] Rather than hew to the practice of drawing districts that followed county boundaries, the 1812 map divided Essex County, a Federalist stronghold, into multiple districts.[172] Shortly after Gerry

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167. The equipopulation principle—"one person, one vote"—is grounded in the Equal Protection Clause. *See* Reynolds v. Sims, 377 U.S. 533, 558, 566 (1964) (concluding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators" and that dilution of votes on the basis of place of residence violates basic constitutional rights). Redistricting typically aligns with the census, which determines how many congressional representatives a state will have. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 (providing for representatives to be apportioned according to the populations of the States).

168. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551 (2004) ("The point of gerrymandering is for the party controlling the process (the 'in-party') to distribute its own supporters efficiently—to win as many seats as possible—while wasting the votes of the 'out-party.' ").

169. *See* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 405–07 (1993) (discussing how gerrymandering allows legislatures to self-select by creating districts of their own voters). The most commonly discussed examples of gerrymandering are racial gerrymanders and partisan gerrymanders. *See, e.g.*, Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 554–57 (2011). Although the context and legal framework for the two types are different, a common concern is that they constitute districts based on illegitimate criteria. The gerrymander analogy in the labor-law context is more akin to partisan gerrymanders, so that is the focus of the discussion herein. The jurisprudence surrounding racial gerrymanders is complicated and evolving, and a full account is beyond the scope of this Article.

170. *See* Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (chronicling examples of partisan districting in colonial Pennsylvania and North Carolina and during the first congressional elections in Virginia); ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 23–60 (1907) (tracing the practice during the colonial era and early republic).

171. Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/ [https://perma.cc/6VCY-MLTE]. Gerry was a signer of the Declaration of Independence and later served as Vice President under Madison. *Id.* He was also, by some accounts, a rather strange man. *See id.* Biographers described him as a "nervous, birdlike little person" and a "dyspeptic hothead" who once argued against direct election of representatives altogether. *Id.* (quoting George Athan Billias, Elbridge Gerry: Founding Father and Republican Statesman (1976)).

172. *Id.*

signed the districting bill, a cartoon appeared in the Boston Gazette illustrating one such district with wings, claws, and teeth.[173] The drawing was captioned "the Gerry-mander," a "new species of Monster, which appeared in Essex South District."[174] The new phrase was quick to find its way into political discourse, and the practice continued under its new name.[175]

Almost everyone hates gerrymandering. Recent polls show that approximately ninety percent of voters oppose partisan gerrymandering.[176] It is viewed as unfair and antidemocratic,[177] leading to electoral results that are contrary to the popular will because the drawing party is more successful than it would have been based on vote share alone.[178] The popular critique of gerrymandering also stems from

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173. BOS. GAZETTE, Mar. 26, 1812, at 2.

174. *Id.* (emphasis omitted). The story goes that the cartoon was drawn at a Boston dinner party, causing one of the guests to state that it looked like a salamander. *See* Trickey, *supra* note 171. "No," another guest retorted, "a Gerry-mander!" *Id.* (internal quotation marks omitted).

175. *See, e.g.*, NICK SEABROOK, ONE PERSON, ONE VOTE: A SURPRISING HISTORY OF GERRYMANDERING IN AMERICA 13, 35, 70, 76 (2022) (chronicling examples of the phrase in 1810s Maryland, 1840s Ohio, and 1850s Indiana and Tennessee). Although the practice was widespread, the phrase itself was slow to enter the judicial vocabulary. The first appearance in a federal court opinion was not until 1892, in a case involving unequal voter-registration laws in Georgia, *In re* Appointment of Supervisors, 52 F. 254, 261–62 (S.D. Ga. 1892), and thereafter only a handful of times before the mid-twentieth century. The Supreme Court did not use the term in the electoral context until *Colegrove v. Greene* in 1946, when Justice Frankfurter famously warned that the courts "ought not to enter this political thicket." 328 U.S. 549, 555–56 (1946). It had previously, and for the first time, used the term to describe the gas-utility industry in a Securities and Exchange Commission case. N. Am. Co. v. SEC, 327 U.S. 686, 701 (1946); *see* Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1095–96 (2021) ("[T]he legal claim of partisan gerrymandering did not come into the general public consciousness until the mid-1960s, despite coinage of the term 'gerrymander' in the early 1800s.").

176. John Kruzel, *American Voters Largely United Against Partisan Gerrymandering, Polling Shows*, HILL (Aug. 4, 2021, 12:48 PM), https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling/ [https://perma.cc/9BRG-ZWSN].

177. *See, e.g.*, GRIFFITH, *supra* note 170, at 7 ("The gerrymander . . . is a species of fraud, deception, and trickery which menaces the perpetuity of the Republic of the United States . . . ."); Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) ("[P]artisan gerrymanders . . . debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people."); Whitcomb v. Chavis, 403 U.S. 124, 177 (1971) (Douglas, J., dissenting in part and concurring in the result) ("The problem of the gerrymander is how to defeat or circumvent the sentiments of the community.").

178. *See, e.g.*, Lewyn, *supra* note 169, at 407 (explaining that "a partisan gerrymander may allow 'a party with only a minority of the popular vote [to] assert control over a majority of seats' " or enable "a party that enjoys only a small majority in popular support . . . [to] translate this popular edge into preemptive institutional dominance" (first and third alterations in original) (quoting Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 304 (1991))). In the North Carolina elections under the map at issue in Rucho, for example, Republican candidates received fifty-three percent of the statewide vote, but won ten of thirteen congressional districts. 139 S. Ct. at 2510 (Kagan, J., dissenting).

the perceived unseemliness of self-interested action. As the saying goes, "Voters should choose their representatives, not the other way around."[179] In other words, a desire to impact the outcome of the election is an "improper criteri[on]" for line-drawing decisions.[180]

Opponents of the practice also cast gerrymandering as a form of vote dilution, in which the targeted voters are prevented from full participation in the political process.[181] Even though they can cast a ballot, voters who are the targets of a gerrymander have a less effective vote than other voters or than they would have in a differently drawn district. The drawer of the districts can accomplish this goal through a variety of means, including strategies known as cracking and packing.[182] With cracking, the line-drawing party's opponents are split up among multiple districts, such that they are unable to command a majority in any given district.[183] Packing takes the opposite course by placing the line drawer's opponents into as few districts as possible so that they have very large majorities in those districts but very little presence in the remaining districts.[184] A corollary strategy is for the party in power to spread its own supporters out among districts to create multiple smaller majorities rather than a fewer number of overwhelming ones.[185] By minimizing its margin of victory in any given district, the party avoids "wasting" votes in that district that instead could contribute to additional victories elsewhere.[186] Such manipulation by dilution damages "the political process as a whole."[187]

Along with their impact on the value of a vote, gerrymanders may be problematic because they "disregard[ ] traditional districting

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179. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (internal quotation marks omitted) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)).

180. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 416 (2006) (Kennedy, J.).

181. *See, e.g.*, Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 402–07 (2005) (explaining the vote-dilution theory of gerrymanders); *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) ("Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others.").

182. *See, e.g.*, Issacharoff & Karlan, *supra* note 168, at 551–52.

183. *See id.* at 551 ("[I]f the out-party's supporters can be completely cracked, it can be denied any seats at all.").

184. *See id.* at 552 (describing the "packing" technique).

185. *See* Michael Li & Annie Lo, *What Is Extreme Gerrymandering?*, BRENNAN CTR. (Mar. 22, 2019), https://www.brennancenter.org/our-work/analysis-opinion/what-extreme-gerrymandering [https://perma.cc/328R-UKUD].

186. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015) (explaining the phenomenon of wasted votes).

187. Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion), *abrogated by* Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts").

principles such as compactness, contiguity, and respect for political subdivisions." [188] They break up existing communities, such as neighborhoods, cities, or counties, that share social or economic interests. [189] Unlike gerrymanders, those "objective factors" are considered appropriate bases for districting decisions. [190] Under this view, districts "should be determined in accordance with neutral and legitimate criteria."[191]

Some commentators have argued that a central problem with gerrymandering is that it entrenches existing power structures. The line drawers design safe seats to protect incumbents at the expense of new voices and new ideas in the halls of power.[192] One species of this critique contends that electoral competitiveness is itself a necessary component of a democratic system of government and that partisan gerrymanders rob the process of that core virtue.[193] Others have argued that drawing districts to favor one political party fosters extreme partisanship.[194] Because one party is almost certain to win the general election in such districts, the true competitive race becomes that party's primary. Candidates in primaries must appeal only (or at least largely)

188. Shaw v. Reno, 509 U.S. 630, 647 (1993).

189. *See* Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1385 (2012) (describing gerrymandering's impact on communities that are not necessarily geographically rooted but are instead based on shared concerns).

190. *See Shaw*, 509 U.S. at 647 ("[O]bjective factors . . . may serve to defeat a claim that a district has been gerrymandered . . . .").

191. *Davis*, 478 U.S. at 166 (Powell, J., concurring in part and dissenting in part); *see also* Karcher v. Daggett, 462 U.S. 725, 760–61 (1983) (district lines should be "supported by adequate neutral criteria") (Stevens, J., concurring); Wilson v. Eu, 823 P.2d 545, 616 (Cal. 1992) (Mosk, J., dissenting) ("[R]eapportionment must be objectively undertaken."); Brian Gordon, Essay, *An End to Gerrymandering: How Rigorous and Neutral Design Criteria Can Restrain or End Partisan Redistricting*, 93 TEMP. L. REV. 533, 546–48 (2021) (providing guidelines for neutral criteria to draw congressional districts).

192. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623–26 (2002) (explaining how incumbents are protected in part by the "manipulation of district lines"). This approach often takes the form of a bipartisan "sweetheart gerrymander," where both parties agree to district maps that protect their respective incumbents. *Id.* at 625.

193. *Id.* at 615 (" 'Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interest and views of citizens.' " (quoting Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV., 643, 646 (1998))). Others have downplayed the importance of competitive districts. *See, e.g.*, Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 666–71 (2002) (arguing that bipartisan gerrymanders that reduce competition also increase proportional representation and political diversity).

194. *See, e.g.*, Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1068 (2005) ("The creation of so many safe seats contributes to the polarization of American politics."); Issacharoff, *supra* note 192, at 627–28 (arguing that bipartisan gerrymandering allows both parties to avoid competing for median voters and "rewards the more polarized activist wing of the party").

to members of their party's base, who tend to favor the most ideological version of the party's positions.[195] Candidates who embody those more extreme positions are thus the most likely to succeed in a gerrymandered district.[196] Gerrymandering also fosters unaccountability. Legislators from gerrymandered districts have little incentive to represent the interests of constituents who do not support them, because they do not need those constituents' support to win.[197]

Despite the harms that follow from partisan gerrymandering, the Supreme Court recently held that partisan gerrymander claims are nonjusticiable in federal court.[198] Litigation challenging such gerrymanders continues in state courts.[199] Partisan gerrymandering continues to be widely disfavored by the public, even if it is no longer a matter for the courts.[200]

B. The Gerrymander's Journey into Labor Law

The concept of the gerrymander found its way into labor law early on. It has been used by policymakers, commentators, courts, employers, and unions. The accusation has had various targets, but its typical purpose has been to delegitimize proposed bargaining units or the processes for evaluating such units by associating them with the disfavored practice of self-interested political actors.

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195. *See* G. Alan Tarr & Robert F. Williams, *Introduction*, 37 RUTGERS L.J. 877, 878 (2006) ("[L]egislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system.").

196. *See* Raviv, *supra* note 194, at 1068 (contending that politicians from gerrymandered districts "tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected"). Others have contested this point or argued that gerrymandering is not the primary cause of polarization. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 821 & n.46 (2014) (arguing the increasing geographic concentration of Democrats is the major cause for the rise of safe seats, as opposed to gerrymandering).

197. *See* Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 791 (2021) ("A Republican legislator in a solidly red district could gain reelection only by attending to the preferences and interests of Republicans . . . ."); Robert Colton, Note, *Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering*, 86 FORDHAM L. REV. 1303, 1307 (2017) ("[A]n elected official shielded from dissenting opinions by the manipulation of electoral districts has little incentive to represent the whole of his or her electorate.").

198. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019).

199. *E.g.*, Harper v. Hall, 868 S.E.2d 499, 509 (N.C. 2022), *aff'd sub nom.* Moore v. Harper, 600 U.S. 1 (2023). *Rucho* specifically mentioned such state court litigation as a potential arena for addressing excessive partisan gerrymandering, 139 S. Ct. at 2507, and the Court recently rejected the argument that state courts lack the authority to reject legislative districts drawn by the state legislature in *Moore v. Harper*, 600 U.S. 1, 21–22 (2023).

200. *See* Kruzel, *supra* note 176 ("Nearly 9 in 10 voters oppose the use of redistricting in a manner that aims to help one political party or certain politicians win an election . . . .").

Like the industrial-democracy metaphor, the gerrymander analogy featured in congressional debates over the NLRA. Francis Biddle, the chair of the predecessor NLRB, warned that giving employers or employees a role in unit-determination decisions would result in "unlimited abuse and gerrymandering" that would "defeat the aims of the statute."[201] Senator Robert LaFollette expressed concern that this "is what the automobile trade has done in Detroit, they gerrymandered the district around until they have defeated the purpose of collective bargaining."[202] Business groups opposed to the new legislation invoked the phrase in briefs written to Congress.[203]

From the outset, employers invoked the gerrymander concept to challenge petitioned-for bargaining units as inappropriate. The first appearance of the phrase in an NLRB decision was in 1939—only four years after the NLRA's enactment.[204] In Southern California Gas Co., the Utility Workers Organizing Committee had petitioned the NLRB to represent employees in one of a public utility company's six divisions.[205] The employer opposed such a grouping, arguing that it was "an arbitrary gerrymandered unit evolved by the [union] for the purpose of this proceeding" and that any bargaining unit had to include employees at all six locations.[206] As detailed above, this is essentially the same argument Starbucks made eighty years later in response to the Buffalo organizing drive.[207]

Employers accusing unions of proposing "gerrymandered" units became a common practice in the ensuing decades. They have alleged that employees who do not support unionization are "gerrymander[ed] out of the bargaining unit"[208] or that pro-union employees are "gerrymandered into[ ] a[ ] . . . unit."[209] As at Starbucks, employers have accused unions of gerrymandering in response to recent high-profile organizing campaigns. When the United Auto Workers sought to represent a bargaining unit of maintenance employees at

201. *1934 Senate Hearings*, *supra* note 58, at 82 (statement of Francis Biddle, Chairman, NLRB), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 58, at 1458.

202. *Id.* (statement of Sen. Robert LaFollette).

203. *See 1935 Senate Hearings*, *supra* note 17, at 743 (including briefs written on behalf of business organizations and trade associations), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 17, at 2129; *Hearings on Labor Disputes Act*, *supra* note 62, at 335–37 (including brief on behalf of Associated General Contractors of America), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 17, at 2809–11.

204. S. Cal. Gas. Co., 10 N.L.R.B. 1123, 1137 (1939).

205. *Id.* at 1135.

206. *Id.* at 1137.

207. *See supra* notes 8–16 and accompanying text.

208. S.S. Logan Packing Co., 152 N.L.R.B. 421, 427 (1965).

209. Petitioner's Opening Brief at 21, Dillon Cos. v. NLRB, 809 F. App'x 1 (D.C. Cir. 2019) (No. 19-1118), 2019 WL 4447388.

Volkswagen's only U.S. manufacturing plant, the car company repeatedly labeled the union's proposed grouping a "gerrymandered unit" because it did not also include the facility's production employees.[210] Wal-Mart has likewise used the phrase.[211] So too did Northwestern University when its football players attempted to unionize.[212] The gerrymander label is not limited to cases that make the headlines. It has appeared in decades of cases before the Board or its Regional Directors.[213] Briefs in over thirty courts of appeals cases challenging the Board's unit determinations have featured references to gerrymanders.[214] These cases ranged from a telecommunications firm in Oregon to a grocery store in Colorado to Panera Bread outposts in Michigan, and from armored car drivers in suburban Detroit to housekeepers at a Myrtle Beach resort hotel.[215]

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210. Employer's Request for Review of Regional Director's Decision & Direction of Election at 20–21, 33–35, Volkswagen Grp. of Am., Inc., No. 10-RC-162530 (N.L.R.B. Dec. 23, 2015).

211. Decision & Direction of Election at 22, Wal-Mart Stores, Inc., No. 12-RC-8484 (N.L.R.B. Apr. 27, 2000) ("The Employer argues in its brief that the Petitioner is trying to improperly 'gerrymander' collective-bargaining units . . . .").

212. Brief to the Regional Director on Behalf of Northwestern University at 93, Nw. Univ., No. 13-RC-121359 (N.L.R.B. Mar. 17, 2014) ("Petitioner's exclusion of walk-on football players from its requested unit demonstrates that its gerrymandered unit is . . . not appropriate . . . .").

213. *See, e.g.*, Vanderbilt University's Post-Hearing Brief at 47, Vanderbilt Univ., No. 10-RC-193205 (N.L.R.B. Apr. 13, 2017) ("[T]he Union seeks to represent a gerrymandered . . . unit . . . ."); Employer's Post-Hearing Brief at 2, Rush Univ. Med. Ctr., No. 13-RC-143495 (N.L.R.B. Jan. 27, 2015) ("[A] gerrymandered selection of employees the Union believes [ ] will vote in its favor."); General Electric's Post-Hearing Brief at 17, Gen. Elec. Co., No. 14-RC-073765 (N.L.R.B. Mar. 5, 2012) ("[T]he petitioned-for unit . . . is merely a gerrymandered, non-cohesive grouping of employees."); Stormont-Vail Healthcare, Inc., 340 N.L.R.B. 1205, 1210 (2003) ("[T]he Union is trying to gerrymander the unit . . . ."); Solvay Process Co., 21 N.L.R.B. 882, 899 (1940) ("[T]he Union has sought to gerrymander the appropriate unit in such a manner as to sustain its claim of majority."). One recent example introduced the mixed metaphor that "the Union is attempting to gerrymander and Frankenstein together two separate groups of . . . employees." Employer's Post-Hearing Brief at 5, USC Care Med. Grp., Inc., No. 31-RC-299354 (N.L.R.B. Sept. 9, 2022).

214. *See* cases cited *infra* note 215. Almost all of these examples are from the 1990s and later, perhaps tracking the uptick in federal court litigation over partisan gerrymanders following the Supreme Court's first recognition of such claims in *Davis v. Bandemer* in 1986. 478 U.S. 109, 143 (1986).

215. In this posture, the gerrymander accusation is often lobbed at the Board itself for accepting the union's petitioned-for unit. *See* Reply Brief of Petitioner/Cross-Respondent at 1, Alaska Commc'ns Sys. Holdings, Inc. v. NLRB, No. 20-1032 (D.C. Cir. Aug. 3, 2020), 2020 WL 4464516 ("[T]he Regional Director gerrymandered the voting pool . . . ."); Petitioner's Opening Brief, *supra* note 209, at 21 (contending employees were "gerrymandered into[ ] an existing multi-store Meat unit"); Final Brief of the Petitioner at 20, Bread of Life, LLC v. NLRB, No. 15-1179 (D.C. Cir. Jan. 28, 2016), 2016 WL 355241 ("The certified unit is the result of pure Gerrymandering."); Final Brief of Respondents/Cross-Petitioners at 17, NLRB v. Guardian Armored Assets, LLC, No. 05-1517 (6th Cir. Nov. 4, 2005), 2005 WL 5099244 ("[T]he Board's decision to direct separate elections among employees at two of three terminals that comprise the Employer's armored car business amounts to gerrymandering pure and simple."); Brief of Appellant at 14, Arcadian Shores, Inc. v. NLRB, 580 F.2d 118 (4th Cir. 1978) (No. 77-1717), 1977 WL 203163 (arguing that the bargaining unit was created by "the Board in its zeal to fragment and gerrymander the company's work force").

From Southern California Gas to Starbucks, employers' goal in using the gerrymander analogy is typically to expand the petitioned-for bargaining unit, and thus the electorate. Such moves likely carry with them the objective of swaying the outcome of the election based on the calculation that the more voters in the election, and especially the more voters that the union has not petitioned to represent, the less likely they will vote for union representation.[216]

Turning the tables, unions have characterized employer arguments to expand or otherwise change a petitioned-for bargaining unit as efforts to gerrymander the unit to lessen the chance of a vote in favor of unionization. In one recent high-profile example, union proponents used this language against Amazon after it successfully expanded the petitioned-for unit in advance of the election at its Bessemer, Alabama, facility to include thousands of additional seasonal employees.[217] In a related context, the Board has reviewed allegations that employers discharged, transferred, or promoted pro-union employees "for the purpose of gerrymandering them out of the unit" in advance of an election.[218]

The NLRB itself has invoked the concept. Board members have accused each other of unit-determination decisions that encourage gerrymandering. In Garden State Hosiery Co., the Board approved a unit consisting of the knitting department in a hosiery factory over the employer's argument for a plant-wide unit.[219] It relied in part on the reasoning that employees in that department had already expressed an interest in organizing and that this was a valid consideration in the unit-determination analysis; such employees should not have to "await an election until all their fellows requested one."[220] Dissenting, Member Reynolds attacked the practice of considering the extent of employee organizing as enabling unions to "manipulate the boundaries of the appropriate unit for the sole purpose of constructing another wherein it

216. *See supra* note 11 and accompanying text (discussing that larger units are often more difficult to organize).

217. Lynn Rhinehart, *How Amazon Gerrymandered the Union Vote—and Won*, ECON. POL'Y INST. (Apr. 15, 2021, 10:02 AM), https://www.epi.org/blog/how-amazon-gerrymandered-the-union-vote-and-won [https://perma.cc/9D8T-2QRU].

218. Honda of Haslett, 201 N.L.R.B. 855, 858 (1973); *see also* Dauman Pallet, Inc., 314 N.L.R.B. 185, 200 (1994) (finding that "a reason that the transfers were made was to allow the Company to try to gerrymander the unit"); Lite Flight, Inc., 270 N.L.R.B. 815, 816–17 (1984) (employer "attempted to gerrymander the bargaining unit by declaring two bargaining unit employees to be supervisors" who were ineligible to vote).

219. 74 N.L.R.B. 318, 319, 324 (1947).

220. *Id.* at 321. The Board rejected the idea that it "should deny the knitting department employees the benefits of the Act until the other employees also become interested in collective bargaining" in favor of an approach that would "make collective bargaining an immediate possibility for those who may presently desire it." *Id.* at 320.

comprises a majority," which is "commonly referred to in political science as 'gerrymandering.' "[221] The majority disputed the aptness of the metaphor, countering that "use of the loaded word 'gerrymandering' in this connection appears to us to beg the question" of whether the petitioned-for unit was appropriate.[222] " 'Gerrymandering' is districting for an improper purpose," the majority noted. [223] By contrast, considering whether employees in the proposed unit have already organized aligns with the statutory purpose of "insur[ing] to employees the full benefit of their right to self-organization and to collective bargaining."[224]

Other intra-agency squabbles on the subject have centered on competing notions of what would constitute a gerrymander in the unit-determination context. The dissent in Great Lakes Pipe Line Co. complained that the direction of an election for a subset of the employer's employees "approaches the familiar gerrymandering practice."[225] The majority countered that its approach "is in fact an effective guarantee against the very gerrymandering practices envisaged by our dissenting colleague" because it avoided "the arbitrary inclusion of such groups in a larger unit wherein they would have no effective voice to secure the benefits of collective bargaining." [226] In Wheeling Island Gaming, Inc., the Board found that a petitioned-for

221. *Id.* at 326 (Member Reynolds, dissenting). The *Garden State Hosiery* dissent was not the first instance of an NLRB member invoking the gerrymander to describe strategic efforts by parties to a representation proceeding. Several years earlier, Member Leiserson expressed doubt that the NLRB could split up an existing unit and order elections in separate units of those employees, as a party to the proceeding had requested. Todd-Johnson Dry Docks, Inc., 18 N.L.R.B. 973, 989 (1939) (Member Leiserson, concurring). He worried that "the assumption of authority thus to rearrange existing and established units for voting purposes opens the door to gerrymandering, which I cannot believe Congress intended by the wording of the Act." *Id.*

222. *Garden State Hosiery*, 74 N.L.R.B. at 323.

223. *Id.*

224. *Id.* at 323–24 (internal quotation marks omitted) (quoting National Labor Relations Act, ch. 372, § 9(b), 49 Stat. 449, 453 (1935)). Congress responded to this internecine debate in the Taft-Hartley Act. It added to Section 9 of the NLRA the instruction that "the extent to which the employees have organized shall not be controlling" in deciding whether a petitioned-for unit is appropriate. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 9(c), 61 Stat. 136, 144 (1947) (codified as amended at 29 U.S.C. § 159(c)(5)). The new language did not actually differ from the NLRB's prior approach. The extent of organizing was never dispositive—it "can never be the sole criterion, nor is it often the controlling one," but must be accompanied by "the coexistence of certain other facts that establish the feasibility of bargaining" in the petitioned-for unit. *Garden State Hosiery*, 74 N.L.R.B. at 322. The Supreme Court also later made clear that Taft-Hartley "was not intended to prohibit the Board from considering the extent of organization as one factor . . . in its unit determination." NLRB v. Metro. Life Ins. Co., 380 U.S. 438, 442 (1965). Or as the D.C. Circuit memorably put it, "Section 9(c)(5), with its ambiguous word 'controlling,' contains a warning to the Board almost too Delphic to be characterized as a standard." Local 1325, Retail Clerks Int'l Ass'n v. NLRB, 414 F.2d 1194, 1199 (D.C. Cir. 1969).

225. 92 N.L.R.B. 583, 586 (1950) (Member Murdock, dissenting).

226. *Id.* at 585 (majority opinion).

unit of poker dealers on a riverfront casino who shared a community of interest was nonetheless inappropriate because their interests were not sufficiently distinct from other employees.[227] The dissent contended that the majority's focus on the narrowness of the unit was misplaced and that only random groupings of some but not all dealers would constitute inappropriate "gerrymandered units."[228] A similar exchange was on display in Riverside Methodist Hospital, where the majority rejected a petitioned-for unit of maintenance employees as insufficiently distinct from the rest of the workforce, but the dissent would have permitted an election within that smaller group because the union "ha[d] not sought to gerrymander a random group of employees."[229]

Courts, too, have gotten in on the game. The first judicial reference to gerrymanders in the labor-law context appeared less than a year after the NLRA's enactment. Describing the NLRB's powers under the new law, the court observed that "[i]mplicit in the power to determine the unit appropriate for the purposes of collective bargaining is the power to gerrymander, and thereby to aggrandize or crush a labor organization."[230] In another early case, the U.S. Court of Appeals for the Seventh Circuit rejected the Board's unit determination after the employer characterized it as a " 'gerrymander' method of grouping heterogeneous groups" that was "at odds with the Company's established hierarchy of management organization."[231] Courts have continued to warn that the Board's unit determinations would not be enforced "[i]f the sought unit represented a crude gerrymander, so delineated that the petitioning unions could win an election in it."[232]

A recent flurry of gerrymander accusations accompanied the NLRB's 2011 decision in Specialty Healthcare & Rehabilitation Center

227. 355 N.L.R.B. 637, 637 (2010).

228. *Id.* at 638 (Member Becker, dissenting).

229. 223 N.L.R.B. 1084, 1087 (1976); *id.* at 1088 (Chairman Murphy, dissenting).

230. Bendix Prods. Corp. v. Beman, 14 F. Supp. 58, 66 (N.D. Ill. 1936), rev'd, 89 F.2d 661 (7th Cir. 1937).

231. Marshall Field & Co. v. NLRB, 135 F.2d 391, 391 (7th Cir. 1943). Notably, *Bendix Products* and *Marshall Field* were some of the first federal court opinions to use the phrase at all. *See supra* note 175. Another early use was also in the labor context, though in a case involving railroad unions, which are governed by the Railway Labor Act rather than the NLRA. *See* Bhd. of Ry. & Steamship Clerks v. Nashville, Chattanooga & St. Louis Ry. Co., 94 F.2d 97, 101 (6th Cir 1937) (warning that certifying a bargaining unit that "ignores the basic facts of historical development, similarity of employment, community of interest, and well-defined group choice" constitutes a "type of gerrymandering").

232. S.D. Warren Co. v. NLRB, 353 F.2d 494, 498 (1st Cir. 1965); *see also* Nestle Dreyer's Ice Cream Co. v. NLRB, 821 F.3d 489, 499 (4th Cir. 2016) (describing an earlier decision denying enforcement to a Board order involving "an apparent union gerrymander").

of Mobile.[233] Specialty Healthcare had clarified the standard for determining whether a petitioned-for unit was appropriate in situations where an employer argued that the only possible appropriate unit had to include additional employees.[234] Under the Specialty Healthcare standard, if the employees in the petitioned-for unit shared a community of interest, the burden was on the party seeking to place additional employees in the unit to show that those employees "share[d] an overwhelming community of interest with the included employees."[235] Critics of the standard, including employer groups, dissenting Board members, and some judges, were quick to label it a gateway to gerrymandered units that excluded employees to guarantee a union victory.[236] When a new administration appointed new NLRB members, Specialty Healthcare was an early target. The newly constituted NLRB emphasized in PCC Structurals, Inc. that the unit-determination analysis should ask not only whether the employees in a petitioned-for unit share a community of interests but also whether any employees excluded from the unit "have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members."[237] That standard was needed to "ensure[ ] that

233. 357 N.L.R.B. 934 (2011), *enforced sub nom.* Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013), *overruled by* PCC Structurals Inc., 365 N.L.R.B. No. 160 (Dec. 15, 2017), *overruled by* Am. Steel Constr. Inc., 372 N.L.R.B. No. 23 (Dec. 14, 2022).

234. *Id.* at 943.

235. *Id.* at 934. Despite vigorous challenge by the management bar, every court of appeals to consider the *Specialty Healthcare* standard upheld it. Rhino Nw., LLC v. NLRB, 867 F.3d 95, 99–102 (D.C. Cir. 2017); Constellation Brands, U.S. Operations, Inc. v. NLRB, 842 F.3d 784, 791–93 (2d Cir. 2016); FedEx Freight, Inc. v. NLRB, 839 F.3d 636, 638–39 (7th Cir. 2016); NLRB v. FedEx Freight, Inc., 832 F.3d 432, 439–45 (3d Cir. 2016); Macy's, Inc. v. NLRB, 824 F.3d 557, 564–70 (5th Cir. 2016), *rehearing denied*, 844 F.3d 188 (5th Cir. 2016); *Nestle Dreyer's Ice Cream*, 821 F.3d at 495–502; FedEx Freight, Inc. v. NLRB, 816 F.3d 515, 522–27 (8th Cir. 2016); *Kindred Nursing Ctrs.*, 727 F.3d at 559–65.

236. *See, e.g.*, Macy's, 844 F.3d at 193 (Jolly, J., dissenting from denial of rehearing) (warning that the NLRB's analysis " 'fail[ed] to guard against . . . an apparent union gerrymander' " (quoting *Nestle Dreyer's Ice Cream*, 821 F.3d at 499)); DPI Securprint, Inc., 362 N.L.R.B. 1407, 1415 (2015) (Member Johnson, dissenting) (describing the majority's approval of a petitioned-for unit as "arbitrary gerrymandering"), *abrogated by PCC Structurals*, 365 N.L.R.B. No. 160; Macy's, Inc., 361 N.L.R.B. 12, 18 (2014) (detailing Chamber of Commerce's view that *Specialty Healthcare* would "allow 'gerrymandering' "), *abrogated by PCC Structurals*, 365 N.L.R.B. No. 160; *NLRB Overreach Not Overlooked by House Education and Workforce Committee*, Nat'l Right to Work Comm. (May 29, 2012), https://nrtwc.org/nlrb-overreach-not-overlooked-by-house-education-and-workforce-committee/ [https://perma.cc/PUE7-CZGV] (arguing that *Specialty Healthcare* "empowered union bosses to gerrymander the workplace to their own advantage"). *Macy's* raised the specter of "union gerrymanders" in asking the Supreme Court to review the *Specialty Healthcare* standard, Petition for Writ of Certiorari at 30, Macy's Inc. v. NLRB, No. 16-1016 (U.S. Feb. 16, 2017), but the Court denied cert, Macy's Inc. v. NLRB, 582 U.S. 914 (2017) (mem).

237. *PCC Structurals*, slip op. at 11 (quoting *Constellation Brands*, 842 F.3d. at 794), *overruled by Am. Steel Constr.*, 372 N.L.R.B. No. 23.

bargaining units will not be arbitrary, irrational, or 'fractured'—that is, composed of a gerrymandered grouping of employees."[238]

As the above discussion chronicles, the invocation of the gerrymander in the labor context has been widespread and varied. The gerrymander accusation has been leveled by employers against unions, unions against employers, employers or unions against the NLRB, the NLRB against employers or unions, judges against the NLRB, and Board members against one another. [239] Although the accused gerrymanderers have denied the label or challenged the accusations on the facts, none have argued that the gerrymander allegation is conceptually inappropriate. This represents a missed opportunity and is the issue to which this Article turns next.

III. THE CONCEPTUAL MISMATCH OF THE GERRYMANDER ANALOGY

The concept of the gerrymander is well entrenched in both election law and labor law. From the earliest years of industrial democracy, this bugaboo of political democracy has raised its head.[240] On some levels, the importation of the concept from the latter to the former makes sense. Bargaining-unit determinations and legislative districting both involve defining an electorate. In both contexts, parties to the election have a strategic interest in shaping the scope of the electorate to reach a desired result.[241] Other parties have an incentive to delegitimize an election they are likely to lose by blaming the process. So the gerrymander analogy has some surface appeal.

Upon closer inspection, however, the analogy begins to fall apart. Perhaps because the term is an equal-opportunity insult that both unions and employers use to advance their interests, its relevance

238. *Id.* at 7. *PCC Structurals* was one of a series of decisions overruling precedents that were issued in the final month of Republican NLRB Chairman Philip Miscimarra's term, a cascade of opinions referred to waggishly as the "Miscimarra Massacre," or, for the portmanteau inclined, the "Miscimassacre." Craig Becker, J*oint Employer Ruling Reveals Trump NLRB's True Motives*, LAW360 (Aug. 26, 2020, 4:53 PM), https://www.law360.com/employment-authority/articles/1304411/joint-employer-ruling-reveals-trump-nlrb-s-true-motives [https://perma.cc/5P88-GFS4]; Sharon Block, *Miscimarra's Parting Shot: Was It a December Massacre?*, ONLABOR (Dec. 19, 2017), https://onlabor.org/miscimarras-parting-shot-was-it-a-december-massacre/ [https://perma.cc/SH9E-3RVG]. Turnabout is fair play, it seems, because the Board recently overruled *PCC Structurals* and returned to the *Specialty Healthcare* standard. *Am. Steel Constr.*, slip op. at 2.

239. By focusing on NLRB decisions, court opinions, and briefs, the above discussion does not necessarily capture the full history of the gerrymander's career in labor law. A large number of representation cases never reach the Board or courts but are instead resolved with unpublished decisions from a Regional Director, which are less easily accessible or searchable.

240. *See supra* Section II.B.

241. *See, e.g.*, Zamadics, *supra* note 9, at 466 (explaining how strategic choice of the size of bargaining units can help advance the interests of unions or employers).

to the labor-law field has not been critically examined.[242] This Part undertakes that examination. A comparison of the purposes, processes, and interests at stake in political elections and union-representation elections reveals that the gerrymander concept does not really map onto[243] the unit-determination process. The two contexts differ in three critical respects that render the gerrymander analogy misplaced. First, the self-interest that makes a districting decision a gerrymander in the political context is a central feature of unit determinations. Second, bargaining-unit determinations are not part of a broader political process in the same way as redistricting. Third, some aspects of gerrymandering that are considered harms in the political context are less likely to occur in the labor context.

A. Self-Interest Is Not an Improper Criterion for Unit Determinations

An initial and overarching flaw with importing the gerrymander concept into the unit-determination context is that bargaining units that take account of employee voters' views and identities are not actually gerrymanders at all. The underlying concern with gerrymandering in the political context is that the intent to promote a particular result is an "improper criteri[on]" for designing districts.[244] Instead, the argument goes, districting decisions should be made objectively, based on neutral criteria.[245] But that critique does not land in the labor context, because self-interest is baked into the unit-determination process on both a policy and practical level.

Unlike legislative districts, bargaining units are drawn for a particular purpose—to be appropriate for collective bargaining.[246] And labor law affirmatively promotes that result. Accordingly, when unions propose bargaining units consisting of employees who are likely to vote in favor of collective bargaining, this is not really a "gerrymander" at all because that concept refers to line drawing based on improper criteria. Promoting collective bargaining is not improper; it is the stated policy of the NLRA. One of the statute's express purposes is "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of . . . designation of

242. *See supra* pp. 437–439 (tracing use of gerrymander analogy by both employers and unions).

243. Pun intended.

244. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 416 (2006) (Kennedy, J.) ("Judicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations."). The NLRB itself has explained that " '[g]errymandering' is districting for an improper purpose." Garden State Hosiery Co., 74 N.L.R.B. 318, 323 (1947).

245. *See supra* notes 188–191 and accompanying text.

246. 29 U.S.C. § 159(a) (2018).

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."[247] Under the NLRA, collective bargaining is thus not only permitted but encouraged. Unlike in the political context, therefore, one electoral result aligns with the underlying purposes of the legal regime under which the election is held. There is no equivalent in the political context. No statutory policy encourages Democratic or Republican representation or promotes one party's policy preferences.[248]

Given the NLRA's express statement of policy in favor of collective bargaining, when it comes to unions or employees seeking representation, self-interest is not only part of the unit-determination process but is, in some ways, the point. Results-oriented line drawing is a feature of the unit-determination process, not a bug. Opponents of this view might argue that Section 9(c)(5) of the NLRA identifies just such an improper criterion in its proscription that the "extent to which the employees have organized shall not be controlling" in unit-determination decisions.[249] But saying that the proposed electorate's views on unionization cannot be the only basis for the scope of a unit does not mean it cannot be a consideration. As the Supreme Court has recognized, Section 9(c)(5) "was not intended to prohibit the Board from considering the extent of organization as one factor . . . in its unit determination."[250]

In addition, the interests of employees seeking representation are valid criteria in unit determinations because the petitioning employees are creating a democracy for themselves. The right that the NLRA protects is not just organization but "self-organization."[251] And it grants employees the "fullest freedom" in that endeavor.[252] Logically encompassed within that guarantee is the choice not only to organize but also with whom to organize.[253] Identifying other employees who also

247. *Id.* § 151.

248. Critics of this view might argue that the NLRA's affirmative support for collective bargaining was scaled back by the Taft-Hartley Act, which added to the statute that employees have the "right to refrain" from concerted activity like collective bargaining. *Id.* § 157. But Taft-Hartley did not remove or alter the language in Section 1 of the NLRA about "encouraging the practice and procedure of collective bargaining" even as it amended other parts of that section. *Id.* § 151; *see* Morris, *supra* note 33, at 23 (rebutting the argument that Taft-Hartley fundamentally altered the basic policy of the NLRA).

249. 29 U.S.C. § 159(c)(5).

250. NLRB v. Metro. Life Ins. Co., 380 U.S. 438, 442 (1965).

251. 29 U.S.C. § 157.

252. *Id.* § 159(b).

253. The NLRB has recognized this point. It explained in *Specialty Healthcare* that "employees exercise their Sec. 7 rights not merely by petitioning to be represented, but by petitioning to be represented in a particular unit" and that those rights include "the right to choose

desire representation is a proper exercise of the employee choice that the NLRA guarantees. Moreover, designing a bargaining unit is a generative act. In an unrepresented workplace, the petitioning employees or union create a democratic body where none previously existed.[254] The initiators of such a project reasonably should have a degree of freedom in shaping it. There is no analogue when drawing district lines. Gerrymandering in the political context involves interested parties taking advantage of an existing structure (a legislature) and an external obligation (the constitutional requirement to redistrict) and event (the Census) to advance their own interests. It lacks the same element of creation and self-determination that underlies the choice of a bargaining unit.

Even apart from their views on unionization, the identity of the employee voters is still a relevant factor in unit-determination decisions. Indeed, it is the core of the community-of-interest analysis that the NLRB uses to determine whether a unit is appropriate. That inquiry looks to who the employees in the proposed unit are and what they do.[255] Taking account of the identity of the would-be voters when crafting the electorate is thus not only permissible but crucial to the undertaking. The NLRB must know who the voters in a unit are to know if collective bargaining would be workable and meaningful in that unit or, in the language of the NLRA, whether that unit would be appropriate for collective bargaining. The veil of ignorance is not a virtue. Accordingly, the argument advanced by some gerrymander critics that legislative districting should not take into account any considerations other than numerical equipopulation is inapplicable in the labor context.[256]

While the NLRA's promotion of collective bargaining protects union efforts to identify union-friendly units from gerrymander accusations, the requirement that units be appropriate for collective bargaining provides some similar cover to employers. Good-faith

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whom to associate with." Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 941 n.18 (2011).

254. *See* Becker, *supra* note 47, at 580 ("The union election inaugurates—it is constitutive of—the system of labor representation. In contrast, the political election is embedded within an already institutionalized system of representative government.").

255. *See supra* p. 422.

256. Admittedly, not all arguments against gerrymandering are premised on the idea that only neutral criteria should be used. Under some state constitutions, districts must be drawn to preserve "communities of interests." Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 244–45 (2019). The phrase is often undefined, leaving courts and legislatures looking to a variety of factors when evaluating this criterion. *Id.* at 245. Notably for the distinction with unit determinations, some states specifically exclude consideration of voters' political views from the analysis. *Id.*

employer arguments for or against a particular unit that are grounded in the workability of collective bargaining in that unit do not warrant the gerrymander sobriquet.[257] Here, too, such arguments align with statutory purpose and thus are not improper considerations.

The distinction between districting and unit determinations regarding self-interest also operates on a practical level. The scope of a bargaining unit is always, and necessarily, in the hands of an interested party. The NLRB itself has no responsibility, or even authority, to create units on its own initiative. The starting point is always the unit proposed by the union or employees in a representation petition.[258] Similarly, there are no objectively neutral criteria for creating bargaining units that were not, in some way, in the hands of one party or the other. The petitioned-for unit comes from whatever party filed the petition (typically a union or employees). Even some of the neutral-sounding factors for grouping employees in the community-of-interest analysis—like administrative organization, degree of employee interchange, or existing working conditions—reflect choices made by the employer in structuring its operations. They do not exist independently of the interests of an actor that is also a party to the representation proceeding. The efforts by opponents of gerrymanders in the political context to identify criteria for drawing district lines that have no, or less obvious, partisan overlay, such as geographic contiguity or existing city or county borders,[259] are thus inapplicable in the unit-determination context. In the language of gerrymander jurisprudence, there are no "traditional districting principles" based on "objective factors" for unit determinations.[260] Nor are there external numerical requirements for bargaining units analogous to the equipopulation mandate for legislative districts.

Moreover, the views of interested parties are even more entrenched in the unit-determination process than the districting process. Unit determinations are one-off decisions in the context of a specific election, and the candidates in that election get to weigh in on the makeup of the electorate. That last point is sometimes the case with legislative districting, as when legislators redraw their own districts, but not necessarily so—the legislators drawing the districts might not

257. An example of such arguments might be that the employees in the proposed bargaining unit lack an internal community of interest, and that the grouping is random or arbitrary.

258. Boeing Co., 337 N.L.R.B. 152, 153 (2001).

259. *See, e.g.*, *Redistricting Criteria*, NAT'L CONF. OF STATE LEGISLATORS, https://www.ncsl.org/redistricting-and-census/redistricting-criteria (last updated July 16, 2021) [https://perma.cc/T2UP-LX9L] (identifying "traditional districting principles"); Karcher v. Daggett, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) (criticizing districting plan that "wantonly disregards county boundaries").

260. Shaw v. Reno, 509 U.S. 630, 647 (1993).

be running for reelection, or the districts might be for a different body (Congress versus state legislature or state house versus state senate). The involvement of interested parties means that self-interest is necessarily part of the equation in unit determinations. Because such interests are an inherent part of the process, they are not a threat to the process the way they are in the political-gerrymander context.

B. Unit Determinations Do Not Pose a Risk of Political-Process Harms

The gerrymander is also an odd fit in the labor context because representation elections are not part of a broader political process in the same way as redistricting. The workplace is not a polity; there is no broader governmental body apart from the bargaining unit.[261] Elections are simply a more targeted exercise in the labor context than in the political context. In light of these distinctions, the impact of a bargaining unit designed to favor unionization is both less consequential and more limited in scope than that of a gerrymandered political district. Unlike with the latter, there is no "political process as a whole" that a purportedly gerrymandered unit could harm.[262]

A unit-determination decision has fewer implications for employees excluded from the bargaining unit than a districting map has on voters outside of a particular district. The union chosen by employees in the unit has no power over employees not in the unit, whereas a legislator elected from a gerrymandered district joins a legislature that passes law governing everyone in the jurisdiction.[263] The result of a unit determination that excludes employees from a proposed unit is that employees do not vote in an election that does not affect them, which is not vote dilution in any legally cognizable sense. It is more like residents of an unincorporated area not getting to vote for city council in a nearby town.[264] Even if union efforts to exclude

261. Cf. Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 330 (2008) ("In contrast to political elections, which occur within the framework of our existing democracy, union representation elections are the starting point for industrial democracy.").

262. Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion).

263. It is possible that employers may extend union-negotiated terms to nonunion employees in the workplace to avoid having different working conditions for otherwise similarly situated employees. But this is not as direct an impact as legislation. The winner of a political election can push for laws that, by their own force, affect everyone in the jurisdiction. By contrast, a union that wins a representation election can negotiate terms with the employer, but those terms have no such force beyond the bargaining unit; the employer has to choose to apply those terms to the remainder of its workforce.

264. In some ways, representation elections are analogous to elections in special-purpose districts, where the franchise is limited to individuals with a particularized interest in the matter

certain employees from the unit may resemble a gerrymander in some general sense, it does not carry the same harm.

For similar reasons, the districting tactics that can draw charges of vote dilution in the political-gerrymander context—packing and cracking[265]—are not tools likely to be utilized in the labor context. These tactics are based on the premise that all voters must go somewhere, like pieces of a larger puzzle. But this is not the case with unit determinations. Not all employees in a workplace must be placed in a bargaining unit the way all voters in a state must be part of some legislative district.[266] Employees excluded from one particular unit are not necessarily placed in a different one. Unit determinations thus are not a zero-sum game the way redistricting is. The makeup of other possible bargaining units is not at issue in any particular unit-determination decision. The union can seek to exclude employees from the petitioned-for unit, but where, if anywhere, those employees go is beyond the scope of the representation proceeding. In this sense, legislative districting and unit determinations are different tasks; unit determinations create new electorates, while legislative districting divvies up an existing one.

In addition, a union wants to represent the unit it petitions for but might not particularly care about "winning" other units at the same employer. There might not even be any other such units. The union thus has no need to dilute the influence of union opponents other than in the one unit at issue. Accordingly, a union is more likely to try to exclude nonsupporters from the bargaining unit it seeks to represent than to crack union opponents by including a small number of them and spreading out the remainder in other units. Similarly, there is no incentive for a union (or an employer) to minimize its majority in any given group of employees in order to spread its supporters out among multiple units. Likewise, there is no opportunity for packing anti-union employees into a single unit. A union simply has no ability to propose a unit that it does not want to represent. A union thus cannot manipulate the entire workplace landscape by proposing a unit of pro-union employees the way one political districting decision necessarily impacts all the others.

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up for a vote and typical law-of-democracy principles do not necessarily apply. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 726–28 (1973) (holding that the equipopulation principle did not apply to elections for water-storage district given such a district's "special limited purpose and . . . the disproportionate effect of its activities on landowners as a group").

265. *See supra* notes 182–184 and accompanying text.

266. *See* Oswalt, *supra* note 29, at 807–08 (explaining that NLRB will evaluate appropriateness of a bargaining unit in a given workplace only after receiving petition that a specifically identified group of employees want representation).

Moreover, exclusion of employees opposed to union representation from a proposed bargaining unit is not only unobjectionable from a democratic process standpoint, it also aligns with the policies of the NLRA. Purportedly "gerrymandered" units of pro-union employees make it more likely that anti-union employees will not be represented. The NLRA provides that employees have the "right to refrain" from union activity,[267] and excluding anti-union employees from a bargaining unit promotes their ability to exercise that right. It is unclear why such employees would take issue with that result.

Finally, the targeted nature of union-representation elections also means that the level of support a union enjoys in the workplace as a whole is not a relevant metric for unit determinations. Accordingly, there is no equivalent to the concern in the political context that gerrymandering results in a higher success rate than is warranted by a party's overall vote share in the state.

C. Other Gerrymander Harms Are Unlikely in the Unit-Determination Context

A third point of departure that calls the gerrymander analogy into question is that some of the other harms associated with gerrymandering in the political context are less likely to occur in the labor context.

For one, unit determinations do not carry with them the risk of entrenchment that accompanies gerrymandering in the legislative-districting context. Unions that propose bargaining units in a representation petition are not incumbents seeking to protect their own or their allies' hold on power. Instead, they are challengers to the existing power structure (i.e., the employer). Crafting bargaining units of employees likely to vote for union representation thus does not entrench existing power structures, because a vote in favor of representation replaces the existing dynamic of employer domination in the workplace.

Similarly, the excessive partisanship concerns caused by gerrymanders that make the party primary the determinative race rarely arise in the labor context. Representation elections almost never have anything akin to primaries. Most representation elections feature a single union "candidate," with employees voting yes or no on whether they want to be represented by that one union. Between 1997 and 2009, for example, only five percent of representation elections featured two

267. 29 U.S.C. § 157.

or more unions.[268] That same figure held in 2021.[269] Moreover, what union is on the ballot is typically determined by the industry in which the employees work, rather than the union's ideological views or policy agenda. The United Steelworkers would represent steelworkers, Service Employees International Union would represent janitors, United Food and Commercial Workers would represent grocery store employees. There are exceptions where more than one union conceivably could represent the same group of employees. For example, teachers might be represented by the National Education Association or the American Federation of Teachers.[270] Even in these situations, any fights stemming from such overlap are more likely to play out prior to the filing of an election petition than at the ballot box.[271]

Another concern with gerrymanders in the political context that has less purchase in the labor context is the idea that legislators from safe districts will lack incentive to represent constituents whose votes they do not need. Labor law is structured to lessen the risk that a successful union will ignore constituents of the "opposite" party (i.e., employees who voted against representation). As a corollary to the concept of exclusive representation, unions owe a "duty of fair representation" to all employees in the bargaining unit.[272] Under the duty of fair representation, a union's actions toward the employees it

268. Drew M. Simmons, *National Labor Relations Board (NLRB) Union Representation Elections, 1997-2009*, U.S. BUREAU OF LAB. STAT. 3 (June 30, 2010), https://www.bls.gov/opub/mlr/cwc/national-labor-relations-board-nlrb-union-representation-elections-1997-2009.pdf [https://perma.cc/A9YH-HG9N].

269. A search of the Recent Election Results page of the NLRB website reveals sixty-nine elections involving two or more labor organizations in 2021, out of 1,252 elections that year. *Recent Election Results*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/reports/graphs-data/recent-election-results [https://perma.cc/6RFZ-VZF5] (last visited Feb. 7, 2024). One reason for this dearth of interunion contests is the AFL-CIO's prohibition on raiding among its fifty-eight member unions. Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 56 (2008). The AFL constitution provides that none of its affiliate unions "shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate." AFL-CIO CONST. art. XX, https://aflcio.org/reports/afl-cio-constitution [https://perma.cc/WAQ9-BF5X].

270. Additionally, although all Starbucks stores that have unionized so far are represented by Workers United, the UFCW petitioned to represent employees at three stores in Wisconsin. Paul Blest, *The Starbucks Union Push Is So Successful It Could Start a Turf War*, VICE (May 5, 2022, 4:15 PM), https://www.vice.com/en/article/bvnqjd/wisconsin-starbucks-unions-ufcw [https://perma.cc/AD6A-B7UD].

271. There are some studies showing that employees are more likely to choose unionization where more than one union is on the ballot in a representation election. MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 207 (1987); Marcus Hart Sandver & Kathryn J. Ready, *Trends in and Determinants of Outcomes in Multi-union Certification Elections*, 19 J. LAB. RSCH. 165, 170–71 (1998). But the author is unaware of any research examining whether employees will select the more "partisan" union in such situations.

272. Vaca v. Sipes, 386 U.S. 171, 177 (1967).

represents must not be "arbitrary, discriminatory, or in bad faith."[273] That duty extends to the union's treatment of employees who are not members of the union or did not vote for representation, thus requiring that the union attend to those employees' interests to the same degree it attends to the interests of its most die-hard supporters.[274] Unions that breach that duty face legal liability.[275] Unlike a politician elected from a gerrymandered district who has little incentive to attend to the interests of voters from the opposing party whose votes he does not need for reelection, therefore, a union is legally obligated to represent the interests of such voters.

* * *

None of this is to say that the concerns underlying the gerrymander accusation have no relevance in the labor context. Parties or policymakers that manipulate unit-determination decisions to undermine the purposes of the NLRA harm both the process and the substantive policies of the statute. Use of the term thus could still be warranted when arguments about the scope of a bargaining unit deviate from the goal of creating a unit that is appropriate for the purpose of collective bargaining. It may accurately describe a situation where an employer seeks to add additional employees to a petitioned-for unit with the goal of making union representation less likely, where bargaining would have been effective in the smaller unit. Likewise, a union would open itself up to that critique by proposing a grouping of pro-union employees whose working conditions are so disparate that the union and employer could not effectively negotiate terms that would cover all of them. But even in that circumstance, the more precise criticism is that the unit is arbitrary, not that it is gerrymandered. The problem is not that the union has proposed a unit it is likely to win—the typical understanding of a gerrymander—but that the unit is one the union is likely to win and the union victory would not lead to

273. *Id.* at 190.

274. *See, e.g.*, Teamsters Local 435, 317 N.L.R.B. 617, 617 n.3 (1995) (finding union breached its duty of fair representation by advocating that employees who had voted against union representation have less seniority), *enforced*, 92 F.3d 1063 (10th Cir. 1996).

275. Specifically, they violate Section 8(b)(1)(A) of the NLRA, which prohibits unions from "restrain[ing] or coerc[ing] . . . employees in the exercise of the rights guaranteed" by the statute. 29 U.S.C. § 158(b)(1)(A). Such violations can include refusing to process grievances of employees who are not union members, *see* American Postal Workers Union, 328 N.L.R.B. 281, 282 (1999), or prohibiting employees from accessing information about job referrals, *see* IATSE Local 16, 371 N.L.R.B. No. 100, slip op. at 3 (May 20, 2022).

meaningful bargaining.[276] So even if the harm at issue is similar, the term is still not quite right.

IV. THE DANGERS OF AN OVEREXTENDED METAPHOR

Despite the foundational idea of industrial democracy, not all norms and concepts from the political arena translate into the labor-law sphere. This disconnect is not just a matter of semantics. Failure to recognize this mismatch can lead to policies that undermine the goals of federal labor law. Continued invocation of the gerrymander in the representation-election context threatens such a result. Delegitimizing efforts to hold elections in units of employees likely to support collective bargaining as gerrymandering has the potential to make collective bargaining less likely. This is both a doctrinal and normative harm, undercutting statutory policy and the benefits that worker voice provides to employees and civic society more broadly. Without critical analysis, this political concept—which has already crawled its way deep into labor-law discourse—could do damage to some of the foundations of industrial democracy as properly understood.

Others have identified the dangers of applying the political model to labor law. Then-Professor (and later NLRB Member) Craig Becker argued that the law's treatment of employers as candidates in representation elections has weakened employees' right to representation by increasing employers' ability to interfere with it.[277] For example, employers can take advantage of their status as parties to representation proceedings to delay the vote by litigating more and more issues, sapping the organizing drive of momentum before employees have a chance to vote.[278] That tactic sometimes drives unions to consent to the employer's preferred terms for the election, including the scope of the bargaining unit, to avoid such delay.[279] And as candidates to the election, employers also can influence employees' choice directly by campaigning against unionization. Moreover, they have succeeded in elevating their opposition to unions to the level of

276. Member Becker raised a similar distinction in his dissent in *Wheeling Island Gaming, Inc.*, where he emphasized that the problem with an inappropriate unit is not that it is narrowly drawn but that it is random (though he referred to the latter as "gerrymandered"). 355 N.L.R.B. 637, 638 (2010) (Member Becker, dissenting).

277. Becker, *supra* note 47, at 498–99, 569.

278. *Id.* at 532–35.

279. *Id.* at 534. This may be what happened in the Amazon election in Bessemer, Alabama, where the union agreed to add thousands of seasonal employees to the petitioned-for unit after Amazon announced it would challenge the smaller proposed unit. Rhinehart, *supra* note 217. The union lost that election. *Id.*

political speech that carries with it First Amendment protections.[280] The incorporation of the political analogy has led to the law's treatment of employers and unions as equal candidates in a campaign akin to competing political parties, an approach that ignores both the power imbalances between the two and the coercive power of the employer over employees. [281] In Becker's view, worker advocates' strategic emphasis on the democracy metaphor came back to bite them. Just as early supporters of the NLRA linked worker representation with political democracy to promote its legitimacy, employers and their allies invoke democratic rhetoric and norms to frame their interest in limiting or opposing unionization in terms of high-minded national ideals. Once political liberty replaced worker empowerment and combating economic inequality as the animating principle of employees' choice of representation under the NLRA, employers were on friendlier terrain.[282]

Professor Paul Weiler launched a similar critique of the overextension of the political analogy in his influential critiques of the state of American labor law.[283] He placed much of the blame for the decline in unionization rates on the fact that employees' decision whether to unionize is preceded by a prolonged political-style campaign in which employers "play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats."[284] Weiler found that analogy not only "incongruous"[285] but also deleterious. "[I]t is precisely because the employer's interests typically diverge from the employees'," he wrote, "that it is strange to give the employer a central role in the representation decision."[286] Instead, he argued that employers should have no more role in representation elections than foreign nationals

280. *See* Thomas v. Collins, 323 U.S. 516, 537 (1945) ("[E]mployers' attempts to persuade . . . with respect to joining or not joining unions are within the First Amendment's guaranty."); Becker, *supra* note 47, at 543–47 (exploring the implications of the Supreme Court's decision in *Thomas* on representation elections). Congress incorporated that view into the NLRA itself as part of the Taft-Hartley amendments, adding the proviso that "[t]he expressing of any views, argument, or opinion" shall not be unlawful so long as it does not contain threats of reprisal or the promise of benefits. 29 U.S.C. § 158(c).

281. *See* Becker, *supra* note 47, at 585 (arguing that the view of a union election "as a contest between employer and union" has "obscured and ratified the disparity of power between the employer and union in the election process").

282. *Id.* at 547.

283. Weiler, *supra* note 47, at 1813–14.

284. *Id.* at 1770, 1813. Weiler focused on the impact of employer unfair labor practices during representation campaigns, *id.* at 1776–81, whereas Becker was troubled by both illegal and legal employer conduct, Becker, *supra* note 47, at 499 n.11.

285. Weiler, *supra* note 47, at 1813.

286. *Id.*

should have in American political elections.[287] As with Becker's critique, Weiler's argument demonstrates the damage done by an analogy taken too far. Political-style campaigns resulted in less collective bargaining. In that way, the industrial-democracy metaphor was turned on itself; the more it looked like political democracy, the less democratic it was.[288]

The incorporation of the gerrymander concept into the labor-law realm poses similar risks. Rhetoric matters, and gerrymander is a particularly harsh brand of rhetoric in an electoral context given its long history as a pejorative term and the practice's deep unpopularity. By labeling bargaining units likely to support union representation as gerrymanders, the analogy has the potential to make collective bargaining less likely. It could invite the NLRB to take a harder look at proposed bargaining units than is statutorily warranted, increasing the possibility that the Board will find the unit inappropriate and refuse to hold an election at all.[289] Short of causing the Board to dismiss the petition altogether, gerrymander arguments could persuade the Board to accept employer requests to add more employees to the unit, decreasing the chances that the union will prevail given that larger units filled with employees the union did not seek to represent are more difficult to organize. Indeed, as with Starbucks, this is typically the point of employers pursuing such arguments.[290] The gerrymander accusation could also cause employees who otherwise might support a union to view the whole enterprise as suspect and vote against representation. Because the gerrymander is a better known concept than the intricacies of labor law, courts reviewing Board orders who are more familiar with gerrymanders than unit determinations might be

287. *Id.* at 1814. Weiler advocated for replacing the existing model with "instant votes," where the Board would hold a secret ballot election immediately after receiving a representation petition from the union. *Id.* at 1811–12. That approach would retain the electoral model but utilize a type of election otherwise unknown in the American political system. Weiler drew inspiration from labor-relations law in Nova Scotia, where elections must be held within five days of a petition. *Id.* at 1812. Elsewhere, he proposed that rather than holding elections to decide whether employees will be represented, union representation would be the default, and elections would decide only which union would serve as representative. WEILER, *supra* note 31, at 282.

288. Becker's and Weiler's articles appear to have inspired a provision in the proposed Protecting the Right to Organize Act that would remove employers as parties in representation proceedings. S. 420, 117th Cong. § 105(1)(A) (2021); *see* Andy Levin & Colton Puckett, *Labor Law Reform at a Critical Juncture: The Case for the Protecting the Right to Organize Act*, 59 HARV. J. LEG. 1, 8 n.58, 9 n.67, 23–24, 23 n.169 (2022) (essay by congressional sponsor of the PRO Act citing Becker's and Weiler's articles when describing the need to reform representation proceedings).

289. *See supra* pp. 440–443 (detailing Board's adoption of the gerrymander analogy when evaluating proposed bargaining units).

290. *See supra* pp. 404, 437–438 (describing employer use of gerrymander rhetoric as part of efforts to expand proposed units).

swayed by arguments grounded in such language.[291] Judicial solicitude for the gerrymander analogy gives employers yet another ground for challenging their employees' choice of representation even after the election, incentivizing them to continue litigating rather than start bargaining.

Signs of this phenomenon can be seen in the NLRB's decision in PCC Structurals, where the Board connected a more searching standard for unit appropriateness with the perceived need to avoid "gerrymandered grouping[s] of employees."[292] It expressly referenced the gerrymander concept in the course of emphasizing that employees in a bargaining unit not only had to share a community of interest but also had to have sufficiently distinct interests from employees not in the unit.[293] Years of gerrymander accusations lodged at the prior Specialty Healthcare standard appear to have convinced the Board to incorporate this language in its own decisions.[294] Regional Directors picked up on the gerrymander language in PCC Structurals, including in decisions where they found a petitioned-for unit inappropriate.[295] In this way, the gerrymander analogy has worked its way into policy.

This is a problem for industrial democracy. An approach to unit determinations that results in less collective bargaining constitutes doctrinal failure because the law encourages collective bargaining.[296] Moreover, any obstacle to representation exacerbates what is already a longstanding problem—decades of historically low union density that continues to shrink year after year. Just six percent of the private sector

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291. *See supra* notes 230–232 and accompanying text (chronicling courts' use of the gerrymander analogy when critiquing the Board's unit determinations).

292. PCC Structurals, Inc., 365 N.L.R.B. No. 160, slip op. at 7 (Dec. 15, 2017).

293. Proponents of this approach argued that it would prevent having multiple small bargaining units in the workplace, potentially represented by different unions, which could increase bargaining costs and create tensions among the different groups of employees. *See, e.g.*, Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934, 952 (2011) (Member Hayes, dissenting) (criticizing the *Specialty Healthcare* standard as leading to "fragmentation of the work force for collective-bargaining purposes, a situation that cannot lend itself to . . . labor relations stability"). Whatever merit this concern may have as a practical matter, it does not mean that smaller units are any less democratic (or any more of a "gerrymander"). Some democracy in the workplace, even if just a little, is better than no democracy.

294. *See supra* note 233 and accompanying text.

295. *See, e.g.*, Decision & Direction of Election at 20–21, 25, Nissan N. Am., Inc., No. 10-RC-273024 (June 11, 2021), *request for review granted*, 371 N.L.R.B. No. 43 (Dec. 21, 2021); Decision & Direction of Election at 18, 25, Air Liquide Adv. Techs. U.S. LLC, No. 04-RC-266637 (Apr. 14, 2021); Decision & Direction of Election at 10–11, Sims Grp. USA Corp., No. 20-RC-216696 (Apr. 6, 2018); *see also* Decision & Order at 21, Vanderbilt Univ., No. 10-RC-193205 (May 3, 2017) (pre–*PCC Structurals* decision finding petitioned-for unit inappropriate that employer described as "gerrymandered").

296. *See* 29 U.S.C. § 151 (stating the NLRA's policy of "encouraging the practice and procedure of collective bargaining").

workforce is unionized, down from over thirty percent in the 1950s, twenty percent in 1980, and twelve percent in 1990.[297]

It is also harmful on a normative level, including in ways that are antidemocratic. Most immediately, it undermines workplace democracy. Less collective bargaining means less worker voice, which perpetuates the workplace as an essentially autocratic environment. In a democratic society, any incident of authoritarianism is problematic, even if it occurs outside of the political system.[298]

An approach to unit determinations that diminishes the prevalence of collective bargaining also undercuts the democracy-promoting spillover effects of unionization. Less worker voice in the workplace means less worker voice in civic life more broadly. As discussed earlier, workers' ability to exercise agency over their lives as employees also promotes their ability to do so as citizens.[299] A unionized workplace can translate into higher participation in political elections because unionized employees are more likely to vote. They also are more likely to have the time and resources necessary to take part in civic life. Organizing also supplies workers with the building blocks and networks to run for office themselves. More broadly, an empowered working class provides a needed counterweight to powerful interests in a time of rising political and economic inequality.[300] All of this is potentially lost when collective bargaining is damned by association with the deeply unpopular concept of gerrymandering.

The gerrymander analogy is thus both conceptually inapt and detrimental to the project of industrial democracy. Even if employers continue to use the gerrymander analogy, the NLRB and the courts should hesitate before giving credence to such arguments, let alone incorporating the concept of the gerrymander in their own unit-

297. *Union Membership (Annual) News Release*, *supra* note 39; LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS 9 (2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/ [https://perma.cc/W23U-Z7V6]. Although recent success in organizing drives at Starbucks and other high-profile workplaces like Amazon, REI, Apple, and Chipotle has provided critical attention and momentum, it has not moved the needle much in terms of overall numbers. Josh Eidelson, *U.S. Labor's Watershed Year Failed to Boost Union Membership*, BLOOMBERG L. (Jan. 20, 2022, 11:37 AM), https://news.bloomberglaw.com/daily-labor-report/u-s-labors-watershed-year-failed-to-boost-union-memberships [https://perma.cc/UD59-AB2H]. These units tend to be small. The two Buffalo Starbucks that started the movement consisted of eighty-two employees, for example. *Id.*

298. ANDERSON, *supra* note 35, at 70–71.

299. *See supra* Subsection I.A.1.

300. Andrias & Sachs, *supra* note 49, at 556, 562; Elmore, *supra* note 52, at 255 ("The lack of worker power and the decline of unions as a significant economic and political actor in the United States are important drivers of income inequality . . . ."); Fishkin & Forbath, *supra* note 73, at 690 ("[T]he evisceration of American labor has left us without a critical political bulwark against oligarchy.").

determination analysis. The focus should be on what the NLRA actually says, not concepts from a different body of law that it partially resembles. Dismissing or altering a petitioned-for unit as a gerrymander essentially prevents employees from choosing union representation on the grounds that they are likely to do so. Labor-law policy should not prevent employees who want workplace democracy from attaining it.

The Board's recent overruling of PCC Structurals was a good start,[301] but more affirmative work can be done. The Board should expressly state that the gerrymander concept has no place in the unit-determination analysis. It should make clear that the focus of that inquiry is whether a petitioned-for unit would result in meaningful collective bargaining if employees in the unit voted for representation. Whether the employees are likely to support representation is immaterial to that determination. The goal of gauging the likelihood of meaningful bargaining is accomplished by the community-of-interest test, which is sufficiently probing to screen out random or arbitrary groupings of employees without unduly interfering with the petitioning union's or employees' choice of with whom they wish to organize.[302] Incorporating the gerrymander analogy into the unit-determination standard unnecessarily and inappropriately adds a layer to the analysis that is both more intrusive and less relevant to the inquiry.

Similarly, the Board should commit to an approach that permits employees who want representation to have it and not deny or delay that choice on the grounds that they are likely to choose representation. Rather than limit opportunities to vote for representation out of fear of gerrymanders, the Board should remember the wisdom articulated in Garden State Hosiery that employees who desire union representation should not have to wait for all similarly situated employees to reach the same conclusion before they can even vote.[303] Units consisting of employees most interested in collective bargaining are not a threat to labor law the way that political gerrymanders are to voting-rights law. Treating them as such is not only unnecessary to advancing the goals of federal labor law but counterproductive to that purpose.

A critical evaluation of the gerrymander analogy reveals a fundamental irony of applying it to the labor context. Gerrymandering is an antidemocratic phenomenon. So one would expect that efforts to police against it would promote democracy. But to the extent the

301. Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).

302. *See supra* pp. 422–423 (describing community-of-interest test).

303. Garden State Hosiery Co., 74 N.L.R.B. 318, 320–21 (1947); *see supra* Section II.B; *supra* note 219 and accompanying text (discussing *Garden State Hosiery*).

gerrymander analogy undermines the prospects for collective bargaining, it has the opposite effect. Instead of safeguarding democracy, importing the gerrymander concept into labor law actually harms democracy, in both its industrial and political manifestations.

CONCLUSION

What happens in Buffalo doesn't stay in Buffalo.[304] The use of gerrymander language in the context of union-representation elections extends well beyond the Starbucks organizing campaign in the Queen City. Nor did it start there. The gerrymander crawled from its home in the political sphere into the labor sphere early on and has resided there unquestioned ever since.

A critical inquiry reveals that the gerrymander analogy is not only inapt but harmful. The analogy falls apart upon closer inspection. Legislative redistricting and bargaining-unit determinations are distinct exercises with different stakes. The consequences that flow from self-interested line drawing in the political context are absent or unobjectionable in the unit-determination context.

The core promise of industrial democracy under the NLRA is workers' right to have a say in the decisions that govern their working lives through union representation and collective bargaining. But the gerrymander analogy makes successful organizing harder and collective bargaining less likely. This result is contrary to statutory policy, which affirmatively encourages collective bargaining. It leaves workers with less voice and, thus, subject to authoritarian control; it perpetuates the anomaly of workplaces essentially functioning as autocracies in an otherwise democratic society. As an obstacle to democracy in the workplace, it also robs society more broadly of the democracy-promoting benefits derived from unionization and robust worker voice. Indeed, that is the point of the charge. For employers like Starbucks, labeling a petitioned-for unit a gerrymander is a tool to defeat employee organizing. In the choice between democracy and no democracy posed by representation elections, that tactic promotes the latter. The gerrymander analogy is at best misguided and at worst a cynical use of a pro-democracy concept to promote antidemocratic outcomes. Even if employers continue to level the gerrymander accusation, the NLRB and reviewing courts should not allow it to influence their analysis in unit-determination cases.

304. Or in that other city. Richard N. Velotta, *Las Vegas Starbucks Becomes First in Nevada to Unionize*, L.V. REV.-J. (Dec. 20, 2022, 4:15 PM), https://www.reviewjournal.com/business/las-vegas-starbucks-becomes-first-in-nevada-to-unionize-2697784/ [https://perma.cc/4C7B-AY7V].

The conceptual mismatch this Article details does not end with the gerrymander. The gerrymander analogy is not the only example of parties, policymakers, or commentators importing norms and concepts from the political sphere into the labor sphere. Yet overreliance on the political model as the basis for a system of industrial democracy demonstrates a fundamental misunderstanding of the distinctions between the two. Identifying that disconnect also calls into question some of the other concepts borrowed from the political sphere, from treating representation elections like campaign-style events to the electoral model itself.

The link between worker voice and democracy is longstanding and well supported in doctrine, norm, and practice. But it does not follow that labor law and election law should march in lockstep. Industrial democracy complements and promotes political democracy, but it is not the same as political democracy. Failure to recognize that distinction can do damage to both.