

# THE LEGITIMACY OF LABOR UNIONS

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## I. INTRODUCTION

Labor unions do not have a well-understood rationale, as do capitalist enterprises, strictly voluntary associations, and democratic states. They are nonprofit associations, but also coercive economic agents; working-class communities, but also powerful special interests; embodiments of rights, but also incompatible with certain individual freedoms. These tensions result in an ambivalent legal status. For instance, unions may collect fees from (and negotiate contracts for) certain employees without obtaining their individual consent, yet no one can be required to belong to a union. Unions are exempt from antitrust laws and may restrain competition, but only in particular ways. We cannot assess these rules unless we have a convincing philosophical justification of unions in hand. This justification must answer utilitarian arguments that unions undermine social welfare by hampering the efficiency of markets; libertarian objections that unions override individual rights of expression and contract; and democratic complaints that unions (being economic “special interests”) are less legitimate than elected governments. This article argues that unions are valuable parts of civil society and are morally legitimate as economic and political actors. Indeed, it would be desirable to ease certain obstacles to union growth by reforming labor law.

## II. THE MORAL DEBATE ABOUT UNIONS

Federal law recognizes a right to join unions,<sup>1</sup> and the United States—by virtue of its membership in the International Labor Organization (ILO)—is obligated “to respect, to promote and to

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1. See 29 U.S.C. § 151 (1994).

realize . . . freedom of association and the effective recognition of the right to collective bargaining."<sup>2</sup> But federal and state laws also impose many *limitations* on the behavior of labor unions, which are weak in the United States compared to other industrialized democracies.<sup>3</sup> The current legal status of unions can, at least in part, be explained as the result of a century's negotiations among interest groups that have economic stakes in labor policy.<sup>4</sup> But the law also expresses a theory about what constitutes a legitimate union and acceptable union behavior.<sup>5</sup> Although this normative theory is subject to criticism, since the 1930s neither lawyers nor political philosophers (outside the Marxist tradition) have written much about the legitimacy of unions.<sup>6</sup> To devise a normative account would not only be worthwhile as an academic exercise, it might also influence those citizens and representatives who are ambivalent about organized labor. Unions invoke such values as "community,"

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2. ILO Declaration on Fundamental Principles and Rights at Work, Int'l Lab. Conference, 86th Sess. (June 1998) Geneva, *available at* <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm> (last visited May 16, 2001).

3. See Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 320-21 n.173 (1998).

4. Some scholars credit the passage of the Wagner Act (which enacted a legally enforceable right to unionize) to Senator Robert Wagner and other government officials who believed in the moral and social value of unions. See Theda Skocpol et al., *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1298-301 (1990). Others explain the same Act as a result of efforts by business and political elites "to constrain, limit, and control the increasingly militant labor movement." Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1274 (1989). Finally, some libertarians see the Wagner Act as a result of negotiations among rent-seekers: "[S]elf-interested political activists—unionists, academics, bureaucrats, politicians, and a minority of big businessmen—played major roles in fostering a major expansion in the labor representation industry [i.e., unions], an event essentially in their financial and nonfinancial interests." Morgan O. Reynolds, *An Economic Analysis of the Norris-LaGuardia Act, the Wagner Act, and the Labor Representation Industry*, 6 J. LIBERTARIAN STUD. 227, 228 (1982). But explaining the causes of any legislation should be a fundamentally different matter from interpreting its meaning or assessing its value.

5. See 29 U.S.C. § 158(b) (1994).

6. The Philosopher's Index on CD-ROM files eighteen works on labor unions or trade unions. The only general normative theory is FRANK TANNENBAUM, *A PHILOSOPHY OF LABOR* (1951). Most of the best work before 1987 is collected in *MORAL RIGHTS IN THE WORKPLACE* (Gertrude Ezorsky ed., 1987). Explicit discussions of unions are strikingly absent in such canonical works of political theory as JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999), ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998), MICHAEL WALZER, *SPHERES OF JUSTICE* (1983), and ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed., 1984). Constitutional lawyers helpfully analyze the connection between unions and constitutional rights. For a recent example, see Aron Gregg, Note, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop*, 78 TEX. L. REV. 1159, 1179-80 (2000). But there are broader issues to consider, including: human rights that may not be constitutionally defined; matters of distributive justice; the economic and civic consequences of unions; and unions' role in a democratic polity.

“solidarity,” “economic equality,” “democracy,” and “rights of association.” But unions are also special interests with coercive powers over their own members and others. Most people accept the legitimacy of elected governments, private enterprises, and voluntary associations, but unions do not fit precisely into any of these categories. So it is no wonder that many thoughtful Americans do not know what to make of organized labor or its place in the law.

In passing the Wagner Act of 1935, which established a federal right to unionize,<sup>7</sup> Congress defended organized labor in basically *utilitarian* terms. Utilitarians believe that we should look to the consequences of our actions, striving either to maximize the aggregate happiness of society or else to satisfy as many preferences as possible.<sup>8</sup> The Wagner Act declares: “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . .”<sup>9</sup> The Act makes an empirical prediction: that unions will promote commerce while preventing discord.<sup>10</sup> Many New Dealers thought that unions would benefit the economy by raising wages (hence purchasing power) and by providing an alternative to violent and chaotic industrial strife.<sup>11</sup> The Act also implies a normative premise, namely, that commerce boosts aggregate happiness, welfare, or satisfaction, whereas “strife and unrest” are signs or causes of unhappiness. The Act seems to depart from utilitarian reasoning when it affirms workers’ “freedom of association.” One person’s freedom could reduce society’s net wealth or happiness. But Congress immediately justifies the freedom to associate in a union with a utilitarian argument, claiming that unions will “eliminate the causes of certain substantial obstructions to the free flow of commerce.”<sup>12</sup>

According to many economists, Congress was wrong about the net

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7. See 29 U.S.C. § 151 (1994).

8. See RAWLS, *supra* note 6, at 21.

9. 29 U.S.C. § 151.

10. See *id.*

11. See generally Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 104 (1993) (discussing the unions’ function in obtaining wage and benefit increases for their members during the New Deal and post-war era).

12. 29 U.S.C. § 151. The Supreme Court largely ignored the utilitarian arguments of Congress when it upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court instead cited fairness and individual rights of association. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

long-term effect of organized labor.<sup>13</sup> These critics argue that unions generally interfere with efficiency, because they protect unproductive workers, raise costs, distort incentives, and frustrate entrepreneurship.<sup>14</sup> The economist W.H. Hutt believed that a strike or threat to strike was always pernicious, even if it was made by a loosely organized group of workers outside a union, because it could harm “the welfare and dignity of the workers *as a whole*.”<sup>15</sup> Clearly, strikes could also harm people other than workers, such as consumers and investors. Hutt’s concern with aggregate consequences marked him as a utilitarian—albeit one with specific empirical beliefs about the effects of strikes.

In contrast, *libertarians* are not concerned about the consequences of private acts on the aggregate welfare.<sup>16</sup> When a group of workers voluntarily walks off the job, libertarians have no reasonable complaint—even if the net economic consequences happen to be harmful—because they believe that adults have the right to make and exit voluntary partnerships. However, libertarians do object when unions gain authority over all the workers in a firm, especially if the state recognizes and upholds this authority.<sup>17</sup> Unions benefit substantially<sup>18</sup> from the ability to override private rights by:

blocking anyone from working under a contract that the union has not negotiated;<sup>19</sup> preventing employers from making offers—even advantageous ones—to individual workers unless the union is informed and consents;<sup>20</sup> requiring fees from all members (or all workers who are covered by union contracts);<sup>21</sup> using these fees to provide living expenses during strikes, to lobby the government, to litigate, and to organize new unions;<sup>22</sup> declaring strikes;<sup>23</sup> fining members who work during strikes;<sup>24</sup>

13. See MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW 187-88 (1987).

14. See *id.*

15. W. H. HUTT, THE STRIKE-THREAT SYSTEM: THE ECONOMIC CONSEQUENCES OF COLLECTIVE BARGAINING 16 (1973).

16. See generally RAWLS, *supra* note 6, at 176-80 (discussing the concept of liberty).

17. See generally REYNOLDS, *supra* note 13, at 193 (discussing unions representing all of the workers in a bargaining unit).

18. For evidence of the benefit, see David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. POL. ECON. 250, 269-71 (1987).

19. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 208 (1984).

20. See *R.R. Tel. v. Ry. Express Agency*, 321 U.S. 342, 347 (1944); see also *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (providing that “[t]he workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result”).

21. See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 743-44 (1963).

22. See generally *Ellis v. Bhd. of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 448 (1984).

and establishing picket lines and attempting by legal means to prevent customers and workers from entering company property during strikes.<sup>25</sup>

Union leaders can choose to employ these powers even if some of the workers whom they represent disagree with them.<sup>26</sup> Thus, Friedrich Hayek claimed that unions “are the one institution where government has signally failed in its first task, that of preventing coercion of men by other men—and by coercion I do not mean primarily the coercion of employers but the coercion of workers by their fellow workers.”<sup>27</sup> Libertarians are especially critical of “closed shop” contracts (which require businesses to hire only union members) and “union shop” contracts (which require all employees to join a specified union after they are hired). Libertarians see such arrangements as state-sanctioned violations of private contract rights. Both closed shops and genuine union shops are now illegal in the United States,<sup>28</sup> so the main targets of libertarian criticism have been removed since Hayek wrote. But if we disagree with libertarian arguments, then we may favor union shops or closed shops. Permitting either arrangement would strengthen labor’s hand.

In any case, there are still “agency shops” in the twenty-nine states

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(providing that “objecting employees may be compelled to pay . . . direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, [as well as] . . . expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union”).

23. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956).

24. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183 (1967).

25. See 29 U.S.C. § 158(b)(7) (1994).

26. See 29 U.S.C.S. § 159(a) (1992).

27. F.A. Hayek, *Unions, Inflation, and Profits*, in *THE PUBLIC STAKE IN UNION POWER* 46, 47 (Philip D. Bradley ed., 1959).

28. See 29 U.S.C. § 158(a)(3) (1994) (providing that closed shops are prohibited by the Taft-Hartley revisions to the National Labor Relations Act); 45 U.S.C. § 152 (1994) (providing that closed shops are prohibited by the Railway Labor Act). Union shops are illegal under Supreme Court decisions that grant employers the right not to join unions, although they may be compelled to pay “agency fees” to cover the costs of collective-bargaining. See *Marquez v. Screen Actors Guild*, 119 S. Ct. 292, 295-96 (1998). In *Marquez*, the court opined that:

Section 8(a)(3) of the National Labor Relations Act (NLRA), 49 Stat. 452, as added, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits unions and employers to negotiate an agreement that requires union ‘membership’ as a condition of employment for all employees. We have interpreted a proviso to this language to mean that the only ‘membership’ that a union can require is the payment of fees and dues, *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453[sic], 10 L.Ed.2d 670 (1963) [sic], and we have held that § 8(a)(3) allows unions to collect and expend funds over the objection of nonmembers only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities, *Communications Workers v. Beck*, 487 U.S. 735, 745, 762-763, 108 S.Ct. 2641 [sic], 101 L.Ed.2d 634 (1988) [sic].

*Id.*

that have not passed legislation forbidding them.<sup>29</sup> In an agency shop, the union negotiates one collective-bargaining agreement that covers a whole class of employees.<sup>30</sup> Workers do not have to join the union—and if they do, they may resign at will—but they must pay dues and work under the union contract unless they quit their jobs.<sup>31</sup> Proponents argue that employees ought to pay fees for a service (union representation) that benefits them tangibly,<sup>32</sup> just as they may be required to pay for food in the company canteen. However, this also means that workers in agency shops are unable to avoid their union's jurisdiction.<sup>33</sup> Libertarians have grave doubts about this arrangement, because majorities within the union may override minorities' preferences.<sup>34</sup> Nor are libertarians reassured if unions have net positive effects on their own members or even on the whole society.<sup>35</sup>

When people join voluntary groups, they exercise freedom of choice and association: rights dear to libertarians. But Americans rarely acquire union cards because they feel a personal commitment to the labor movement; they join because the company where they want to work is already unionized.<sup>36</sup> Organized labor is popular among covered workers; only eight percent would vote to "get rid of" their unions.<sup>37</sup> But if even one person who must pay dues opposes the very existence of her union, then it isn't a voluntary association satisfactory to libertarians. As Senator Barry Goldwater (R-AZ) told the union leader Walter Reuther in 1953: "There is only one question in this whole field in my mind. What about the man who just does not want to belong to a union?"<sup>38</sup> Goldwater spoke in the days of closed shops, when union membership (not merely dues) could be required. But more recently, Rep. Bob Goodlatte (R-VA)

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29. The twenty-nine states currently forbidding agency shops are listed by the National Right to Work Legal Defense Foundation, available at <http://www.nrtw.org/rtps.htm> (last visited May 14, 2001).

30. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

31. See *Gen. Motors Corp.*, 373 U.S. at 743-44.

32. See *id.* at 742-43.

33. See *id.* at 744.

34. See generally 29 U.S.C. § 159(a) (1994) (providing that the majority selects the representatives for collective bargaining purposes).

35. See MORGAN O. REYNOLDS, *POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA* 263 (1984).

36. See generally John A. McClendon, Hoyt N. Wheeler & Roger D. Weikle, *The Individual Decision to Unionize*, 23 LAB. STUD. J. 34 (1998) (discussing employee behavior in the organizing process).

37. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 69 (1999) (citing the Worker Representation and Participation Survey (WRPS)).

38. *Taft-Hartley Act Revisions: Hearings Before the Committee on Labor and Public Welfare*, United States Senate, 83d Cong. 415 (1953) (statement of Senator Barry Goldwater).

said on the House floor: “Compelling a man or woman to pay fees to a union in order to work violates the very principle of individual liberty upon which this nation was founded.”<sup>39</sup>

A third line of criticism holds that only one institution represents all citizens and is therefore fit to regulate the economy: the democratic state.<sup>40</sup> Governments may choose to tolerate or even encourage unions because of their positive effects, but conflicts will arise sooner or later between unions’ goals and public purposes as defined by popularly elected officials.<sup>41</sup> In such cases, a democratic government is more legitimate than unions—or so these critics argue.<sup>42</sup> For example, in December 2000, Venezuelan voters decisively approved a referendum promoted by President Hugo Chavez that will dismiss all incumbent labor union leaders, thus removing an obstacle to Chavez’ plan for a “single state-controlled entity to be called the Bolivarian Labor Force. His supporters said . . . that they planned to introduce legislation this week to ‘profoundly democratize the union movement.’”<sup>43</sup> Chavez and his allies may think that the proposed “Bolivarian Labor Force” is more democratic than an array of independent unions, because a popular government is accountable to the public, whereas private associations answer only to their members.

To be sure, most democratic theorists are not satisfied with mere majority rule; they also insist upon individual rights: especially freedom of expression and association.<sup>44</sup> But these rights do not clearly justify a system of collective bargaining in which unions become the sole negotiating agents for all the members of a workforce. Thus, for example, John Rawls strongly defends freedom of association within a democratic society, but not in a way that is favorable to labor unions. Although he says nothing explicitly about unions, he assumes that in a “well-ordered society,” public institutions (such as law-making bodies and state agencies) ensure fair treatment for all, while citizens pursue “their more particular aims” within various “social unions,” which include formal associations, families, and friendships.<sup>45</sup> Our “primary

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39. 145 CONG. REC. E264 (daily ed. Feb. 23, 1999) (statement of Hon. Bob Goodlatte).

40. This statist critique of unions was made most explicitly during the Progressive Era. See JOHN R. COMMONS, *INDUSTRIAL GOODWILL* 47 (1919); SIDNEY & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 822 (Augustus M. Kelley, Bookseller, 1965) (1897).

41. See WEBB, *supra* note 40, at 822-23.

42. See *id.*

43. Larry Rohter, *Venezuelan Voters Approve Removal of Labor Leaders*, N.Y. TIMES, Dec. 5, 2000, at A14.

44. See RAWLS, *supra* note 6, at 53-54.

45. *Id.* at 462-63.

concern is that there are many types of social union and from the perspective of political justice we are not to try to rank them in value.”<sup>46</sup> The well-ordered society is “a social union of social unions.”<sup>47</sup> It has the unique purpose of ensuring fairness among the smaller associations that it contains.<sup>48</sup>

Insofar as labor unions are voluntary associations that people join in order to fulfil their “private aims,” Rawls will defend their right to exist—although he cannot argue (without violating his scrupulous liberal neutrality) that they are superior to other associations, from the Boy Scouts to the National Association of Manufacturers.<sup>49</sup> And insofar as unions use power to redistribute money, Rawls may view them with skepticism, because distribution is the sole responsibility of political institutions.<sup>50</sup> A democratic state must override private rights under appropriate circumstances,<sup>51</sup> but unions are not fully democratic institutions because they do not represent consumers or owners. In practice, unions often nudge market economies in the direction of Rawls’ ideal principles of distributive justice, which require maximizing the welfare of the least advantaged.<sup>52</sup> But there is no guarantee that unions will benefit poor people outside of their jurisdiction when conflicts arise with their own members. For Rawlsian liberals, it is the responsibility of democratic institutions to evaluate labor organizations and to regulate or ban them as justice demands.<sup>53</sup>

Despite their fundamental differences with Rawls, some socialists share his skeptical view of unions because they also see the state as the proper guarantor of justice. Marx himself asserted that unions were only useful to the extent that they paved the way to revolution.<sup>54</sup> Under capitalism, Marx argued, workingmen’s organizations that failed to combine and seize political power would never be able to “free the masses, nor even to perceptibly lighten the burden of their miseries.”<sup>55</sup> And once workers seized the state, presumably there would be no need

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46. *Id.* at 462.

47. *Id.*

48. *See id.*

49. *See* RAWLS, *supra* note 6, at 463-64.

50. *See id.* at 54.

51. *See id.* at 53-54.

52. *See id.*

53. *See id.*

54. *See* Karl Marx, *Inaugural Address of the International Working Men’s Association*, in 3 THE KARL MARX LIBRARY: ON THE FIRST INTERNATIONAL 5, 10-11 (Saul K. Padover ed. & trans., 1973).

55. *Id.* at 11.



for independent labor organizations.<sup>56</sup>

One might ask why unions owe a response to these challenges, since corporations and markets are rarely forced to justify *their* legitimacy before hostile critics. But I think that every assertion of power requires a justification; unions are not immune to this requirement just because they are relatively weak. Furthermore, the labor movement needs converts, yet many Americans are predisposed to distrust organizations that seem to put solidarity, security, and fraternity above personal liberty, innovation, and competition. Thomas Geoghegan describes a union meeting at which “paunchy, middle-aged men, slugging down cans of beer, come to hold hands, touch each other, and sing ‘Solidarity Forever.’ O.K., that hardly ever happens, but most people in this business, somewhere, at some point, see it once, and it is the damndest un-American thing you will ever see.”<sup>57</sup>

If the labor movement is in some sense “un-American,” then preaching to a choir of believers about the values of unionism will not suffice. The movement needs arguments that can convert fair-minded skeptics. For this purpose, it is not helpful to accuse labor’s opponents of bad motives, as if their arguments had no merit whatsoever. Consider, for instance, the definition of “flexibility” in the pro-union *The Lexicon of Labor*: “A management term [used] . . . to stress the need for fewer restrictive job-security clauses in the contract so companies can operate more ‘competitively’; that is, at a higher profit at the expense of union jurisdiction.”<sup>58</sup> This is a fairly typical example of pro-union rhetoric. However, it is likely that unions really do reduce flexibility, which results in harm to consumers and investors.<sup>59</sup> If this criticism is false, it requires empirical refutation. If it is true, unions and their friends may still reply that flexibility is less important than other values. But they need a normative argument for that position.

This paper does not present a knock-down argument from first principles, meant to convince all skeptics. Instead, I will canvass the main functions of contemporary, American private-sector unions, looking for moral considerations in their favor and against them. They will emerge as legitimate, I think, unless one adopts certain radical and

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56. For the fortunes of unions in later Marxist thought, see MICHAEL POOLE, THEORIES OF TRADE UNIONISM: A SOCIOLOGY OF INDUSTRIAL RELATIONS 11-13 (1981).

57. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT’S FLAT ON ITS BACK 5 (1991).

58. R. EMMETT MURRAY, THE LEXICON OF LABOR 69 (1998) (emphasis omitted).

59. See Craig A. Olson & Brian E. Becker, *The Effects of the NLRA on Stockholder Wealth in the 1930s*, 44 INDUS. & LAB. REL. REV. 116, 126 (1990).

contentious normative positions along with controversial empirical theories. On the other hand, some of the major objections to unions have moral weight and should not be dismissed out of hand. There are ways to accommodate critics without blocking labor organizations from increasing their size and power.

### III. UNIONS AS ECONOMIC AGENTS

#### *A. Efficiency and Social Welfare*

The most obvious role of organized labor is to change the way that workers bargain with employers, thereby altering the labor market.<sup>60</sup> But almost every economic consequence of unions is controversial. There is no consensus about whether their effect on aggregate efficiency is positive or negative, who bears the costs of unionization, why workers unionize, or whether their own wages rise as a result.

Answers to these questions may not generate normative conclusions. If it turned out that all unions were always good for everyone, then no one but the most principled individualist would object to them. But even pro-union economists do not go this far.<sup>61</sup> If, at the opposite extreme, unions always harmed everyone—even their own members—then only the most doctrinaire trade-unionist would support them. But this is equally implausible. It is more likely that unions have varied effects on various groups (e.g., majorities and minorities of their own members, managers, investors, consumers, non-unionized workers, and the unemployed), depending on the situation. So, even if economists can agree about the mean effect of unions—or of certain *types* of unions in certain generic situations—we still will not know how to respond when a particular union benefits or harms particular individuals in specific ways. Nor should we use a theory about the aggregate effects of unions to write labor legislation, because that would mean treating all union behavior alike. Perhaps it would be wise to tolerate strikes when (and *only* when) their consequences are acceptable. But then we would need a normative theory that told us under what economic circumstances we ought to tolerate, legally recognize, support, or join a union.

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60. For an earlier normative evaluation of union's economic effects, see Charles Landesman, *The Union Movement and the Right to Organize*, in *MORAL RIGHTS IN THE WORKPLACE*, *supra* note 6, 152-60.

61. See, e.g., FREEMAN & MEDOFF, *supra* note 19, at 11-12, 190 (discussing the positive and negative effects of unions).

Economics cannot provide such a theory. It cannot tell us how much any group should have to pay as a result of unionization; nor whether workers have a moral right to form unions; nor whether employers should enjoy a private freedom of contract.

Thus, we always need moral criteria to assess economic systems and their performance. Some people believe that Vilfredo Pareto devised a satisfactory criterion when he described as “optimal” any outcome that could not be altered without making at least some people worse off.<sup>62</sup> This is often described as a “socially efficient” situation because it exhausts all changes that are harmless or uncontroversial.<sup>63</sup> The New Deal Congress promised to achieve a Pareto improvement by legally recognizing unions. Congress asserted that the Wagner Act would benefit many and harm no one, because unions would reduce strife and discord. Proponents sometimes add that unions boost morale and trust, reduce turnover, give senior workers incentives to share knowledge with novices, and improve the flow of information between workers and managers.<sup>64</sup> One recent study found that productivity in unionized firms was ten percent higher than in comparable non-unionized firms.<sup>65</sup> This does not prove that unions harm no one (an impossible standard for any government, firm, or association to meet), but it does show that there is no necessary conflict between labor and management.<sup>66</sup> During

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62. See Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 820-21 (1989).

63. See *id.* at 821. Cooter explains how social efficiency, so defined, can be used to evaluate policies:

[We first assume] that there is an initial distribution of resources, which is given outside the model. Once the initial distribution is described, the analysis proceeds to ask whether any reallocation of resources can make at least one person better off without making anyone else worse off. If the answer is ‘Yes,’ the reallocation is a *Pareto improvement*. If the answer is ‘No,’ the initial allocation is *Pareto efficient* (also called ‘Pareto optimal’). Starting with an initial allocation that is inefficient, Pareto efficiency is achieved by reallocating resources until the opportunities for Pareto improvements are exhausted.

*Id.* at 820-21. Note that the Pareto approach is relative to the “initial distribution.” For instance, a Paretian might argue against the formation of a union on the ground that unions generally harm at least some people. But once unions exist, Paretians would have to defend them, because abolishing them would hurt their members (or at least their leaders).

64. See FREEMAN & MEDOFF, *supra* note 19, at 3, 9.

65. See SANDRA E. BLACK & LISA M. LYNCH, HOW TO COMPETE: THE IMPACT OF WORKPLACE PRACTICES AND INFORMATION TECHNOLOGY ON PRODUCTIVITY 23-25, 29 (Nat’l Bureau of Econ. Research, Working Paper No. 6120, 1997).

66. Note, however, that all studies “reach the same basic conclusion: profits and shareholder wealth are less in firms whose employees are represented by unions than they are in firms whose employees are not represented by unions, *ceteris paribus*.” Steven E. Abraham, *The Impact of the Taft-Hartley Act on the Balance of Power in Industrial Relations*, 33 AM. BUS. L. J. 341, 344 n.14

negotiations that I witnessed, a union's representative informed the employer about lax management in a paint shop, so that the employer would not outsource the painters' jobs.<sup>67</sup> Although slack managers may have been harmed by this disclosure, the union, employer, and community all benefited. The union made this sharing of information possible because individual painters could not have complained about poor management without union protection.<sup>68</sup> So, conceivably, unions increase social efficiency (loosely understood) by making companies work better.

However, as Edith Stokey and Richard Zeckhauser write: "A fundamental theorem of welfare economics, which economists have been busy proving under different assumptions since the days of Adam Smith, demonstrates that under certain ideal conditions free competition working through the price system will produce a Pareto optimum."<sup>69</sup> Unions block free competition, so they must hamper social efficiency if this theorem is true.<sup>70</sup> After all, one of the main purposes of any union is to prevent individual workers from competing in the labor market.<sup>71</sup> And organized labor is specifically exempted from antitrust laws whose general goal is to promote competition.<sup>72</sup> Richard A. Posner concludes that "American labor law is best understood as a device for facilitating, though not to the maximum possible extent, the cartelization of the labor supply by unions."<sup>73</sup> It is therefore "founded on a policy that is the opposite of the policies of competition and economic efficiency that most economists support."<sup>74</sup>

Judge Posner exaggerates, because the law makes it very difficult to

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(1996). Furthermore, the stock prices of affected companies fell in response to passage of the Wagner Act, meaning that shareholders lost money because markets predicted long-term damage to companies. See Olson & Becker, *supra* note 59, at 126. However, if the markets were wrong to predict damage from the Wagner Act, then the shareholders' losses were the fault of investors, not of unions or Congress.

67. This was during collective bargaining between Yale University and Locals 34 and 35, Federation of University Employees, AFL-CIO, in 1988.

68. See FREEMAN & MEDOFF, *supra* note 19, at 9.

69. EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 271 (1978).

70. Pareto himself claimed that competition creates an equilibrium that is (Pareto-)optimal. See VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 451-53 (Ann S. Schwier ed. & trans., Alfred N. Page ed., Augustus M. Kelly 1971) (1927).

71. See Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001-02 (1984).

72. See 15 U.S.C. § 17 (1994). "[N]or shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." *Id.*

73. Posner, *supra* note 71, at 990.

74. *Id.*

organize unions and prohibits them from using certain anti-competitive methods.<sup>75</sup> But even the relatively weak unions that exist in the United States may prevent the economy from operating with maximum efficiency. Some economists claim that they cost the country as much as 4.9% of GNP annually.<sup>76</sup> Other estimates of the lost output are much lower, ranging from 0.02% to 0.2% of GNP in the United States.<sup>77</sup> But reducing the production of desired goods and services *at all* means harming someone, thus violating Pareto's criterion of social efficiency.

Whenever we tax a citizen to provide education or health care for others; whenever we punish someone for a misdeed; and whenever we force one person to tolerate someone else's free speech, we are deliberately making an individual worse off for (putatively) moral reasons. In such cases, most people are glad to violate the Pareto criterion. One might wonder, then, why Pareto optimality holds any attraction as a normative principle. It appeals mostly to two groups. First, anarchists and some libertarians who are very biased against state action will tolerate government intervention in markets only when the intervention benefits everyone—the Pareto criterion. (Note that they do not hold firms to the same standard.) Second, moral skeptics who treat all ideas of justice, fairness, desert, and equity as subjective and arbitrary sometimes prefer “social efficiency” as a more scientific-sounding alternative.

Utilitarians are not skeptical about moral principles, nor are they automatically hostile to the state. They claim that it is just to maximize aggregate happiness or the satisfaction of individual preferences, and they are willing to make some people worse off if the net impact on human utility is positive. Thus, utilitarians dissent from Pareto's normative approach. Nevertheless, they often share in his enthusiasm for competitive markets. This is because markets are thought to maximize the aggregate production of desirable goods and to allow people to do what they want (thereby satisfying their preferences). If competitive

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75. For instance, “secondary boycotts” are unfair labor practices. See 29 U.S.C. § 158(b) (1994). A secondary boycott occurs when unionized workers at one company refuse to handle business with another company that is in a labor dispute.

76. See REYNOLDS, *supra* note 13, at 189-90 (attributing a 4.9% loss of potential GNP to unions). For other economic critiques of unions, see Edward H. Chamberlin, *Labor Union Power and the Public Interest*, in THE PUBLIC STAKE IN UNION POWER, *supra* note 27, at 3-20; Frank H. Knight, *Wages and Labor Union Action in the Light of Economic Analysis*, in THE PUBLIC STAKE IN UNION POWER, *supra* note 27, at 21-45; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 124 (1962); Posner, *supra* note 71; and ALBERT REES, THE ECONOMICS OF TRADE UNIONS 80-91 (3d ed. 1989).

77. See ALISON L. BOOTH, THE ECONOMICS OF THE TRADE UNION 61 n.6 (1995).

markets maximize utility by being more productive than other social structures, then presumably unions are bad because they hamper markets.

Again, economists disagree about whether unions prevent markets from maximizing the production of wealth. Their real impact is probably small—at least in America, where they represent just a few private-sector employees. But for the sake of argument, let us assume that the most wealth would be produced in the absence of unions. This thesis can only support a utilitarian critique of organized labor if we assume that money is a proxy for utility, which is usually defined either as aggregate happiness or as preference-satisfaction.

Take happiness first. As Blanchflower and Oswald note: “[t]he idea that income buys happiness is one of the assumptions—made without evidence but rather for deductive reasons—in microeconomics textbooks.”<sup>78</sup> If one actually measures the relationship between income and self-reported happiness (or life-satisfaction), it appears that although money helps, its impact is “not as large as some would expect.”<sup>79</sup> Other variables—such as marriage, employment, and race—have more powerful effects.<sup>80</sup> Indeed, while Americans have grown much wealthier in the aggregate since 1945, we have also seen a tenfold increase in the depression rate, a quadrupling of the teenage suicide rate, and dramatic increases in “headaches, indigestion, [and] sleeplessness” among younger people, even affluent ones.<sup>81</sup> Robert Putnam argues that the cause is a decline in social connectedness.<sup>82</sup> Interpreting data on self-reported happiness, he finds that “getting married is the ‘happiness equivalent’ of quadrupling your annual income” and that “[r]egular club attendance, volunteering, entertaining, or church attendance is the happiness equivalent of getting a college degree or more than doubling your income.”<sup>83</sup> Thus, if we are utilitarians whose goal is to maximize happiness or welfare, then we should strongly favor unions even if they reduce aggregate money income, because they provide civic connections, and “[c]ivic connections rival marriage and affluence as predictors of life happiness.”<sup>84</sup>

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78. DAVID G. BLANCHFLOWER & ANDREW J. OSWALD, WELL-BEING OVER TIME IN BRITAIN AND THE USA 11 (Nat'l Bureau of Econ. Research, Working Paper No. 7487, 2000).

79. *Id.* at 12.

80. *See generally id.* at 10-17 (discussing non-economic variables).

81. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 261-63 (2000).

82. *See id.* at 264.

83. *Id.* at 333.

84. *Id.*

Data from the General Social Survey suggests that American union members are *less* happy than other full-time workers of the same income, race, and sex.<sup>85</sup> But this may be a function of the kinds of job that unionized workers tend to do. The less happy employees are with their working conditions and management, the more likely they are to unionize.<sup>86</sup> Certainly, organized labor *promises* to provide ingredients of happiness (or welfare) that cannot be purchased on the market, such as solidarity, security, political participation, meaningful work, and sense of control over one's environment.

This analysis has invoked surveys that ask people about their "happiness." Individuals define this word differently however, depending on their expectations and temperaments. Thus interpersonal measures of happiness are probably useless except to raise doubts about the assumption that money equals well-being or welfare. Some utilitarians argue that instead of maximizing happiness, we ought to satisfy as many individual preferences as possible.<sup>87</sup> Whereas happiness eludes measurement, ordinal preferences (*e.g.*, "I like apples better than oranges") are thought to be observable by counting people's choices in the marketplace.<sup>88</sup> If, in the aggregate, people choose to forego job security in the interests of gaining higher salary, then presumably they do not value security highly. Similarly, if they reduce their own social ties in order to work longer hours, then presumably they want consumer goods more than they want solidarity. If we assume that citizens are free to choose as individuals, then there is no need for unions, which would only obscure their preferences by imposing collective decisions on them. By allowing individuals to make their own choices, an unregulated market is supposed to satisfy the most preferences possible. Certain exceptions may arise because of monopolies, business cycles, environmental constraints, or foreign invasions, and in these circumstances utilitarians who want to satisfy individual preferences will

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85. See Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin/12/hsda?harcstda+gss98> (May 12, 2001) (analyzing cumulative datafile for GSS). According to the General Social survey, 29.5% of union members reported being "very happy," as compared to 33.8% of non-unionized full-time employees. See *id.* The T-statistic for "very happy" union members is -3.6, suggesting a strong negative relationship. See *id.* The same pattern occurs if one looks only at middle-income employees, only at males or females, and only at whites or African Americans. See *id.* There is some evidence, however, that the worst-paid union members are less unhappy than their non-unionized counterparts. See *id.*

86. See Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin/12/hsda?harcstda+gss98> (May 12, 2001) (analyzing cumulative datafile for GSS).

87. See Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LIT. 689 (1993).

88. See Alvin I. Goldman, *Simulation and Interpersonal Utility*, 105 ETHICS 711 (1995).

accept government intervention. But if unions are legitimate only when they are necessary to overcome specific market failures, then the argument is tilted strongly against them.

On the other hand, what can a utilitarian *really* conclude from data about people's behavior in a labor market? The data usually do not tell us for certain what anyone's preferences were. Did an individual take a job as a pastor because of its psychological rewards, the prestige, the pay, his fear of God, or pressure from his mother? Even *he* may not know. We can determine his choice from his behavior, but we cannot determine his preferences (either ordinal or cardinal).<sup>89</sup> I concede that workers obviously prefer to be paid more rather than less, *ceteris paribus*. But what does this imply about social welfare? What workers actually accept will depend upon the relative scarcity of capital and labor, the amount of competition or collusion among workers and among firms, and the relative skill and knowledge of each party—among other factors. If we introduce unions on the workers' side, we potentially decrease competition among them and increase their negotiating capacity. Are the results better or worse in utilitarian terms than what would have emerged in the absence of unions? The market data cannot tell us.

Furthermore, although we can safely assume that workers would prefer more money rather than less, we cannot as easily determine from their behavior whether they would choose an increment of money over leisure, satisfaction, security, or social solidarity. Most workers are never offered such options. For example, there are no tenure-track openings for poultry workers; therefore we do not know whether such jobs would be popular at any given hourly wage.

Finally, some choices are not even potentially available in a market. Employers can offer pay as well as leisure time, but they cannot provide the kind of solidarity that unions promise. But if unions exist, we cannot tell what people's preferences are because unions interfere with the labor market. Therefore, market data cannot tell us how much people value solidarity.

Apart from markets, a group of workers may deliberate and then choose their own priorities in a vote. By organizing themselves, they change the balance of power in their favor, thereby acquiring an overall larger share of resources. They can then make collective choices about their preferred balance of security, leisure, benefits, or salary. They can

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89. See Mark Sagoff, *On the Relation Between Preference and Choice*, INST. FOR PHIL. & PUB. POL'Y (on file with Hofstra Labor and Employment Law Journal).



decide what would make them most happy—or they can choose something other than happiness (such as justice) as their goal. This is the method of social choice that unions make possible. It has its own disadvantages (e.g., majority tyranny, manipulation by leaders, and exclusion of those outside the union), but it addresses some of the chief objections to markets.

### *B. Rights and Liberties*

Libertarians often cite natural or individual rights, such as freedom of property and choice, that militate against unions.<sup>90</sup> When an American state bans the closed shop and the union shop, thereby undermining unions, its legislation is called a “right-to-work” law.<sup>91</sup> In Hobbes and Locke, the idea of natural rights is motivated by fear of the state; it implies that people should enjoy whatever individual liberties were theirs before legal communities were established.<sup>92</sup> A natural right is a veto that any individual can wield when the state acts against his or her conscience or fundamental interests.<sup>93</sup> Unions aren’t states, but perhaps individuals have similar rights against them.

Collective decisions by unions may harm some individuals economically.<sup>94</sup> In one important case, African American workers, dissatisfied by their union’s efforts to end discrimination at a department store, attempted to picket without the union’s approval.<sup>95</sup> The Supreme Court ruled 8-1 that only the union could take such actions, because of the principle of majority rule, which permits the union “to bargain with its employer to make union membership a condition of employments, thereby imposing its choice upon the minority.”<sup>96</sup> As Justice Thurgood Marshall explained: “Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.”<sup>97</sup> But majority-rule can undercut individual freedom and minority rights.<sup>98</sup> In his dissent, Justice

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90. See, e.g., NOZICK, *supra* note 6, at 33.

91. See Keith Lumsden & Craig Petersen, *The Effect of Right-to-Work Laws on Unionization in the United States*, 83 J. POL. ECON. 1237, 1237 (1975).

92. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 97 (1952).

93. See *id.*

94. See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

95. See *id.* at 55-56.

96. *Id.* at 62.

97. *Id.*

98. See *id.* at 62.

Douglas wrote: "The Court's opinion makes these Union members—and others similarly situated—prisoners of the Union."<sup>99</sup>

Unions may not only overlook some workers' economic interests; they may also abridge an individual's freedom of conscience.<sup>100</sup> Justice Potter Stewart once noted that a worker's

moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination.<sup>101</sup>

Jefferson put the libertarian case forcefully: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and* abhors, is sinful and tyrannical."<sup>102</sup>

On the other hand, unions have the potential to safeguard rights and due process better than the labor market normally does. Indeed, a group of workers might consider the job market to be a "state of nature," a competition of each against all that does not safeguard legitimate individual rights—a living wage, job tenure, freedom to criticize and dissent, and some measure of self-rule. They might view their employer as a despot, according to Locke, one who has "absolute, arbitrary power" over another.<sup>103</sup> In particular, workers may "disbelieve and abhor" company policies for reasons of conscience, yet they can be fired for complaining. One way to guarantee rights is to pass and enforce legislation. Another way to guarantee these rights would be to unionize. Workers who are treated unfairly cannot expect their fellow workers to take coordinated action in defense of their rights unless they belong to a disciplined, organized entity that can overcome collective-action problems.<sup>104</sup> Unions are such entities.

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99. *Emporium Capwell Co.*, 420 U.S. at 73.

100. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 210 (1977) (holding that the appellants could constitutionally prevent the union's spending part of fees to express ideological views unrelated to its duties as exclusive bargaining representative).

101. *Id.* at 222.

102. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd ed., 1950).

103. LOCKE, *supra* note 92, at 98.

104. *See, e.g., Burton Hall, Collective Bargaining and Workers' Liberty*, in MORAL RIGHTS IN

This argument hinges on the notion that employers are “despots,” since their power to discipline and fire workers is comparable to the police powers of a state. “[T]he mere threat of termination[,]” writes Charles E. Lindblom, “can be as constraining, as coercive, as menacing as an authoritative governmental command.”<sup>105</sup> Although losing one’s livelihood is not equivalent to being executed, it can be catastrophic. Furthermore, layoffs and demotions can be arbitrary—entirely lacking in due process or rational justification.<sup>106</sup>

Unions seem likely to enhance rights whenever employers have distinct bargaining advantages over workers due to a relative scarcity of capital and an overabundance of labor in a particular market. In an extreme, but common, case that Lindblom cites:

Landless rural laborers in much of the world remain dependent for livelihood on land-owning employers too few to compete. That helps explain why, for example, during twenty-five years of democratic national government, millions of India’s agricultural laborers often surrendered control of local government to the landlords, submitted to beatings and other indignities at their hands, and accepted exploitative work contracts.<sup>107</sup>

But the union’s role in protecting rights diminishes as the market value of the workers rise to the point where highly skilled employees may feel constrained rather than protected by unions.

A second factor may also determine whether unions safeguard

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THE WORKPLACE, *supra* note 6, at 165-67 (discussing liberation through collective bargaining).

105. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL-ECONOMIC SYSTEMS* 48 (1977). Compare that statement with the Supreme Court’s opinion in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), where the court stated:

Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209.

*Id.*

106. See Hall, *Collective Bargaining and Workers’ Liberty*, in *MORAL RIGHTS IN THE WORKPLACE*, *supra* note 104, at 162.

107. LINDBLOM, *supra* note 105, at 49.

rights. If workers believe their employer is trying to produce the best possible goods in a competitive market, they may want to leave major decisions to management—especially if they know they have the option of leaving for another job. The firm needs flexibility to acquire market share and to create wealth that the employees expect to share. Sometimes, however, workers distrust management, believing that their supervisors are likely to act foolishly or contrary to the interests of the firm. For instance, an executive may be more interested in sexually harassing a subordinate than in maximizing sales. Under conditions of distrust, workers reasonably want enforceable and inflexible rules to govern their salaries, promotion prospects, grievance procedures, and job descriptions. Then they may feel that unions protect rights not guaranteed by their mere ability to leave for competing jobs. This desire for unions strongly correlates with distrust for management.<sup>108</sup>

Going beyond the idea of workplace rights, some have argued that jobs ought to be workers' *property*.<sup>109</sup> Late in the nineteenth century, Henry C. Adams contended that our concept of property should evolve in this direction,<sup>110</sup> just as it had broadened in the past to encompass corporations, patents, and copyrights. Employees should, he thought, have certain rights, "even though they are not proprietors, in the ordinary acceptance of that word."<sup>111</sup> For example, they should be "given tenure of employment," so that they "cannot be discharged except for cause that satisfies a commission of arbitrators."<sup>112</sup> They should be consulted whether hours of work or the numbers employed shall be reduced, and given preference over those outside the industry.<sup>113</sup> These steps would, in essence, make jobs into "workmen's property."<sup>114</sup> Adams further argued that the best means to redefine property rights was a union because the state could not be trusted to intervene fairly.<sup>115</sup>

As Adams realized, there is no universal and self-evident definition of "property."<sup>116</sup> Any regime of public and private goods requires

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108. See FREEMAN & ROGERS, *supra* note 37, at 71 (Exhibit 4.2 shows that there are strong pro-union sentiments in groups that traditionally face discrimination, especially African Americans.).

109. See MARK PERLMAN, *LABOR UNION THEORIES IN AMERICA: BACKGROUND AND DEVELOPMENT* 169-70 (1958).

110. See *id.* at 166-71.

111. *Id.* at 166.

112. *Id.* at 166-67.

113. See *id.* at 168.

114. See PERLMAN, *supra* note 109, at 169-70.

115. See *id.* at 170.

116. See *id.* at 169-70.

justification. Sometimes people claim that a class of objects ought to be defined as property because doing so will have positive consequences—encouraging investment, effort, or the efficient use and distribution of goods. Presently, jobs are normally the alienable property of employers, which means they are treated as means to the end of maximum profits. If jobs were instead treated as the (non-transferable) property of workers, then investment and innovation might suffer, but employees might also feel deep satisfaction when positions became *theirs* because of *their* work. Thus, because there would be both positive and negative consequences of Adams' proposal, the net change would be difficult to measure and assess.

It seems to me that only the state has the authority to decide what is the best system of ownership in the labor market. The marketplace itself cannot make such decisions, because any market presupposes the existing system of property. Nor should we allow unions to determine property rights unilaterally, because they do not allow outsiders to vote. But elected legislatures could decide that jobs should become workers' property under certain circumstances. If they chose that end, then an appropriate means would be to strengthen unions.

Another kind of right that unions promise is political participation; the ability to shape one's work by deliberating and voting. Classical liberals argued that any legitimate government must protect *natural* rights, otherwise the regime would be worse for its members than no government at all.<sup>117</sup> John Dewey drew a distinction between such natural rights and civil liberties, which are fundamentally social.<sup>118</sup> He argued that civil liberties are justified not as our birthright but because they are important means to the end of a just, good, or fair society.<sup>119</sup> A good community could be one in which the powerful are held accountable by others, and one in which collaboration, discussion, and face-to-face interaction occur regularly. If we accept this vision, then we may defend the civil right to form unions. Even if that right conflicts with private economic freedom, we may reasonably favor it.

Finally, we might note that if investors can create corporations, then perhaps workers ought to be able to form bargaining units.<sup>120</sup> A

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117. See Dewey, *supra* note 90, at 373; see also John Dewey, *Liberalism and Civil Liberties*, in JOHN DEWEY: THE LATER WORKS 1925-1953 372, 373 (Jo Ann Boydston ed., 1987).

118. See *id.*

119. See *id.*

120. John Commons advanced this principle in COMMONS, *supra* note 40, at 47. Commons' work influenced the Wagner Act, which decries "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. §

principle of equal treatment may justify unionization. In that case, however, we must ask why investors have the right to form corporations. If this right is a moral one, it is safe to presume that workers have a parallel right to create unions. If incorporation is allowed only because it benefits the economy, we must hold unions to the same standard.

### *C. Desert and Dignity*

Another way to reach a pro-union conclusion is to ask who deserves the fruits of labor. (Note that the notion of desert has no place in pure utilitarian theory.) The profit from any good sold in the market is divided between workers—including those who manage subordinates—and investors. These are the people who provide the inputs to production, so they receive the benefits. Mainstream economists draw no morally relevant distinctions among the various inputs, which include effort, “human capital,” raw materials, machinery, and anything else that can be bought with money. For economists, labor is a commodity just like fuel or steel; its price reflects its value. Thus workers have no better claim to profits than the people who provide machines or raw materials.<sup>121</sup>

But an old tradition assigns a special dignity and value to work. This view is reflected, not only in Marxism, but also in Catholic doctrine and in the legal concept of “earned income.” Whereas the purchase of a stock is a cost that is only worthwhile if it generates a financial benefit,

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151 (1994). Equal treatment was also a principal reason that the Supreme Court invoked in upholding the Wagner Act. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.

*Id.*

121. *See* Samuel Bowles & Robert Boyer, *Labor Discipline and Aggregate Demand: A Macroeconomic Model*, 78 AM. ECON. REV. 395, 395 (1988).

The neoclassical theory of employment and output may be characterized by its two most basic abstractions: the acceptance of Say's law [regarding market clearance] and the representation of labor as a commodity like any other input. . . . The representation of labor as a commodity denies its more obvious status as a human activity motivated in part by the intentions of the worker, and disciplined, if possible, by the employer.

*Id.* *See* Kenneth J. Arrow, *Invaluable Goods*, 35 J. ECON. LIT. 757, 757-65 (1997) (stating economists treat of *all* priced goods as mutually commensurable). The phrase “human capital” itself implies an equivalence of labor with other forms of capital (i.e., any input that has monetary value). “[H]uman capital [means the] increased productive capacity achieved through investment in education, job training, and work experience.” LLOYD G. REYNOLDS ET AL., *LABOR ECONOMICS & LABOR RELATIONS* 589 (10th ed. 1991).

working is supposed to be an end in itself. This is because purposeful effort is a major source or sign of human dignity and value. One doesn't have to be a Marxist to criticize the idea that work is "a sort of 'merchandise' that the worker—especially the industrial worker—sells to the employer." One can hold instead that "work is a good thing for man—a good thing for his humanity—because through work man not only transforms nature, adapting it to his own needs, but he also achieves fulfillment as a human being and indeed in a sense becomes 'more a human being.'"<sup>122</sup> This is the position taken by Pope John Paul II.<sup>123</sup> Arguably, it's also the law of the land, because Congress declared in the Clayton Act of 1914 that "[t]he labor of a human being is not a commodity or article of commerce."<sup>124</sup>

Perhaps Congress should have said that labor is not "simply" or "merely" a commodity. There's no denying that work can be traded for other goods, and that this is the only way for most people to survive in a capitalist system. But if we *simply* view work as a commodity, then we will treat unions as combinations whose function is to raise the reward that their members receive for their hours of labor. We will then assess the impact of unions by asking whether workers deserve higher pay, given the cost to consumers, non-unionized workers, and investors. Our answer may vary depending on the circumstances.

If, on the other hand, we view work as inherently valuable, then we can see a different rationale for unions. They potentially increase their members' *dignity* as workers by giving them some measure of control and independence. To put the matter bluntly, unions differentiate laborers from their tools, because the tools remain commodities that belong to the firm, but the workers enjoy self-government through their union. If unionization tends to give workers greater "ownership" of their work but at the same time raises prices for consumers and lowers returns for investors, this could be a beneficial outcome, because neither investing nor consuming has the inherent value of laboring. This is not to deny that a particular union's demand for "dignity" could be unreasonable. We would certainly want to know whether better work conditions and more worker autonomy in a unionized firm worsened the

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122. Encyclical of Pope John Paul II on Human Work (*Laborem exercens*), September 14, 1981, *available at* [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html).

123. *See id.*

124. *See* Eric Foner, *Intellectuals and Labor: A Brief History*, in *AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA* 46, 47 (Steven Fraser & Joshua B. Freeman eds., 1997).

environment in other jobs. But if a union hurt other workers as consumers, we would not be as concerned, for we would regard our species as *homo faber*.

According to many Marxists, labor creates all value, and *therefore* laborers deserve the full price of their products.<sup>125</sup> It is a scandal of capitalism that some of the reward goes instead to capitalists, who do not work.<sup>126</sup> In the words of Ralph Chaplin's "Solidarity Forever" (1915):

It is we who plowed the prairies, built the cities where they trade, We  
built the mines and workshops, endless miles of railroad laid \* \* \* All  
the world that's owned by idle drones is ours and ours alone. We have  
laid the wide foundations; built it skyward stone by stone. It is ours,  
not to slave in, but to master and to own.<sup>127</sup>

Robert Nozick and others argue that this "labor theory of value" is a mistake.<sup>128</sup> The sheer amount of labor used to make an object does not determine or explain its utility, because some labor is unnecessary, wasteful, or even counterproductive.<sup>129</sup> If we stipulate that "value" is whatever labor creates, then this definition cannot support the moral conclusion that workers deserve all the fruits of what they make. If instead we claim that the amount of labor used to make an object determines its actual value, we make a factual error. By any reasonable measure of "value," it is increased not only by work, but also by the application of knowledge, organization, machinery, risk, reputation, the passage of time, sheer luck, and other inputs, some of which capitalists provide. As G.A. Cohen writes, "we might as well say that the value of an object is created by desire for it. Yet would we say that desirers are exploited because they create the value of the product, and the capitalist receives part of that value? The suggestion is absurd."<sup>130</sup>

Nozick seems to want to deny any moral difference between work

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125. Marx's own theory is complicated by (1) his insistence that nature and tools also make value, and (2) his doctrine that in the creation of value, the time that is socially necessary alone counts. See THE MARX-ENGELS READER 354, 525 (Robert C. Tucker ed., 2d ed. 1978). If what is "socially necessary" is revealed by a commodity's market price, then the simple labor theory of value fails, because prices are affected by demand. See NOZICK, *supra* note 6, at 260. Justin Schwartz argues that the labor theory of value "is indefensible and that Marx does not hold it." See Justin Schwartz, *What's Wrong with Exploitation?*, 29 NOUS 158, 182 (1995).

126. See THE MARX-ENGELS READER, *supra* note 125, at 526.

127. The text of this folk song is available at <http://www.uawlocal325.org/links.html> (last visited May 14, 2001).

128. See NOZICK, *supra* note 6, at 260-61.

129. See *id.*

130. See G.A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFF. 338, 357 (1979).



and other phenomena that produce objects of value.<sup>131</sup> Certainly, he would not defend the use of state power or other forms of coercion to favor work. But even if we don't accept the argument that labor "really" produces value and that workers therefore have a natural right or desert to all profits, we can still understand labor as morally different from other economic activities. Compare two people, one who makes a living by digging ditches, while the other profits from inherited stocks even though she is comatose after an accident. The first labors; the second does not. An intermediate case is someone who actively invests, mixing knowledge, intellectual labor, and accumulated capital to generate wealth. We may feel that the work aspect of wealth-creation is virtuous, onerous, and not sufficiently rewarded by the market. We may then endorse policies (such as high taxes on capital gains) that favor work, and we may also support unions.

Critics will claim that unions do not reward work; they protect lazy and inefficient laborers from competition. We could reply that even an indolent employee may work harder than a passive investor who makes fifty times as much money. But the deeper point is that mere quantity or intensity of labor is not what we ought to promote—not if we define "labor" in Hannah Arendt's sense, as activity necessary to sustain life.<sup>132</sup> Rather, we ought to foster and reward creative activity that produces lasting objects of value (Arendt's "work"), and also deliberation and cooperation among human beings (Arendt's "action").<sup>133</sup>

Marxists argue that wage labor is inevitably alienated: it cannot involve "work" or "action," because those who labor are different from those who make decisions and own their products.<sup>134</sup> I think that it is an empirical question whether any salaried job is alienated, and whether any union promotes "work" and "action" by giving employees some control over their jobs. But a union that partially overcame alienation would be defensible even if it caused the public to pay more money for less labor.<sup>135</sup>

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131. See NOZICK, *supra* note 6, at 258-61.

132. See HANNAH ARENDT, *THE HUMAN CONDITION* 99-100 (2d ed. 1998).

133. See *generally id.* at 136-247 (discussing Arendt's view of "work" and "action").

134. See *THE MARX-ENGELS READER*, *supra* note 125, at 70.

135. Note that this argument contradicts a founding assumption of classical economics as phrased by Adam Smith:

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 625

Unions are not automatic antidotes to alienation. According to the General Social Survey, American union members report being *less* satisfied with their jobs, *more* eager to quit if they ever become rich, and *less* convinced that their work is important, compared to non-unionized full-time workers.<sup>136</sup> And according to Freeman and Rogers, union members are less likely than other workers to report having adequate influence on workplace decisions.<sup>137</sup> But the workplaces that unionize may be the ones where employers were the least reasonable to start with. Experts on both sides of labor disputes often say that organizing campaigns only succeed when companies lose support by being exceptionally obdurate.<sup>138</sup> If this is true, then many union members would feel mistreated in their jobs despite the *positive* effects of unions. Since the vast majority of members support organized labor, it is plausible that they improve work satisfaction, everything else being equal.<sup>139</sup>

#### D. Distributive Justice

We may assume that a marginal dollar spent by a working-class person is more likely to buy basic goods (such as shelter, food, essential clothing, health care, or education) than the same dollar spent by a wealthy person. This is another reason to support unions, for they redistribute money to workers. However, they may shift money from other workers or from poor consumers, and they do not necessarily assist the non-unionized poor.

To be sure, unions want to avoid large gaps in wages, benefits, or security between their own members and others, because such discrepancies would put competitive pressure on unionized firms and

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(Edwin Cannan ed., 1937).

136. See Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin/12/hsda?harcsta+gss98> (May 12, 2001).

137. FREEMAN & ROGERS, *supra* note 37, at 52.

138. See generally *id.* at 82 (stating reasons why non-union employees want unions).

139. Jeanette A. Davy and Frank Shipper show that unions are unpopular among workers who hold "post-materialistic" values (meaning that they care more about satisfaction than money). See Jeanette A. Davy & Frank Shipper, *Union Membership Decline: Do the Goals of Unions Reflect the Changing Values of Workers?*, 12 LAB. STUD. J. 20-27 (1988). They blame unions, which "give little attention to issues such as participation and increased communication on the job that would promote personal growth and self-actualization." *Id.* at 22. Davy and Shipper may be right, although they do not control for any variables except white-collar/blue-collar status. In any case, unions have a *potential* (perhaps unrealized so far) to increase "self-actualization." If American workers are indeed becoming post-materialistic, then unions' need to satisfy their own members should compel them to provide job satisfaction rather than money.

would give managers an excuse to cut labor costs. Therefore, unions lobby for increases in the minimum wage, unemployment benefits, and other government assistance for the poor. Unlike other organizations, they at least *advocate* economic justice and dignified work for all. And the mere threat of unionization may cause employers to raise salaries for non-organized workers.<sup>140</sup> It appears that the increase in inequality in the United States since 1973 is partly the result of shrinking unions.<sup>141</sup>

On the other hand, some economists believe that the increase in pay achieved by organized labor does not come at the expense of capitalists, but in large part at the expense of nonunion labor.<sup>142</sup> Unionized firms must raise prices, which hurts other workers *qua* consumers.<sup>143</sup> The increase in prices also harms other firms, which may have to cut their personnel budgets as a result.<sup>144</sup> Meanwhile, the level of employment in the unionized sector drops because of elevated labor costs, forcing more workers into other sectors, where wages fall.<sup>145</sup> Even if *all* workers were unionized, “[i]t would still be possible for strong unions to make gains at the expense of weak ones.”<sup>146</sup> Thus, according to Milton Friedman and some leftists alike, unions hurt the least advantaged among us.<sup>147</sup> Friedman writes: “they have . . . made the incomes of the working class more unequal by reducing the opportunities available to the most disadvantaged workers.”<sup>148</sup> Whether this is true is a complex empirical matter, but it is clear that it could be true in some cases. For instance, there have been grave tensions—as well as periods of cooperation—between established U.S. unions and non-unionized African American workers.<sup>149</sup> Thus, an argument for organized labor on the grounds of distributive justice is contingent, and we may want representative

140. See Lawrence M. Kahn, *The Effect of Unions on the Earnings of Nonunion Workers*, 31 INDUS. & LAB. REL. REV. 205, 205 (1977).

141. DAVID CARD, THE EFFECT OF UNIONS ON THE DISTRIBUTION OF WAGES: REDISTRIBUTION OR RELABELLING? (Nat’l Bureau of Econ. Research 1992), available at <http://papers.nber.org/papers/W4195>; DAVID CARD, NATIONAL BUREAU OF ECONOMIC RESEARCH, FALLING UNION MEMBERSHIP AND RISING WAGE INEQUALITY: WHAT’S THE CONNECTION (1998), available at <http://papers.nber.org/papers/W6520>.

142. See Kahn, *supra* note 140, at 205-06.

143. See REES, *supra* note 76, at 89.

144. See *id.*

145. See *id.*

146. See *id.*

147. See, e.g., David M. Beatty, *Ideology, Politics and Unionism*, in STUDIES IN LABOUR LAW 299, 305-13 (Kenneth P. Swan & Katherine E. Swinton eds., 1983) (providing a leftist version of this argument). For some empirical evidence, see Kahn, *supra* note 149, at 208-15.

148. FRIEDMAN, *supra* note 796 at 124.

149. See Herbert Hill, *Lichtenstein’s Fictions: Meany, Reuther and The 1964 Civil Rights Act*, 7 NEW POLITICS 82, 89-102 (1998) (cataloguing the tensions).

national institutions to assess and regulate union behavior.

Indeed, anyone who believes strongly in democratic government may argue that Congress ought to decide such matters as prevailing wages, acceptable levels of risk, employment security, and opportunities for advancement and training. In practice, some of these matters are influenced by federal statutes and regulations, but Congress largely leaves employers and unions (where they exist) free to negotiate contracts under the eye of the National Labor Relations Board (NLRB).<sup>150</sup> The law is thus basically proceduralist. Congress empowers an executive agency to define “good-faith negotiation” and “collective bargaining” so as to achieve clear, voluntary, binding, and lasting agreements and to avoid labor strife, but it leaves the *content* of these contracts to be negotiated by unions and management.<sup>151</sup> One Senator who helped to create the NLRB explained: “When employees have chosen their organization, when they have selected their representatives, all . . . [we propose] to do is to escort them to the door of the employer and say, ‘Here they are, the legal representatives of your employees.’ What happens behind those doors is not inquired into . . . .”<sup>152</sup>

American labor law since the New Deal thus exemplifies what Theodore Lowi calls “interest-group liberalism.”<sup>153</sup> Interest-group liberals assume that there is no knowable “public good” or “common interest”; instead, society is an array of groups with identifiable members and fixed interests (which may be either selfish or altruistic).<sup>154</sup> Under these circumstances, it is pointless to deliberate about what ought to be done as a matter of principle. Instead, interest-group liberals attempt to construct bargaining procedures that generate a minimum of strife and unpredictability.<sup>155</sup> In a more idealistic spirit, they also adjust the procedures to achieve greater equity among the bargaining interests, and they intervene to insure that disorganized groups are formally represented.<sup>156</sup> For example, the NLRB recognizes unions as the sole

150. See Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 389-90 (1950).

151. PETER LEVINE, *THE NEW PROGRESSIVE ERA: TOWARD A FAIR AND DELIBERATIVE DEMOCRACY* 224 (2000).

152. Cox & Dunlop, *supra* note 150, at 389 (quoting Senator Walsh from the 79th Congressional Record in 1935).

153. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 50-56 (2d ed. 1979) (arguing that the NLRB is not a classic example of the interest-group liberalism phenomenon); see also LEVINE, *supra* note 151, at 223 (stating that “interest-group liberalism[s] . . . quintessence is the National Labor Relations Board (NLRB)”).

154. See LOWI, *supra* note 153, at 50-56; LEVINE, *supra* note 151, at 41-45.

155. See LOWI, *supra* note 153, at 50-56; LEVINE, *supra* note 151, at 41-45.

156. See LOWI, *supra* note 153, at 50-56; LEVINE, *supra* note 151, at 41-45.

representatives of certain workers and then forces labor and management to sit down together at the bargaining table. The unelected NLRB has no mandate to consider explicitly normative questions, such as “What should workers get in a contract?” or “Are unions beneficial?” Therefore, its decisions have a technical feel. The Board mainly relies on precedents, analysis of legislative intent, and formal legal or economic methods to decide such matters as the proper definition of a “bargaining unit” or the correct distinction between management and employees.<sup>157</sup> Since these are complex issues, lawyers and other experts inevitably play major roles in NLRB proceedings, while “rank-and-file committees tend to be relegated to advisory or window-dressing functions or simply play the role of bystander.”<sup>158</sup> But despite their arcane quality, NLRB decisions have powerful effects.<sup>159</sup> An organizing campaign can be won or lost depending on who is considered an employee (and therefore eligible to vote).

Strong proponents of state sovereignty argue that elected legislatures ought to set policies for the nation, guided by moral considerations and subject to public scrutiny. In their view, the NLRB’s technical approach obscures normative questions that the nation must address, and the Board is not sufficiently accountable for its actions. Meanwhile, organized labor and big business are two “special interests” that may be entitled to their opinions, but not to determine policy. The Webbs thought that “the community itself” stood above workers, consumers, and industrial managers.<sup>160</sup> “To its elected representatives and trained Civil Service is entrusted the duty of perpetually considering the permanent interests of the State as a whole.”<sup>161</sup> They worried that particular unions and companies might collude in preserving jobs despite social, economic, or environmental damage to others.<sup>162</sup> Lowi might complain that the Webbs gave too much discretion to civil servants, in violation of the principle that only legislatures should make laws. But he would agree that the state—not organized partial interests—should determine labor policy.

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157. See generally Cox & Dunlop, *supra* note 150, at 405-32 (discussing the sources used to define NLRB standards).

158. STANLEY ARONOWITZ, FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS 220 (1992).

159. See *id.* at 218.

160. WEBB, *supra* note 40, at 822.

161. *Id.*

162. See *id.* at 822-23.

## IV. UNIONS AS PARTS OF CIVIL SOCIETY

This statist conception of democracy is open to challenge, however. Many political theorists deny that even the most democratic of governments should monopolize power. They recommend a division of labor, in which private groups do a share of public work and check the potential abuses of the state. These groups are not merely “special interests.” Rather, they form the valuable social sphere that we call “civil society.”

In current debates, the term “civil society” has a positive ring, and everyone uses it to describe non-profit, non-governmental, non-partisan organizations, which are much in favor.<sup>163</sup> But theorists disagree about whether the term should also encompass other institutions, such as families, corporations, legal norms and bodies, political parties, the mass media—and labor unions.<sup>164</sup> If civil society is morally neutral, then we can stipulate what it includes. But if it is used as a positive term, then we ought to explain why certain institutions are important and valuable, and then define “civil society” so that it includes only them. It seems that five normative definitions are operative in current debates, and unions meet these definitions to varying degrees.<sup>165</sup>

*A. The Voluntary Sector*

For some people, the good in civil society is its voluntariness. In that case, the authentic institutions of civil society are the ones that people can join because they share common values. But, as I noted above, people generally join unions as a side-effect of employment decisions. They can quit, but in agency shops that means waiving their right to vote without escaping the obligation to pay dues and to work under the union contract.<sup>166</sup> Thus, if free association is our goal, unions serve it less well than many other organizations do.

I would, however, dispute this voluntarist understanding of civil society. Everything else being equal, the right to enter and exit groups is a good thing; it promotes individual freedom and is preferable to the kind of oppression that arises within organizations that control their

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163. See Robert K. Fullinwider, *Introduction*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL* 1-5 (Robert K. Fullinwider ed., 1999).

164. See *id.*

165. See *id.*

166. See MICHAEL C. HARPER & SAMUEL ESTREICHER, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 1069 (4th ed. 1996) (defining an agency shop).

members by preventing defections. But it seems to me that the genius of civil society is to combine this liberal right of exit with a diverse array of strong, disciplined, tightly-knit associations. One can quit a labor union or traditional family, but only at a cost. And one can only enter such groups if one agrees to contribute and to conform to specified norms. By threatening to exclude or expel members, organizations gain power over individuals, even in a liberal state. In particular, they can compel their own members to contribute to common purposes and to obey norms. In very fluid organizations, by contrast, members often choose to benefit from the group without contributing anything.

Disciplined organizations may discriminate against outsiders and oppress people at the bottom of their internal hierarchies. But, they require their members' general assent, and in return they offer political power and paths for advancement. For instance, a white, working-class American man of the nineteen-fifties could count on fairly loyal service from the Democratic Party, the Catholic Church, and labor unions. He could also imagine rising to be a party elder, a Cardinal, or a union president. All of these associations have lost membership and political importance, partly as a result of reforms that were designed to ease entry and exit. For the most part, today's disciplined and powerful organizations are corporations, which offer little to people without skills or wealth. Civil society has become less discriminatory—but also considerably weaker, leaving working-class citizens without an important source of power.

### *B. The Home of Community*

This argument against a strictly voluntarist theory of “civil society” allows us to consider other conceptions that would be more hospitable to unions. A second definition presents civil society as the home of certain *virtues*: those that reflect community rather than individualism and solidarity rather than selfishness.<sup>167</sup> With this view, civil society is an

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167. For example, William A. Schambra approvingly summarizes Alexis de Tocqueville's communitarian theory of civil society. Tocqueville thought that citizens who were

fully engaged in creating their own public life and in solving their own social problems . . . [would be] unlikely to succumb to the temptation merely to immerse themselves in the self-interested pursuit of material gain. Moreover, their ability to construct, within each locality, a coherent and powerful moral and spiritual community—a community reinforced by the mutually supportive teachings of churches, schools, associations, and neighborhoods—made unlikely the spiritual and moral decline threatened by an untrammelled marketplace.

William A. Schambra, *Is There Civic Life Beyond the Great National Community?*, in CIVIL

important moral or psychological counterweight to commercialism and private rights—and unions are exemplary civic institutions. Unions often meet Thomas Bender's definition of a "community:"

A community involves a limited number of people in a somewhat restricted social space or network held together by shared understandings and a sense of obligation. Relationships are close, often intimate, and usually face to face. Individuals are bound together by affective or emotional ties rather than by a perception of individual self-interest. There is a "we-ness" in a community; one is a member.<sup>168</sup>

Richard Rorty writes:

You would never guess, from William Bennett's and Robert Bork's speeches about the need to overcome liberal individualism, that the labor unions provide by far the best examples in America's history of the virtues these writers claim we must recapture. The history of the unions provides the best examples of comradeship, loyalty, and self-sacrifice.<sup>169</sup>

Rorty is right; cultural conservatives should concede that unions exemplify some of their favorite virtues. Nevertheless, conservatives may reasonably prefer *other* institutions that simultaneously inculcate different virtues, such as religious faith, military discipline, and individual initiative and responsibility. They may want the church and the Army, rather than unions, to build Rorty's triad of comradeship, loyalty, and self-sacrifice. Most people who use the language of virtue favor a long list of character traits, each one balanced carefully against the others. It is not obvious that unions are especially good at generating the most valuable virtues as ranked by conservatives, by liberals, or by anyone else. However, it is possible that they generate virtues that are particularly neglected in our culture.

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SOCIETY, DEMOCRACY, AND CIVIC RENEWAL 89, 94-95 (Fullinwider ed., 1999). "The contemporary debate about 'civil society' is, in one measure, a debate about virtue and vice. It is a debate about character." Loren E. Lomasky, *Civil Enough: Toward a Liberal Theory of Vice (and Virtue)*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL 273, 273 (Fullinwider ed., 1999).

168. THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 7-8 (1978).

169. Richard Rorty, *The People's Flag is Deepest Red*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 57, 58 (Steven Fraser & Joshua B. Freeman eds., 1997).



### C. The Source of Social Capital

A third theory of civil society understands it not as the sector that generates personal virtues, but rather as the source of “social capital.”<sup>170</sup> “Social capital” refers to habits, skills, and attitudes that expedite collective action and lessen the burdens on government.<sup>171</sup> According to Robert Putnam and his colleagues, people learn such skills by participating in voluntary associations.<sup>172</sup> Putnam includes unions in this category, asserting that they have “both created and depended upon social capital.”<sup>173</sup> He expresses nostalgia for “[t]he solidarity of union halls[, which] is now mostly a fading memory of aging men.”<sup>174</sup>

Union members have much more social capital than people who belong to no groups at all.<sup>175</sup> According to the General Social Survey, they are ten percent more likely to trust other people, nineteen percent more likely to express an interest in politics, sixteen percent more likely to vote, seventeen percent more likely to influence others about elections, and twenty-two percent more likely to talk to several people about important issues.<sup>176</sup> The same patterns occur even when one controls for income, education, and employment status.<sup>177</sup> Large numbers of union members report having contacted the government (18.3%), attended conferences (56.5%), or served as committee members (49%) and officers (36.8%) as a result of their membership.<sup>178</sup>

However, union members are not very active in civil society compared to people who belong to at least one association, but not to a

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170. See PUTNAM, *supra* note 86, at 21.

171. See *id.* at 19, 349.

Whereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense social capital is closely related to what some have called ‘civic virtue.’ . . . The performance of our democratic institutions depends in measurable ways upon social capital.

*Id.* at 19, 349; see also John Brehm & Wendy Rahn, *Individual-Level Evidence for the Causes and Consequences of Social Capital*, 41 AM. J. POL. SCI. 999, 1000 (1997).

172. See PUTNAM, *supra* note 81, at 21.

173. *Id.* at 81.

174. *Id.*

175. See Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin12/hsda?harcstda+gss98> (May 12, 2001) (analyzing cumulative data of GSS).

176. See *id.*

177. See *id.*

178. See *id.* The patterns of trust in local and federal government are similar to those for trust in other people, but there is so much controversy about the value of trusting the government that I have omitted these figures.

union.<sup>179</sup> Union members perform at least five percent worse than these other participants on all the measures listed above except “influencing people about elections,” where union members are more active than other members.<sup>180</sup> In short, unions boost civic participation, but somewhat less than the average association does. Furthermore, union membership is a relatively weak predictor of overall associational membership.<sup>181</sup> It seems that union members are not avid joiners the way that Rotarians and PTA volunteers are. Thus, we can count unions within civil society, conceived as the sector that correlates with (and probably cultivates) civic behavior. But they are not outstanding parts of that sector.

#### *D. The Realm of Interest Group Politics*

A fourth definition of “civil society” views it as the domain of interest groups, political factions, or lobbies.<sup>182</sup> This definition clearly covers unions, since they lobby government officials, litigate, communicate to their own members about elections and issues, spend money on grassroots political campaigns, buy advertising, make endorsements, and donate to candidates and parties. Especially in recent decades (and especially in the United States), these political activities have been much more effective than the traditional tactics of labor unions: organizing workers, bargaining with employers, and striking.<sup>183</sup>

Even union leaders abhor some methods of modern interest-group politics that they themselves employ, such as huge “soft money”

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179. *See id.*

180. *See* Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin/12/hsda?harcsta+gss98> (May 12, 2001) (cumulative data analyzed by author).

181. *See id.*; *see also* Brehm & Rahn, *supra* note 171, at 1005-07.

182. *See* ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* 163-64 (1992).

In the West the voluntary associations of civil society are interest groups; they are organized for the pursuit of mutual interest on the institutional level (of what Habermas would call strategic action). Their interaction with other groups (and with the State) is defined by this instrumental rational orientation (and the terms of membership within the group are likewise so defined).

*Id.*

183. *See, e.g.*, Bruce Nissen, *Introduction*, in *WHICH DIRECTION FOR ORGANIZED LABOR?: ESSAYS ON ORGANIZING, OUTREACH, AND INTERNAL TRANSFORMATIONS* 11 (Bruce Nissen ed., 1999) (discussing the weakness of unions in the marketplace). “Union bargaining power, with few sectoral exceptions, has dropped dramatically, as demonstrated by collective bargaining outcomes.” *Id.* By contrast, Cornell Professor Richard Hurd says that unions “were probably more effective [in the 2000 elections] than they’ve ever been politically.” Steven Greenhouse, *New Political Field Challenges Labor Leaders*, N.Y. TIMES, Feb. 12, 2000, at A21.

contributions.<sup>184</sup> However, even under fairly drastic campaign-finance reform legislation, unions would still retain a substantial political role. Indeed, they might be strengthened in their political competition with corporations, since companies and executives give a much bigger total of hard and soft money than unions do.<sup>185</sup> Unions would certainly be allowed to make endorsements, to lobby, to communicate to their own members about political matters, to defend their rights in court, and to make strike decisions partly on political grounds.

Whether these actions are desirable depends on our general view of interest groups. Most political theorists from Plato to Rousseau viewed all “factions” as dangerous, self-interested, divisive, and even conspiratorial groups. At best, political organizations seemed likely to promote inequality (because they conferred power on their leaders) or to put their institutional interests above the common good.<sup>186</sup> *Stasis*, the

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184. See AFL-CIO, *The Defeat of Campaign Finance Reform*, available at [www.aflcio.org](http://www.aflcio.org), (last visited Feb. 26, 1998).

Once again today, campaign finance reform lost out to big money. The vote in the senate shows how hard it is for working Americans to make their voices heard above those of corporate interests. The current system unfairly rewards corporations and wealthy contributors by amplifying their voice at the expense of ordinary Americans. Until soft money is removed from our election system, corporations will continue to own our nation's political system. The AFL-CIO wholeheartedly supports and will keep fighting for *real* campaign finance reform which gives all Americans a place at the table, not just those who can afford to buy the seat.

*Id.*

185. The most recent study available at the time of writing shows that businesses gave \$196 million in soft money from January 1, 1999 through June 30, 2000, whereas labor gave \$16 million: a 12:1 ratio. See Common Cause, *You Get What You Pay For: Special Interests Contribute Record Amounts of Soft Money During First 18 Months of 2000 Election Cycle*, available at <http://commoncause.org/publications/sept00/softmoney/090701.htm> (last visited Sept. 7, 2000).

186. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 203 (G.D.H. Cole trans., 1950); 1 PLATO, *THE REPUBLIC* 494 (Paul Shorey trans., 1946) (stating his characteristic use of “stasis” to mean faction). Cf. LOCKE, *supra* note 92. But perhaps the strongest statement of the view that political association leads to strife appears in Thomas Hobbes’ *De Cive*:

Now I call a faction, a multitude of subjects gathered together, either by mutual contracts among themselves, or by the power of some one, without his or their authority who bear the supreme Rule. . . . [M]any men who are themselves very well affected to civil society, do through want of knowledge, cooperate to the disposing of subjects minds to sedition . . . they may join the ill affected together into faction and conspiracy . . . and nominate the persons and Places, to assemble and deliberate of such things whereby the present government may be reformed, according as it shall seem best to their interests. . . . They must have their secret meetings apart with a few, where they may order what shall afterward be propounded in a general meeting, and by whom, and on what subject, and in what order each of them shall speak, and how they may draw the powerfulllest, and most popular men of the faction to their side: And thus when they have gotten a faction big enough, in which they may rule by their eloquence, they move it to take upon it the managing affaires; and thus they sometimes oppress the Commonwealth, namely where there is no other faction to oppose them, but for the most part they rend it,

Greek word for any party or group, especially meant a faction formed for seditious purposes; it was also the word for civil strife or discord. Rousseau wrote: "When intrigues arise, and partial associations are formed at the expense of the great association [i.e., the state], it may then be said that there are no longer as many votes as there are men, but only as many as there are associations."<sup>187</sup> Under his influence, the French revolutionary government forbade members of the same occupation from deliberating or making decisions about "their supposed common rights."<sup>188</sup> Any coalition, whether of workers or masters, was seen as "a conspiracy against the common good."<sup>189</sup>

Most people now agree with Madison that such remedies are "worse than the disease."<sup>190</sup> Only by a repressive act of state can we prevent people from forming associations that lobby government in their collective self-interest.<sup>191</sup> "Liberty is to faction, what air is to fire, an ailment without which it instantly expires."<sup>192</sup> Citizens must be able to persuade one another and the government that their views are correct; this is as important as voting. Therefore, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."<sup>193</sup> If unions and other organizations *cannot* take public positions, then private freedom of association and assembly will be hampered, because people will not be able to form groups for the purpose of petitioning. They will not be able to exercise their individual rights fully within their organizations, because one outcome that they might reasonably prefer (lobbying) will be foreclosed. Madison therefore, defended the rights of private associations, but in the hope that each one would be checked by its competitors, so that the "permanent and aggregate interests of the community" might prevail.<sup>194</sup> The Framers did not specifically endorse workers' organizations,<sup>195</sup> but surely unions should not be prevented

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and introduce a civil war.

Thomas Hobbes, *De Cive*, available at <http://sites.netscape.net/hannibalism/HobbesDC2.html#XII> (last visited May 20, 2001).

187. ROUSSEAU, *supra* note 186.

188. Michael Harrington, *Trade Unions: Past and Future*, in MORAL RIGHTS, *supra* note 4, at 143, 144.

189. *Id.*; see also 1 CHARLES DOWNER HAZEN, THE FRENCH REVOLUTION 407-08 (1932).

190. The FEDERALIST NO. 10, at 43 (James Madison) (Gary Wills ed., 1982).

191. See *id.*

192. See *id.*

193. U.S. CONST. amend. I.

194. The FEDERALIST NO. 10, *supra* note 190, at 43.

195. See The FEDERALIST NO. 35, at 167 (arguing that people employed in the "mechanic and manufacturing arts" will be well represented by merchants who are likely to be elected to Congress,

from entering the political fray if other organized political factions are tolerated.

One could object that unions “speak” for all their members, including those who are outvoted on a given issue. If freedom of speech and petition includes the right *not* to express a view, as Jefferson held,<sup>196</sup> then unions seem to undermine First Amendment rights in a way that is not true of the Sierra Club or the NAACP (groups that one can easily quit). Whereas unions are generally popular with their own rank-and-file, they score the lowest levels of support for their “positions on national political issues” and their “[e]ndorsements of candidates in political campaigns.”<sup>197</sup> In a train of cases since 1977, the Supreme Court has ruled that union members may resign without penalty and that non-members who are required to pay dues do not have to pay for lobbying or organizing efforts.<sup>198</sup> These rulings have not gone far enough for libertarians, who worry that some workers will want to retain their union memberships (so that they can vote on bargaining issues), yet will disagree with the union’s political agenda.<sup>199</sup> Libertarians also complain that dissenting dues-payers must seek refunds instead of being automatically exempted from the costs of political speech.<sup>200</sup>

On the other hand, supporters of organized labor find the Court’s concern for dissenters’ rights overly burdensome, especially since corporations are not similarly regulated. Employees lack the right to vote on a company’s political agenda, although they help create the wealth that funds lobbying efforts. As for shareholders, they can easily find themselves outvoted on matters of conscience, yet the Supreme Court has ruled that corporate lobbying does not violate individual shareholders’ First Amendment rights as long as they can vote.<sup>201</sup> By the

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so there is no need for them to represent themselves).

196. See Jefferson, *supra* note 102, at 546.

197. FREEMAN & ROGERS, *supra* note 37, at 78 (stating that about a quarter of unions’ members disagree with unions’ political agendas to varying degrees).

198. See, e.g., *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 507-08 (1991) (announcing a strict three-part test for “determining which activities a union constitutionally may charge to dissenting employees”); *Communications Workers v. Beck*, 487 U.S. 735, 735 (1988) (holding that workers can withhold dues for everything but the cost of bargaining); *Pattern Makers League v. NLRB*, 473 U.S. 95, 106 (1985) (holding that union members have constitutional rights to resign without losing their jobs); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220 (1977) (noting that compulsory dues for politics are unconstitutional).

199. See *infra* Section III.D.

200. See, e.g., *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 774 (1961) (holding that “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee”).

201. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794-95 (1978).

same token, unionized workers have the power to elect and remove *their* leaders, so their individual interests are in some ways protected even if they must pay dues for political action.<sup>202</sup> Although the costs of exiting from a union's membership because of a moral dispute are high, they are not higher than the costs of quitting one's job to protest a company's policies. And unions, unlike firms, are obliged to grant each member political equality.<sup>203</sup> Since the passage of the Landrum-Griffin Act in 1959, unions have been required by federal law to guarantee their members equal rights, freedom of speech and assembly, secret ballots, and due process.<sup>204</sup> The Supreme Court has required unions to act fairly toward all their members, where fairness means "without hostility or discrimination toward any . . . with complete good faith and honesty, and [without] . . . arbitrary conduct."<sup>205</sup> Companies operate under far weaker legal obligations.

Thus, the current treatment of unions' political speech seems defensible: any committed dissenters can avoid violations of their conscience by renouncing their memberships and requesting refunds of their dues.<sup>206</sup> Blocking unions from lobbying would mean either suppressing everyone's rights of association and petition or else discriminating in favor of labor's opponents. This is a grudging defense, but one could adopt a more positive attitude, claiming that interest-groups are valuable because they generate a vigorous debate about public issues. Rousseau thought that "factions" would distort the public debate by pursuing their narrow interests.<sup>207</sup> More recently, interest-group liberals (also known as pluralists) have asserted that there is no knowable public good or that the good simply lies in having a rich field of competing interest groups that operate under fair rules of engagement.<sup>208</sup> A third possibility is that the national interest exists, but it can only be known if there are organized groups to debate it.<sup>209</sup> If labor's viewpoint is not represented by disciplined, well-funded organizations, then public deliberation will be less informed and balanced.

Speech is sometimes a public good that cannot be produced by uncoordinated, individual action. Each worker may be tempted to act as

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202. See generally *infra* note 199 and accompanying text.

203. See 29 U.S.C. § 411 (1994).

204. See *id.*

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

206. See generally *supra* note 200 and accompanying text.

207. See generally ROUSSEAU, *supra* note 187.

208. See LEVINE, *supra* note 152, at 42.

209. See generally *id.* at 41-45.

a free-rider, relying on others to speak for the interests of workers as a class. The few who do speak (or who voluntarily pay for speech) will see weak results from their efforts. But if workers form a union for collective-bargaining purposes, and if it can *compel* everyone to pay for political activities, then all workers will gain a strong voice at a small cost to each. For the rest of society, the advantage will be a more robust public debate. Absent unions, corporations and wealthy individuals will predominate, because they can overcome collective-action problems. In many poor communities, unions are among the only institutions that have the power to fund themselves without outside assistance from either government or philanthropy. Since unions stand on their own two feet financially, they can represent people who would otherwise be silent.

### *E. The Public Sphere*

The ideal of robust and diverse debate brings us to a final definition of civil society. Jean L. Cohen writes: “the concept of the public sphere . . . [is] the normative core of the idea of civil society and the heart of any conception of democracy.”<sup>210</sup> The public sphere is the arena in which citizens gather information, form preferences about public policy, encounter alternative perspectives and arguments, and sometimes improve their views. Private conversations are narrow; market discourse is influenced by wealth and subject to collective-action problems; and political debate is competitive and dominated by professional elites. Thus, we also need the conversations that occur in civil society, defined to include newspapers, call-in shows, book clubs, religious denominations, fraternal associations, and the like.

What about unions? The General Social Survey data cited above shows that union members participate in deliberative activities such as serving on committees, attending conferences, contacting the government, and writing to newspapers as a result of their membership.<sup>211</sup> Unions actually surpass other associations in the percentage of their members who discuss elections.<sup>212</sup> Unions also force other institutions, such as the mass media and legislatures, to debate issues that may otherwise be ignored. Some groups (e.g., sweat-shop

210. Jean L. Cohen, *American Civil Society Talk*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL* 55, 59 (Robert K. Fullinwider ed., 1999).

211. See Survey, *General Social Survey*, available at <http://csa.berkeley.edu:7502/cgi-bin12/hsda?harsda+gss98> (May 12, 2001) (analyzing cumulative data).

212. See *id.*

employees and migrant laborers) are too small and politically weak to demand attention. Others (such as regular salaried employees) are very numerous, but their issues—the minimum wage, job security, and workplace safety—may nevertheless be overlooked because it takes coordinated action to put any matter on the national agenda. This is where unions can help. By threatening to strike, they can force elected bodies, regulatory agencies, and courts to consider their complaints. If, for example, UPS workers stop delivering packages, then the government can either let their strike proceed, order them back to work, or try to improve the general labor climate through broad legislation. In any event, public institutions will have to deliberate, and their actions will be accompanied by a lot of discussion in newspapers, television shows, and living rooms.

Meanwhile, unions permit workers to deliberate about the conditions of their employment. Thus, they generate an inner public sphere, just as the liberal state, with its civil rights and democratic procedures, generates a national public sphere. They do so by protecting freedom of association and criticism inside the workplace, and by giving workers a means to *act* on their deliberate beliefs. Without the possibility of action, discussion soon seems pointless. As Boyte and Kari argue, many “deliberative theorists put citizens in the role of judicious audience.”<sup>213</sup> That is, they assume a distinction between judgment, the citizens’ role, and work or action, which is what rulers do. But when union members debate a contract, decide to strike, and then provide food and childcare for their fellow strikers, they fruitfully combine judgment, work, and action.<sup>214</sup>

If we want civil society to promote deliberation, then obstacles to resigning from a group may actually be an advantage. According to Albert Hirschman’s classic theory, people can express dissatisfaction with organizations in two ways: by using “exit” or “voice.” Individuals are most likely to use voice when they cannot easily exit, and vice-versa (this is assuming that their institution *permits* democratic discussion and criticism).<sup>215</sup> For example, members of a mailing-list organization who disagree with its tactics or aims may simply stop contributing. But “when workers are dissatisfied with the services of a union, they cannot

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213. HARRY C. BOYTE & NANCY N. KARI, *BUILDING AMERICA: THE DEMOCRATIC PROMISE OF PUBLIC WORK* 210 (1996).

214. *See generally id.* (discussing the blend of negotiation, bargaining, and compromise in public life).

215. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 80 (1970).



switch easily and rapidly to another and are that much more likely to make an effort at revitalizing the union with which they are affiliated.”<sup>216</sup> These efforts at revitalization normally require discussion.

A similar distinction is between “thick” groups and “thin” ones.<sup>217</sup> A “thin” organization is formed by people who share pre-existing aims; they remain members so long as the group efficiently serves their private interests.<sup>218</sup> Most of the discussion within such organizations is tactical, because their fundamental values and purposes are fixed.<sup>219</sup> “Thick” groups, on the other hand, are viewed as ends in themselves.<sup>220</sup> People view membership as a matter of identity, but they have to decide what purposes the group will serve and what values will guide it.<sup>221</sup> Thus, as long as they are democratically organized, “thick” groups are more likely to promote deliberation about ends than “thin” ones are.<sup>222</sup> Unions are surely an intermediate case, but they are “thicker” than purely voluntary associations.<sup>223</sup>

If unions are valuable for their internal public spheres, then there ought to be associations, independent journals, and spirited, public discussions within the union movement, which is not often the case. Still, the bare existence of a union allows workers to discuss the economic conditions of their own lives, to debate tactics for bettering their situations, and then to take collective and binding action in their mutual interest. Other associations offer these opportunities separately. We can talk about economics in a reading group and take action by changing our own jobs. We can think about tactics at the office or on a sports team or act in common in a soup kitchen. But no other organization links these components into one (potentially) seamless whole. Unions are not primarily places in which some people get together to help others, nor where each helps themselves, but where every member can assist everyone else by implementing democratic decisions.

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216. *Id.*

217. See Bruce Bimber, *The Internet and Political Transformation: Populism, Community, and Accelerated Pluralism*, 31 *POLITY* 133, 148-49 (1998).

218. See *id.*

219. See *id.*

220. See *id.*

221. See *id.*

222. See Bimber, *supra* note 217, at 148-49.

223. See *id.*

## V. CONCLUSION

The moral considerations listed in this paper all incline toward the same conclusion. Unless one adopts radical and controversial moral principles or contentious interpretations of the empirical data, it appears that unions are at least as legitimate as other institutions are. Workers have the right to join them and to form new ones by majority vote. Indeed, unions are good for the nation because of their civic, economic, and political effects. Governments should not pressure people to join, because unions ought to be fully democratic and independent institutions, built from the ground up by their members. But it is appropriate for the state to ensure that when more than 50 percent of workers want a union, they can have one.

The powers and prerogatives of unions should be balanced against the individual rights of dissenting workers and the duty of the state to legislate in the common interest. Thus, individuals ought to be able to avoid union membership and dues beyond those germane to contract negotiations. In addition, all members ought to have enforceable rights not to be discriminated against within unions. And finally, contract agreements should be subject to state oversight. But none of these qualifications (which are enshrined in current law) would prevent strong unions from forming.

Unfortunately, the actual rate of union membership, fifteen percent of all employees, less in the private sector, is much lower than it is in other democracies and below half the level reached in America around 1950.<sup>224</sup> About one third of non-unionized American workers believe that "were an election held tomorrow, workers at their firm would support a union,"<sup>225</sup> but they are unlikely ever to cast a vote. These statistics are troubling if one sees unions as legitimate.

Experts disagree about why American unions are weak and have shrunk in recent decades. Some plausible causes include the passage of right-to-work laws; automation; affluence; a shift of employment into white-collar occupations and service jobs; the increasing numbers of young people, immigrants, and women in the workforce; intensified competition in traditionally unionized industries (especially competition with developing countries); the movement of plants to Southern states; enhanced federal safety and health regulations (which make unions

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224. See *Workers of the World*, WASH. POST, Aug. 30, 1997, at A24 (comparing unionization rates of 91.7 percent in Denmark, 58.4 percent in South Africa, and 42.3 percent in Argentina). For a U.S. time series, see PUTNAM, *supra* note 81, at 331-35.

225. FREEMAN & ROGERS, *supra* note 37, at 69.

appear less necessary); the NRLB's failure to protect organizing campaigns from retaliation; more efficient and aggressive anti-union tactics; more humane management techniques; the AFL-CIO's weak commitment to organizing; and even the changing values of American workers.<sup>226</sup> Given all these threats to the labor movement, it is not obvious that either better laws or tougher enforcement would boost membership dramatically. However, if workers have a moral right to form bargaining units by majority vote, then their right to advocate a union must be protected, and it is wrong to ban the agency shop.

By repealing Taft-Hartley, Congress could at one stroke legalize agency shops nationwide. Although the statistical evidence is ambiguous, it seems reasonable to predict that this reform would cause about five percent of the population in current "right-to-work" states to join unions, for a total increase of millions of members. To protect the right to organize, Congress could also direct considerably more funds to

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226. Gary N. Chaison & Joseph B. Rose consider all the factors listed here, concluding that public policies (such as the laws concerning union certification) and employer attitudes explain more of the variance in union density than any other causes. See Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS* 3, 3-45 (George Strauss et al. eds., 1991). Similarly, Michael Goldfield analyzes scores of variables, concluding that the main problems for unions have been (1) improved anti-union tactics by management; (2) anti-union laws and policies (such as Taft-Hartley); and (3) apathy on the part of the AFL-CIO. See generally MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987). For a focus on better federal regulation as a cause, see George R. Neumann & Ellen R. Rissman, *Where Have All the Union Members Gone?* 2 J. LAB. ECON. 175, 175-92 (1984). On more effective anti-union tactics, see William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 IND. & LAB. REL. REV. 560, 560-75 (1982). On poor enforcement of the NLRA, see Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769-1827 (1983). On changing worker values, see Davy & Shipper, *supra* note 153, at 21-27. The AFL-CIO's apathy about organizing before about 1996 is epitomized by President George Meany's comment in 1972: "Frankly, I used to worry about the membership, about the size of the membership. But quite a few years ago, I just stopped worrying about it, because to me it doesn't make any difference." Bruce Nissen, *supra* note 183, at 14-15. On growing competition in unionized industries, see Garth L. Mangum and Stephen L. Mangum, *The Loss of Competitive Shelters: Another Insight into Union Decline*, 12 LAB. STUD. J. 4, 4-18 (1987). Robert J. Newman shows that right-to-work states are magnets for new jobs and company relocations (even within the South). Thus state labor laws have contributed to job migration, which has hurt unions. See Robert J. Newman, *Industry Migration and Growth in the South*, 65 REV. OF ECON. & STAT. 76, 76-85 (1983). More generally, David T. Ellwood and Glenn Fine find that right-to-work laws cut the rate of organizing dramatically, thereby causing union membership to fall by 5-10 percent in the long run. See generally Ellwood & Fine, *supra* note 18, at 250-73. Because they emphasize the rate of union organizing rather than the level of membership, their work seems to be a methodological improvement over earlier studies. See, e.g., Keith Lumsden & Craig Petersen, *supra* note 91, at 1237-48 (finding no impact). But see Ronald S. Warren, Jr. & Robert P. Strauss, *A Mixed Logit Model of the Relationship between Unionization and Right-to-Work Legislation*, 87 J. POL. ECON. 648, 648-55 (1979) (finding a significant impact).

the NLRB, which could, in turn, adopt an aggressive stance against unfair labor practices. Some managers have become increasingly skillful at delaying representation elections, because delay demonstrably lowers the union's chance of victory. They have also mastered the art of intimidating union supporters. It is illegal to fire employees for advocating unions, but termination can effectively stop an organizing drive, and the only penalty that managers risk is reinstatement of the union advocates with back-pay, minus any salary that they earned at another job.<sup>227</sup> By 1980, more than 10,000 workers were winning reinstatement orders annually, although hardly anyone who was terminated under such conditions would actually return to work.<sup>228</sup> Since only about 200,000 people were voting to unionize each year, this means that one in twenty union supporters was being fired each year "for exercising rights supposedly guaranteed by federal law a half-century ago."<sup>229</sup> The NLRB has never done much about this problem, which persists today.<sup>230</sup>

When a company breaks the law in its efforts to prevent a union from forming, federal judges may declare the union automatically certified, regardless of the results of the election.<sup>231</sup> In practice, however, the results appear to be disappointing. A union that was crushed during its organizing drive, and only exists because a federal judge has intervened, seems hopelessly weak from the start. Thus, managers may not feel compelled to make it a serious contract offer.

A possible solution is to require the NLRB to recognize a union as the sole legitimate bargaining agent of a workforce as soon as a majority of the covered workers have signed a petition to unionize.<sup>232</sup> Then it would be much easier for unions to form, and members could always vote to decertify if they didn't like the results. Neither side would know how deeply the rank-and-file was committed to the union, since workers would not have had to struggle against management intimidation to organize. Therefore, neither side would know how well the union would weather a strike. But this very uncertainty would encourage management

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227. See 29 U.S.C. 158(a)(1)-(3) (1994). On delay tactics, see GOLDFIELD, *supra* note 5, at 51-52; Weiler, *supra* note 226, at 1776-82.

228. See Weiler, *supra* note 226, at 1780-81.

229. *Id.* at 1781.

230. See JOHN J. SWEENEY & DAVID KUSNET, AMERICA NEEDS A RAISE 82 (1996) (alleging that 10,000 workers are still fired annually for advocating unions). See generally GEOGHEGAN, *supra* note 57, at 276 (discussing how labor laws should be reformed).

231. See 45 U.S.C. § 152 (1994).

232. See Weiler, *supra* note 226, at 1794-95 (discussing the Canadian industrial relations system).

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to negotiate seriously with the union leadership, who would have dues money and other resources to use during the bargaining process.

The results are impossible to predict, since this reform has not been tried in the United States before. But it is consistent with the philosophical considerations that I have explored in this essay. Geoghegan writes:

I can think of nothing, no law, no civil rights act, that would radicalize this country more, democratize it more, . . . than to make this one tiny change in the law: to let people join unions if they like, freely and without coercion, without threat of being fired, just as people are permitted to do in Europe and Canada.<sup>233</sup>

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233. GEOGHEGAN, *supra* note 57 at 276.