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INDUSTRIAL DEMOCRACY AND THE NATIONAL LABOR RELATIONS ACT: A PRELIMINARY INQUIRY†

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Industrial democracy is a central promise of the National Labor Relations Act (NLRA).¹ The Act, drawing from lessons learned in the political sphere, provides a quasi-democratic procedure for governance of the work place. Representatives are elected. Rules are established by the representatives. Disputes are adjudicated according to the rules. This model of the NLRA — as a charter of industrial democracy — supplies much of the allure of labor law as an academic discipline. Labor law as a representative democracy promises the same rewards and confronts the same problems as its parent and archetype, liberal democracy.

The idea of industrial democracy first gained momentum in the rhetoric of the union movement. In 1918, the American Federation of Labor argued that “workers should have a voice in determining the laws within industry and commerce which affect them, equivalent to the voice which they have as citizens in determining the legislative enactments which shall govern them.”² The idea then entered the realm of political rhetoric and provided supporters of the Act with an ideological basis for their proposal. Senator Wagner, chief sponsor of the Wagner Act,³ said that “[t]he principles of [the] proposal were . . . that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that . . . workers . . . can enjoy this participation only if allowed to . . . bargain collectively through representatives of their own choosing.”⁴ Later, influential commentators used the notion of industrial democracy to change public perception of the Act from an impression that the Act was a largely unwelcome gov-

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¹ National Labor Relations Act, 29 U.S.C. §§ 151-68 (1976) [hereinafter referred to as “the Act,” “the NLRA,” or “the National Labor Relations Act”].

² M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965* 165 (1970) [hereinafter cited as M. DERBER]. See generally H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 26-27 (1968) [hereinafter cited as H. WELLINGTON].

³ Wagner Act, Pub. L. No. 198, 49 Stat. 449 (1935), is the original ancestor of the current National Labor Relations Act.

⁴ New York Times, April 13, 1937, at 20, col. 1. For a similar statement by Senator Wagner in a more formal setting, see 75 CONG. REC. 4918 (daily ed. Feb. 29, 1932).

ernmental intrusion into the view that the Act established a system of democratic norms forming an integral part of the industrial milieu. For example, Professor Cox noted in 1948 that the most important measure of the value of collective bargaining in its governmental aspect was the degree of democracy it introduced into industrial life. Collective bargaining, he stated, aimed to establish a rule of law and enable the individual employee to share in industrial government.⁵ Industrial democracy, then, is the ideology of the American labor relations system; it is the ideology of the NLRA.⁶

Despite an illustrious history,⁷ industrial democracy under the National Labor Relations Act is largely a myth. The Act has failed to fulfill its promise.⁸ This article will first trace the notion of industrial democracy from its origins to the Wagner Act to its development under current labor laws. Next the article will analyze the quasi-democracy created by the National Labor Relations Act. The manner in which the Act answers the essential questions of democratic theory — questions such as who votes, how votes are weighed, and what limitations are imposed on outcomes — will then be described and criticized. Finally, the article will discuss the effects of viewing labor relations through this lens.

1. INDUSTRIAL DEMOCRACY — A BRIEF HISTORY

"The democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well."⁹

Albert Gallatin, Secretary of the Treasury under Thomas Jefferson and James Madison, made this statement upon the introduction of a profit sharing plan into his factory in 1797.¹⁰ The idea of industrial democracy, then, arose with the rise of industry.¹¹ This idea became even more embedded, especially in the minds of workers, when it became apparent that "wage earning was [not] a mere way station to independence as farmer, artisan or entrepreneur."¹² The creation of a permanent, economically dependent class heightened awareness, both inside and outside the class, of the importance and

⁵ Cox, *Some Aspects of the Labor Management Relations Act*, 1947 (pt. 2), 61 HARV. L. REV. 274, 276 (1948) [hereinafter cited as Cox, *LMRA* (pt. 2)]; See also Cox, *Some Aspects of the Labor Management Relations Act*, 1947 (pt. 1), 61 HARV. L. REV. 1 (1948) [hereinafter cited as Cox, *LMRA* (pt. 1)].

⁶ Professor Dunlop has defined the ideology of an industrial-relations system as "a set of ideas and beliefs commonly held by the actors that helps to bind or to integrate the system together as an entity." J. DUNLOP, *INDUSTRIAL RELATIONS SYSTEM* (1958) [hereinafter cited as J. DUNLOP].

⁷ See *infra* notes 9-50 and accompanying text.

⁸ This article reaches this conclusion analytically by comparing the concept of democracy to the realities of the NLRA processes. Other scholars have reached similar conclusions through other types of analysis. See, e.g., Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) [hereinafter cited as Klare]; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) [hereinafter cited as Stone]; Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979). Cf. Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984) [hereinafter cited as Hyde].

⁹ M. DERBER, *supra* note 2, at 6.

¹⁰ *Id.*

¹¹ Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 339 (1981) [hereinafter cited as Gorman & Finkin]. See also D. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, 57 (1974); F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951).

¹² See generally M. DERBER, *supra* note 2, at 6-12, 29-107; Gorman & Finkin, *supra* note 11, at 339-41.

rewards of industrial democracy. Records from inside the class are sketchy, because members did not have ready access to the press and historians have largely ignored their views, but recent research indicates a yearning for democratic control that extended well beyond the traditional modes.¹³ From the perspective of those outside the class, the new laboring class threatened not only industry, but the larger democracy as well.¹⁴ Contemporary commentators recognized that the contradiction between general political liberty and industrial slavery could not coexist for very long and predicted that political liberty would be extinguished or industrial liberty would be restored.¹⁵

Quite different branches could be grafted onto this emerging trunk of industrial democracy. The statement of Albert Gallatin quoted at the beginning of this section was made upon the introduction of a profit sharing plan, and other employers shared his view that profit sharing was a respectable offshoot of industrial democracy.¹⁶ There were, however, many other respectable offshoots of industrial democracy such as employer-sponsored employee representation plans, public ownership of business, scientific management, and, of course, collective bargaining.¹⁷ All of these variants of industrial democracy share two common characteristics: a weakening of autocratic employer control of the work place and a concomitant increase in the participation of employees or the public or both in industrial decisionmaking.

By the time of the Wagner Act, however, collective bargaining had emerged from among these variants to become the standard bearer of industrial democracy. Industrial democracy now meant collective bargaining between employers and representatives chosen by employees. Senator Wagner championed the cause stating that democracy in industry must be based upon the same principles as democracy in government.¹⁸ He maintained that "[m]ajority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered."¹⁹ Senator Wagner was joined by a chorus of other voices. Representative Mead proclaimed that the NLRA created a democracy within industry that gave industrial workers the same general idea of freedom the founding fathers conferred upon citizens of the United States²⁰ and Representative Truax, with some overstatement, declared that the Wagner-Connery bill, the precursor to the Wagner Act, freed the industrial slaves of this country from the tyranny and aggression of the overlords of wealth, just as Lincoln had freed the blacks in the South.²¹ Thus, collective bargaining and, specifically, collective bargaining under the NLRA model became the embodiment of industrial democracy.

But the model of democracy under the Wagner Act was only a seed. The model did not come into full flower until it was articulated by Archibald Cox and other, post-war liberals.²² These post-war liberals wrote extensively²³ and presented the model in its

¹³ Klare, *supra* note 8, at 290-91 & nn. 78-79.

¹⁴ Gorman & Finkin, *supra* note 11, at 340 & n.203.

¹⁵ L. BRANDEIS, *THE CURSE OF BIGNESS* 39 (1934), *cited in*, Gorman & Finkin, *supra* note 11, at 340-41.

¹⁶ M. DERBER, *supra* note 2, at 7, 9, 62-65, 130, 483-85.

¹⁷ See Gorman & Finkin, *supra* note 11, at 341; M. DERBER, *supra* note 2, at 130; Guzda, *Industrial Democracy: Made in the U.S.A.*, 107 MONTHLY LAB. REV. 26 (1984).

¹⁸ 79 CONG. REC. S7571 (daily ed. May 15, 1935) (statement of Sen. Wagner).

¹⁹ *Id.*

²⁰ 79 CONG. REC. H9710 (daily ed. June 19, 1935) (statement of Rep. Mead).

²¹ 79 CONG. REC. H9714 (daily ed. June 19, 1935) (statement of Rep. Truax).

²² Professor Cox and a number of other intellectuals shared, and indeed molded, the model of the NLRA described in this article. See *infra* notes 25-29, 33, 41, 48-49, 52-53 and accompanying text. Other significant architects of the model were Benjamin Aaron, a law professor and arbitrator; Neil

clearest and most unified form. They had a significant influence on the development of American labor law, evidenced by the reliance placed upon their writings by the courts.²⁴

Collective bargaining in the workplace as a self-contained representative democracy is the central metaphor of the model as articulated by the post-war liberals.²⁵ Representatives of management and labor meet to negotiate a collective bargaining agreement which becomes the basic statute governing the conduct of industrial relations within the plant.²⁶ Disputes over the meaning of the collective bargaining agreement are resolved through arbitration and, hence, private arbitration serves as the judiciary in this democracy.²⁷ To ensure the proper functioning of this mini-democracy, the processes of the state — primarily the courts, but also to a lesser extent the legislature — should not intervene;²⁸ the workplace as representative democracy is "an island of self-rule whose self-regulating

Chamberlain, a Harvard economist; John Dunlop, a Harvard professor and former Secretary of Labor; David Feller, a professor of law; and Harry Shulman, an arbitrator and former Dean of the Yale Law School. See Stone, *supra* note 8, at 1516 n.29.

²³ Professor Cox alone, for example, had 42 articles on labor law listed in the *Index to Legal Periodicals* from 1944 to 1980, 11 of which appeared in the widely-read and influential *Harvard Law Review*. During this time, he also authored or co-authored a number of books. See, e.g., A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* (8th ed. 1977) [hereinafter cited as A. COX, D. BOK & R. GORMAN]; A. COX, *LAW AND THE NATIONAL LABOR POLICY* (1960) [hereinafter cited as A. COX].

²⁴ Using Professor Cox as an example once again, his articles were cited in at least 47 labor cases decided by the United States Supreme Court between 1950 and 1983. (I do not warrant that my computer search was exhaustive). The cases include a virtual Hall of Fame of labor law cases. E.g., *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 623 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626 n.16 (1967); *Vaca v. Sipes*, 386 U.S. 171, 191 (1967); *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421, 430 (1967); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 n.6 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 n.6 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 458 (1957); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 295 (1956) (Frankfurter, J., dissenting); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 405 n.16 (1952).

²⁵ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-81 (1960) ("A collective bargaining agreement is an effort to erect a system of industrial self-government"); *Steel v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198 (1944). See, Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1959) [hereinafter cited as Cox, *Preserving Union Democracy*]; Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 22-28 (1958); Cox, *LMRA* (pt. 1), *supra* note 5, at 1; Cox, *LMRA* (pt. 2), *supra* note 5, at 275.

²⁶ Cox, *LMRA* (pt. 2), *supra* note 5, at 275. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-80 (1960); *Steel v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198 (1944); Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492 (1959) [hereinafter cited as Cox, *Reflections*]. See generally Stone, *supra* note 8.

²⁷ Cox, *Reflections*, *supra* note 26, at 1506; Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTS. L. REV. 247, 263 (1958) [hereinafter cited as Cox, *Current Problems*]; Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 101-02 (1977) [hereinafter cited as Feller]; Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 63 (1922); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007, 1024 (1955) [hereinafter cited as Shulman]. See Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 463 (1981) [hereinafter cited as Klare, *Historiography*]; Stone, *supra* note 8, at 1514-15.

²⁸ Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951) [hereinafter cited as Cox, *Concerted Activities*]; Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 425-32 (1950) [hereinafter cited as Cox & Dunlop]; Shulman, *supra* note 27, at 1024; Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 771-72 (1973).

mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."²⁹

The National Labor Relations Act serves as the constitution in this mini-democracy. It provides the basic organizational structure for the democracy and contains certain basic "civil" rights.³⁰ The National Labor Relations Board is empowered to designate appropriate election units,³¹ to hold hearings, and to conduct representation elections.³² Thus, the Act "set[s] up machinery for periodically determining the union designated as their representative by a majority of the employees."³³ It thus provides for the democratic selection of a major participant in the mini-democracy, the employee representative. In addition, the Board is empowered to enforce rights and restrictions established by the Act,³⁴ including the employer's duty "to bargain collectively" with employee representatives.³⁵

The rights and restrictions established by the Act, however, pose a threat to the NLRA model articulated by Professor Cox and others. These rights and restrictions invade the "island of self-rule"; instead of a self-contained democracy, the Board and the courts interfere with decisions reached by the democratic process.³⁶ For example, section 8(a)(3) of the Act, makes it illegal for an employer to treat an employee differently because of the employee's union membership or non-membership.³⁷ Even if the differential treatment is a result of the preferred process (collective bargaining),³⁸ it is illegal.³⁹ Section 8(a)(3), then, is a limit on democratic outcomes. The section threatens the claim that the Act is a self-contained democracy because the processes of the state intervene to alter substantive outcomes.

Champions of the NLRA model met this challenge by characterizing the Act's rights and restrictions as instrumental or, to borrow a term from political theory, as

²⁹ Stone, *supra* note 8, at 1515. See also, P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 151-58, 178-82 (1969); Cox, *The Role of Law in Labor Disputes*, 39 CORNELL L. Q. 592, 606 (1954) [hereinafter cited as Cox, *The Role of the Law*] (the NLRA should "encourage private democracy").

³⁰ This model of the NLRA mirrors the model of the United States Constitution forwarded by some commentators, most notably John Hart Ely. See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-101 (1980) [hereinafter cited as J. ELY]. See also Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEG. EDUC. 457, 463-67 (1954); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 254-55 (1975).

³¹ NLRA, § 9(b), 29 U.S.C. § 159(b) (1976).

³² NLRA, § 9(c), 29 U.S.C. § 159(c) (1976).

³³ Cox & Dunlop, *supra* note 28, at 389.

³⁴ NLRA, § 10, 29 U.S.C. § 160 (1976).

³⁵ NLRA, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

³⁶ In a similar fashion, the substantive provisions of the United States Constitution threaten the process-oriented interpretation of some commentators. This threat is met in much the same way that the threat to the NLRA model is met. The Constitution is "overwhelmingly" dedicated to process concerns, but it is not exclusively so dedicated, J. ELY, *supra* note 30, at 92, and, moreover, many of the seemingly substantive provisions were actually "centrally intended to help make our governmental processes work." *Id.* at 93-94. See, *id.* at 88-101.

³⁷ NLRA, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

³⁸ For the moment, I am ignoring the issue of whether rights are waivable. The right to strike guaranteed by the Act, for example, can be waived through the collective bargaining process. See *infra* notes 44-48 and accompanying text.

³⁹ The closed shop is a common example. A closed shop provision, or even a lesser provision that conflicts with the requirements of section 8(a)(3), is illegal even if it was agreed upon in the collective bargaining process. See, e.g., *Operating Engineers, Local 542 (Elmhurst Contracting Co.)*, 141 N.L.R.B. 53, 53-55 (1963), *enforced*, 329 F.2d 512 (3rd Cir. 1964); *Billings Local No. 1172 (Refinery Engineering Co.)*, 130 N.L.R.B. 307, 307 (1961).

representation-reinforcing.⁴⁰ The right to be free from discrimination on the basis of union membership or non-membership is protected because it is necessary to the democratic procedures established by the Act.⁴¹ This limited intrusion on substantive outcomes is required to ensure the proper functioning of the mini-democracy; in the case of Section 8(a)(3), to ensure that employees can choose their representative free of employer coercion.⁴² The rights and restrictions, then, are not designed to further intrinsic or fundamental values,⁴³ but rather to further the collective bargaining process.

The ability of unions to waive some, but not all, employee rights is a logical extension of this instrumentalist interpretation of the Act's rights and restrictions. Unions, for example, can waive the right to engage in an economic strike,⁴⁴ but cannot waive the right to engage in in-plant leafletting.⁴⁵ The Supreme Court has distinguished between waivable and non-waivable rights by analyzing the importance of the rights in question to the procedures established by the Act. Thus, in-plant leafletting is not waivable because it is a mechanism for facilitating the selection of a bargaining representative (a critical process under the Act), while the right to strike is waivable because it is merely a tie-breaking mechanism (a less critical process under the Act).⁴⁶ The Act, then, does not contain rights and restrictions for their intrinsic value or they would uniformly be unwaivable.⁴⁷ Rather, the rights and restrictions may or may not be waivable depending on their instrumental value to the essential processes of the Act.⁴⁸

⁴⁰ Under a representation reinforcing scheme, substantive outcomes may be overturned only if the democratic process cannot be trusted. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MICH. L. REV. 451, 486 (1978). See also J. ELY, *supra* note 30.

⁴¹ One commentator has stated: "[T]he Act's essential role was mainly procedural and not substantive: to protect the process by which these governing mechanisms were developed and administered and to prohibit practices which would undermine or defeat it." Feller, *supra* note 27, at 106. See also Cox, *The Role of the Law*, *supra* note 29, at 606.

⁴² Cf. *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-26 (1974) (employee rights affecting the selection of a bargaining representative cannot be waived by a union).

⁴³ Section 8(a)(3), for example, is not designed primarily to protect worker freedom and dignity by prohibiting employment decisions based on factors unrelated to merit or productivity. Cf. Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1976).

⁴⁴ *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

⁴⁵ *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325-26 (1974); *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 704-06 (5th Cir. 1968).

⁴⁶ *NLRB v. Magnavox Co.*, 415 U.S. at 325-26; *Mastro Plastics Corp. v. NLRB*, 350 U.S. at 280; *NLRB v. Mid-States Metal Products Inc.*, 403 F.2d at 704-06.

⁴⁷ Compare the NLRA model with the Civil Rights Act of 1964, *supra* note 43. The Civil Rights Act established intrinsic rights against certain types of employment discrimination. The rights cannot be prospectively waived. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). See also *Wilko v. Swan*, 346 U.S. 427 (1953) (no prospective waiver of judicial trial and review under the Securities Act of 1933).

⁴⁸ For a criticism of this aspect of the NLRA model, see Klare, *Historiography*, *supra* note 27, at 475-78; Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 483-93 (1981). This article focuses on the NLRA model's procedure for establishing rules, but it should be noted that there were also threats to the autonomy of the judicial branch of the NLRA model. Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1976), for example, created federal court jurisdiction to enforce collective bargaining agreements. To the extent the section could be used to substitute federal court litigation for arbitration, the state (through judicial interpretation of collective bargaining agreements) would play an ever-expanding role in governing the workplace and the autonomous system envisioned by the NLRA model would be undercut. This challenge was met by arguing for an interpretation of section 301 that would both limit the role of courts and reaffirm the predominance of arbitration as the method for resolving contract disputes. Cox,

The NLRA model of industrial democracy, in sum, was based on republicanism. Representatives of capital and labor establish rules that govern the work place. Even as articulated by the post-war liberals, though, the model remained but an outline. Proponents spoke in vague and general terms,⁴⁹ but the difficult questions of democratic theory⁵⁰ were certainly not answered and, to a large extent, were not even asked. Over time, however, the outline has become a manuscript. The questions have been asked and answered, not by the post-war theorists, but by decisions in concrete cases.

II. THE NLRA MODEL EXPLICATED

A. Issues

Every political system, including the "industrial democracy" established by the NLRA, consists of procedures for establishing substantive rules, the substantive rules themselves, and procedures for determining the applicability of substantive rules to particular situations.⁵¹ The NLRA model and this article are primarily concerned with the procedures for establishing substantive rules. Employers and employees both participate in a process of establishing rules for the governance of the enterprise. It was clear from the beginning that the NLRA model was not intended to establish the substantive rules themselves:

When the employees have chosen their organization, when they have selected their representatives, all the [Wagner Act] proposes to do is to escort them to the door of their employer and say "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into and the bill does not seek to inquire into it.⁵²

Reflections, *supra* note 26 at 1507-18; Cox, *Current Problems*, *supra* note 27, at 258-66. See also, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 24-25 (1957). The *Steelworkers Trilogy* adopted just such an interpretation of section 301. Under the *Steelworkers Trilogy*, the courts were extremely limited in their ability to resolve disputes prior to arbitration and in their ability to review the decisions of arbitrators. Prior to arbitration, judicial inquiry was limited to whether the parties had agreed to arbitrate the dispute. If they had, the matter was to be referred to arbitration. If there were doubts about whether the parties had agreed to arbitrate, they "should be resolved in favor of [arbitration]." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). See also *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960). In reviewing arbitration awards, the courts were to enforce awards if they drew their "essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitration award should be enforced even if the arbitrator does not issue an opinion and even if there is ambiguity about the basis for the award. *Enterprise Wheel*, 363 U.S. at 598. The primary function of the courts under section 301, then, was to enforce arbitration decisions. Thus, section 301 "served simply to enforce compliance with the system of self-government." Feller, *supra* note 27, at 106.

⁴⁹ The effect of the vague metaphors was often heightened by repetition. See, e.g., Cox & Dunlop, *supra* note 28, at 421 ("[t]o alter the figure, the divine right of kings has yielded to a constitutional monarchy in which there is a large measure of industrial democracy"); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408 (1958) [hereinafter cited as Cox, *Duty to Bargain*] ("to change the figure, the divine right of the king must yield to a constitutional monarchy, in which a large measure of industrial democracy will prevail"). See Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 165 (1982).

⁵⁰ See *infra* note 66 and accompanying text.

⁵¹ J. DUNLOP, *supra* note 6, at 13.

⁵² 79 CONG. REC. 7660 (daily ed. May 16, 1935) (statement of Sen. Walsh). This quotation was

The substantive rules were to be established by private bargaining under the procedural rules established by the Act.⁵³ The NLRA model does provide procedures for determining the applicability of substantive rules to particular situations.⁵⁴ These procedures are an important aspect of the governance system created by the NLRA model, and they present significant problems.⁵⁵ This article, however, will focus on the procedures for establishing rules and on the legislative aspects of the model.

To evaluate a model of industrial democracy, one must first define the elements of a democracy and then articulate the major issues that any model of democracy must address. No single definition of democracy exists. The definitional issue has divided generations of political scientists. Most definitions, however, contain certain elements to which we can compare the NLRA model of industrial democracy. A democracy, it is agreed, is a system for governing.⁵⁶ The authority to govern resides in a representative body selected for limited terms by the electorate.⁵⁷ The electorate is defined broadly to include most or all of those governed⁵⁸ who are competent⁵⁹ to exercise voting rights. The votes of electors have approximately the same weight in affecting governance decisions.⁶⁰ This parity in weight given to votes means both that the votes of electors have the same weight in selecting representatives and that the votes of representatives, assuming similarly-sized constituencies, have the same weight in establishing policy.⁶¹ Certain liberties (for example, freedom to present alternative policies and to vote free of coercion or intimidation) are protected to ensure proper functioning of the system,⁶² but, except for these essential liberties, democracy is neutral on outcomes.⁶³ And, finally, the principle of

used often by the major proponents of the NLRA model. See, e.g., Cox, *Duty to Bargain*, *supra* note 49, at 1402; Cox, *Government Regulation of the Negotiation and Terms of Collective Agreement: An Address*, 101 U. PA. L. REV. 1137, 1137 (1953).

⁵³ H.K. Porter Co. v. NLRB, 397 U.S. 99, 102-05 (1970). See Feller, *supra* note 27, at 106; Cox, *Concerted Activities*, *supra* note 28, at 322-23.

⁵⁴ Labor arbitration is the process for applying rules to particular situations. See *supra* note 48.

⁵⁵ Proponents of the NLRA model spilled much ink on the arbitration process. See, e.g., Stone, *supra* note 8, at 1523-31, 1559-65.

⁵⁶ D. PICKLES, *DEMOCRACY* 13 (1970) [hereinafter cited as D. PICKLES]; RANNEY & KENDALL, *BASIC PRINCIPLES FOR A MODEL OF DEMOCRACY IN EMPIRICAL DEMOCRATIC THEORY* 47 (C. Cnudde & D. Neubauer, eds., 1969) [hereinafter cited as RANNEY & KENDALL].

⁵⁷ J. RAWLS, *A THEORY OF JUSTICE* 222 (1971) [hereinafter cited as J. RAWLS]; J. PLAMENATZ, *DEMOCRACY AND ILLUSION* 184-85 (1973) [hereinafter cited as J. PLAMENATZ]; DAHL & LINDBLOM, *POLYARCHY IN FRONTIERS OF DEMOCRATIC THEORY* 55-57 (H. Kariel, ed., 1970) [hereinafter cited as DAHL & LINDBLOM]; D. PICKLES, *supra* note 56, at 13.

⁵⁸ See Ellerman & Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 460-61 (1983) [hereinafter cited as Ellerman & Pitegoff].

⁵⁹ Thus, minors and the insane may be excluded from the electorate. J. RAWLS, *supra* note 57, at 222.

⁶⁰ J. RAWLS, *supra* note 57, at 223; DAHL & LINDBLOM, *supra* note 57, at 56; RANNEY & KENDALL, *supra* note 56, at 49.

⁶¹ J. RAWLS, *supra* note 57, at 223.

⁶² *Id.* at 224-27; J. PLAMENATZ, *supra* note 57, at 188; C. FRANKEL, *THE DEMOCRATIC PROSPECT* 167-68 (1962) [hereinafter cited as C. FRANKEL].

⁶³ See J. ELY, *supra* note 30, at 87, 101. Neutrality on substantive issues is also a central premise of the NLRA model. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved"); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the

majority rule is accepted as the arbiter of conflict⁶¹ so that resort to force is not necessary.⁶⁵

Every democracy, then, including industrial democracy under the NLRA model, must answer at least three questions. First, who is allowed to participate in the process? More narrowly, who can vote and what is the rationale for depriving certain groups of the right to vote? Second, how does the process weigh the votes? How are the votes of electors weighed and how are the votes of elected representatives weighed? Third, what limitations are placed on the process or its outcomes or both?⁶⁶ This article will parse the NLRA model by exploring the answers it gives to these essential questions.

B. Who Votes?

The right to vote is the quintessential right⁶⁷ in any democracy. Thus, the issue of *who* participates in the system "is a question that must precede any inquiry into the fairness of the process itself."⁶⁸ The question is often not an easy one to answer. Four amendments to the United States Constitution have been required to answer "who votes" questions,⁶⁹ but the issue has by no means been resolved.⁷⁰ Similarly, voting rights for economic strikers under the National Labor Relations Act have been granted,⁷¹ and revoked,⁷² and granted anew.⁷³

The National Labor Relations Act establishes a representative democracy for resolving labor relations issues. Representatives of labor and management must meet and bargain in good faith about the terms and conditions of employment.⁷⁴ The "who votes" issues under the Act concern the procedures for selecting these representatives. The Act provides a complex election procedure⁷⁵ and protects employees from employer interference in the selection of their representatives.⁷⁶

In representation elections, employees vote to select the organization to represent them. If the employees vote against union representation, the industrial democracy

bargaining strengths of the parties."). See also A. COX, D. BOK & R. GORMAN, *supra* note 23, at 83-84; Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1676 (1983).

⁶¹ See R. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-34 (1956).

⁶² D. PICKLES, *supra* note 56, at 23; R. M. MACIVER, THE ROLE OF THE PEOPLE IN BASIC ISSUES OF AMERICAN DEMOCRACY 18 (6th ed. 1970); C. FRANKEL, *supra* note 62, at 167.

⁶⁶ See Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1043 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1071-72 (1980) [hereinafter cited as Tribe].

⁶⁷ Tribe, *supra* note 66, at 1071.

⁶⁸ *Id.*

⁶⁹ U.S. CONST. amends. XV, XIX, XXIV, XXVI.

⁷⁰ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) (nonresidents not entitled to vote even though jurisdiction taxes and regulates them); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 214-15 (1970) (franchise cannot be limited to property owners). See generally Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

⁷¹ See, e.g., *Columbia Pictures Corp.*, 64 N.L.R.B. 490, 491 (1945); *The Rudolph Wurlitzer Co.*, 32 N.L.R.B. 163, 166 (1941).

⁷² Taft-Hartley Act, Pub. L. No. 101, § 101, 61 Stat. 135, 144 (1947), amended by Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 (1959).

⁷³ NLRA, § 9(c)(3), 29 U.S.C. § 159(c)(3) (1976).

⁷⁴ NLRA, §§ 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1976).

⁷⁵ NLRA, § 9, 29 U.S.C. § 159 (1976); 29 C.F.R. §§ 101.17-101.30 (1983). See generally C. MORRIS, *THE DEVELOPING LABOR LAW* 309-549 (2d ed. 1983) [hereinafter cited as C. MORRIS]; H. WELLINGTON, *supra* note 2, at 45.

⁷⁶ NLRA, §§ 8(a)(1), 8(a)(3), 29 U.S.C. §§ 158(a)(1), 158(a)(2), 158(a)(3) (1976).

aspects of the NLRA model collapse. Indeed, if the employees vote against representation, the NLRA severely limits employer attempts to introduce democracy in the absence of a union. Employer efforts, for example, to establish employee advisory committees may run afoul of Section 8(a)(2) of the Act.⁷⁷ Employees who vote against union representation, then, have chosen employer autocracy over democracy. The ability of employees to make this choice under the NLRA is comparable to the federal government allowing the citizens of a state to adopt a monarchical form of state government. Thus, the NLRA model, unlike the political model in this country,⁷⁸ does not require a democratic form of industrial government, it merely permits such a form. The initial question posed in representation elections, then, is whether a democratic form should be adopted.

Not all employees⁷⁹ are entitled to vote in representation elections. The Act explicitly excludes supervisors from its coverage.⁸⁰ Thus, if a company hires a person to manage a portion of the business and that person has the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,"⁸¹ that supervisor would be unable to vote in a Board representation election and, indeed, is not entitled to participate in any way in the NLRA governance model.

Managerial and confidential employees are also ineligible to vote in representation elections. Managerial employees are employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."⁸² Managerial employees, then, are more closely aligned with capital⁸³ and should be represented by the management side in the NLRA procedure. Confidential employees are employees who "assist and act in a confidential capacity to [managerial employees]."⁸⁴ An executive secretary to a company's labor relations director would be a confidential employee. Confidential employees are not directly represented by management in the NLRA model (they are not managers), but they cannot be represented by unions. They are disenfranchised. Even if employees vote in favor of union representation, then, the NLRA model at its base may fail to satisfy an essential element of democracy. The model may not provide representation to all or most of those governed.⁸⁵

⁷⁷ See, e.g., *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414 (3rd Cir. 1972); *NLRB v. Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807 (7th Cir. 1962); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). But see *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974).

⁷⁸ See U.S. CONST. art. IV, § 4.

⁷⁹ The term "employee" is used here in a non-technical sense.

⁸⁰ NLRA, §§ 2(3), 2(11), 29 U.S.C. §§ 152(3), 152(11) (1976).

⁸¹ NLRA, § 2(11), 29 U.S.C. § 152(11) (1976).

⁸² *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947). See *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946).

⁸³ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285-89 (1974); *American Locomotive Co.*, 92 N.L.R.B. 115, 116-17 (1950); *In re Denton's, Inc.*, 83 N.L.R.B. 35, 37 (1949).

⁸⁴ *The B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). See also Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C., 253 N.L.R.B. 450, 450-51 (1980); *Air Express Int'l Corp.*, 245 N.L.R.B. 478 (1979); *In re Ford Motor Co.*, 66 N.L.R.B. 1317 (1946). *Accord* *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

⁸⁵ See *supra* note 58 and accompanying text. If the number of managerial and supervisory personnel compared to other personnel is relatively small and the rationale for excluding them from participation is accepted, this element of democracy may be satisfied. If, however, the relative number of managerial and supervisory personnel is large or the rationale for exclusion is not accepted, this element of democracy may not be satisfied. See, e.g., *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (faculty members are managerial employees and, hence, do not fall within the NLRA governance model).

If employees do vote for a union to represent them, the NLRA model provides protections to ensure that a democratic process is used to select the leaders of that union.⁸⁶ The model provides for periodic elections of leaders at both the local and national levels.⁸⁷ These elections must be by secret ballot,⁸⁸ the nomination process must be open,⁸⁹ voter coercion is prohibited⁹⁰ and free speech and assembly rights are protected.⁹¹ These carefully worded guarantees have often been swept aside and many union organizations tend to oligarchy.⁹² Nevertheless, the guarantees generally meet the formal requirements of democratic process⁹³ and express a public policy of democratization at least on the issue of selection of union leaders.⁹⁴ That is, the *model* is democratic, even if reality sometimes strays.

The NLRA model does not address the selection procedure for the other representative in the process — the management representative. The Act only provides that labor organizations may not restrain or coerce management in its selection of a representative.⁹⁵ Affirmative guarantees of democratic selection are absent. The disparity in selection procedures for union and management representatives has not gone unnoticed by labor leaders. William Winpisinger, head of the International Association of Machinists, has recently complained that "[t]here are no democratic controls [on management]. Everything else has democratic controls on it, including statutory controls to democratize labor. But there are none on capital, not a damn one."⁹⁶

Even without statutory guarantees, however, does a rough form of democracy exist in the selection of management representatives? Corporations have shareholders who meet periodically to select managers who select representatives for labor negotiations. This process is very rough democracy, if it is democracy at all. Shareholder votes are not weighed equally and, perhaps, they should not be. But because they are not equally weighed, the label democracy does not describe the process.⁹⁷ Moreover, the management representatives must represent managerial and confidential employees. These employees are not represented by unions because of their close relationship with management.⁹⁸ But

⁸⁶ Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976).

⁸⁷ *Id.* at § 481.

⁸⁸ *Id.* at §§ 481(a) & (b).

⁸⁹ *Id.* at § 481(e).

⁹⁰ *Id.*

⁹¹ *Id.* at § 411(a)(2).

⁹² See generally S. LIPSET, *POLITICAL MAN THE SOCIAL BASIS OF POLITICS* 387-433 (1981); S. LIPSET, M. TROW, & J. COLEMAN, *UNION DEMOCRACY THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 3-13 (1956).

⁹³ See *supra* notes 56-65 and accompanying text.

⁹⁴ On other issues, such as democracy in collective bargaining, unions may not fare as well. See generally Hyde, *supra* note 8.

⁹⁵ NLRA, § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1976).

⁹⁶ Brody & Donlan, *Labor's Last Angry Man*, *Barron's*, Jan. 30, 1984, at 26, col. 5 (interview with William Winpisinger).

⁹⁷ See *supra* notes 60-61 and accompanying text. This criticism may be unfair. In a situation where persons have differing interests in the entity to be governed, it may not be democratic to weigh all votes equally. Or, conversely, in such a situation it may be democratic to weigh votes unequally. Cf. Baker, *Counting Preference in Collective Choice Situations*, 25 UCLA L. REV. 381, 393-413 (1978) (discusses situations in which certain voter preferences should not be counted). To weigh shareholder votes unequally solely on the basis of shares held, however, assumes that shareholder interest in an entity can be fairly judged solely on that basis. Moreover, even if weighing shareholder votes unequally does not undermine democracy claims, other factors do. See *infra* notes 98-101 and accompanying text.

⁹⁸ See *supra* notes 82-84 and accompanying text. See also Derber, *Industrial Democracy as an*

these employees, of course, have no formal voice in the selection of management's representative. In addition, even if these employees did have formal voting rights, they lack the basic liberties necessary to ensure free exercise of these rights.⁹⁹ For example, the employment-at-will doctrine permits an employer to fire or discipline managers or confidential employees who attempt to forward a certain representative or to articulate certain policy positions;¹⁰⁰ the NLRA model provides few protections for these employees.¹⁰¹

Finally, even if management representatives were democratically selected, one may question management's right to participate in the process. Democratic theory authorizes *those governed* to vote.¹⁰² Thus, labor's right to participate is firmly based. Owners or stockholders, however, are not among "those governed." Their right to participate may be based on their property interests in the enterprise, but property interests as a basis for voting rights have been long rejected by democratic theory.¹⁰³ Alternatively, the "vote" of management may be justified on the theory that anyone *affected* by the decisions of a government should have the right to participate in that government.¹⁰⁴ But that rationale is too broad-reaching; under such a theory, because Canadians are *affected* by United States government decisions on acid rain, Canadians would have the right to vote in United States' elections. Thus, the very existence of a management "vote" under the NLRA challenges the democracy model of the Act.

On the issue of "who votes?", then, the NLRA model permits half a democracy. The model merely "permits" a democracy because if employees vote against union representation in the first instance, the democracy model collapses. If employees vote for union representation, half a democracy results. The model attempts to ensure democratically elected union representatives, but makes no attempt to ensure democratically elected management representatives.

C. How Are Votes Weighed?

The National Labor Relations Act establishes a representative democracy. Capital and labor are each entitled to one representative,¹⁰⁵ each representative having one vote.

Organizing Concept for a Theory of Industrial Relations, ESSAYS IN INDUSTRIAL RELATIONS THEORY 180 (G. Somers, ed., 1969) (political analogy does not apply to selection of top management).

⁹⁹ See *supra* note 62 and accompanying text.

¹⁰⁰ The employment-at-will doctrine permits employers to discharge employees for any reason or for no reason at all. See, e.g., *Alford v. Life Savers, Inc.*, 210 Neb. 441, 442, 315 N.W.2d 260, 261 (1982); *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 393, 153 N.W.2d 587, 589-90 (1967); *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123, 123 (10th Cir. 1953), *cert. denied*, 345 U.S. 941 (1953); *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). See generally *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Comment, *The Employment At Will Rule*, 31 ALA. L. REV. 421 (1980).

¹⁰¹ See *Parker-Robb Chevrolet, Inc.* 262 N.L.R.B. 402, 402-04 (1982). See generally *Bethel, The NLRB and the Discharge of Supervisors: Parker-Robb Brings Questionable Reform*, 54 U. COLO. L. REV. 1 (1982).

¹⁰² See *supra* note 58 and accompanying text.

¹⁰³ 1 MORRISON & COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 468, 507 (4th ed. 1951).

¹⁰⁴ Ellerman & Pitegoff, *supra* note 58, at 460-61. See A. COX, *supra* note 23, at 93; R. DAHL, *AFTER THE REVOLUTION?* 64 (1970).

¹⁰⁵ Or one set of representatives.

The representatives, in theory,¹⁰⁶ occupy co-equal bargaining positions: each is required to bargain with the other¹⁰⁷ and each must sign the collective bargaining agreement negotiated.¹⁰⁸ Thus, the Act views capital and labor as equal. Both sides receive one vote under the Act¹⁰⁹ regardless of the capital- or labor-intensiveness of the industry involved, regardless of pre-existing labor conditions, regardless of the value of the capital or labor to those supplying it to the entity — regardless of anything. This procedure, naturally, results in a high frequency of tie votes.

Alternative vote-weighting schemes would have resulted in fewer tie votes. The National Labor Relations Act, for example, could have counted only the votes of capital¹¹⁰ or labor. Alternatively, the Act could have assigned a voting-weight to each unit of capital and each unit of labor and resolved disputes based on such a weighted voting scheme. Such schemes, though, would remove the putative outcome neutrality of democracy and of the NLRA model.¹¹¹ Determining whether to count the votes of capital or labor or determining the voting-value of labor versus the voting-value of capital would require governmental decisions on the value of each. Thus, the state would be required, in making these weighting decisions, to elevate its values¹¹² above the values that might emerge through a more neutral process.

The National Labor Relations Act resolves this conflict between a high frequency of tie votes and the value imposition¹¹³ implicit in a procedure that would avoid tie votes, by invoking a "neutral" dispute resolution mechanism. The Act permits resort to economic weapons — primarily the strike, lockout and boycott — to resolve tie votes. This type of resolution is neither peaceful nor deliberate. Terms used to describe the tie-breaking mechanism make this clear: the parties use "economic weapons" to engage in "economic warfare."

The reaction against value imposition that resulted in the Act's tie-breaking mechanism is also a reaction against industrial democracy. The votes of representatives may not have the same weight in establishing policy.¹¹⁴ Rather, if skilled labor needed by an employer is short and the employer's product is in great but seasonal demand, the "votes" of labor may be weighted very heavily. Or if laborers are plentiful and the employer has large stockpiles of his product, the "votes" of management may be weighted very heavily. These examples, of course, grossly oversimplify bargaining dynamics, but the central point is clear: the NLRA's tie-breaking mechanism undermines any claim to equal weighting of votes. The Act's tie-breaking mechanism also undermines industrial democracy because it is not a peaceful or orderly procedure for resolving disputes. In a democracy, theorists agree, the principle of majority rule is accepted as the arbiter of conflict so that

¹⁰⁶ See Stone, *supra* note 8, at 1577-80.

¹⁰⁷ NLRA, §§ 8(a)(5), 8(b)(3), 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1976).

¹⁰⁸ NLRA, § 8(d), 29 U.S.C. § 158(d) (1976).

¹⁰⁹ More specifically, an employer receives one vote vis-a-vis each bargaining unit. This results in a greater number of potential tie votes (several per employer rather than one per employer); divides employees into more manageable groups; and requires jurisdictional decisions that limit union influence. See *infra* notes 145-49 and accompanying text.

¹¹⁰ This is, in effect, the result when employees vote against union representation. See *supra* notes 77-78 and accompanying text.

¹¹¹ See *supra* note 63 and accompanying text.

¹¹² More specifically, the state would impose its valuations of the relative value of capital and labor.

¹¹³ See J. ELY, *supra* note 30, at 73 (value imposition ought to be avoided under United States Constitution).

¹¹⁴ See *supra* notes 60-61 and accompanying text.

resort to force is not necessary.¹¹⁵ The majority rule principle is not an element of the NLRA model. Instead, disputes are resolved in a manner closer to the state of nature — the more powerful rule.

The resort to economic warfare as a tie-breaking mechanism, although in conflict with the goal of industrial democracy, resolved other policy problems. First, it permitted the state to maintain a position of nonintervention¹¹⁶ and, second, it allowed consumers, investors and the public at large to participate in the negotiation process. This second point deserves clarification. Through the NLRA, the state chose a moderate course of public, that is, non-employer and non-employee, intervention in labor relations. At one extreme, the state could have acted to set wages, hours and terms and conditions of employment. The public, then, would have controlled labor relations. At the other extreme, the state could have acted with the goal of separating labor relations and the state by, for example, empowering employers and employees to set wages, hours and working conditions and requiring private binding arbitration of disputes.¹¹⁷ The NLRA took a middle route by empowering employers and unions to establish wages, hours and working conditions, but permitting either party to, in effect, take disputes to the public. The boycott weapon is most obviously an appeal to the public for a favorable resolution of a labor dispute,¹¹⁸ but the outcomes of strikes and lockouts also depend heavily on consumer, investor, and other public reaction.

In sum, the votes of labor and capital are formally equal. Each receives one vote. But the NLRA model is designed to create a large number of tie votes and, when tie votes occur, any claim to real vote equality disappears. In addition, tie votes create other conflicts with fundamental democratic notions, such as the majority rule principle and the rejection of force.

D. Outcome Limitations

A consideration of outcome limitations is essential to an evaluation of any democracy. In a democracy, the authority to govern must reside in the electorate or in a representative body.¹¹⁹ If there are severe limitations on the ability of the representative body to act, the authority resides elsewhere. Thus, a governance system that meets all of the requisites of a democracy, except that the representative body has only the authority to make recommendations to the Queen, is not a democracy; the authority to govern resides in the Queen. At the same time, liberal democratic theory recognizes the need for some outcome limitations to ensure, at the least, adequate functioning of the process.¹²⁰ Consequently, limitations on the ability of the representative body to disenfranchise minority groups or parties are necessary.¹²¹ These types of outcome limitations do not undermine a democracy; they preserve it.

Three basic types of outcome limitations are present in the NLRA model. One type

¹¹⁵ See *supra* notes 64-65 and accompanying text.

¹¹⁶ See *supra* note 113 and accompanying text.

¹¹⁷ Some have argued that the NLRA model ought to approach this end of the continuum. See, e.g., Shulman, *supra* note 27.

¹¹⁸ Cf. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Clairborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409, 421-26 (1984) (discusses the boycott as political action).

¹¹⁹ See *supra* note 57 and accompanying text.

¹²⁰ See *supra* note 62 and accompanying text.

¹²¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). See generally J. ELY, *supra* note 30.

has already been mentioned.¹²² The Act directly prohibits certain results. Thus, a contractual provision requiring an employer to hire only union members is prohibited even if the union and employer involved agree to the provision.¹²³ A second type of outcome limitation establishes the outer boundaries of the democracy. The Act's processes need only be followed with respect to employee wages, hours, and other terms and conditions of employment.¹²⁴ This outcome limitation establishes the scope of the sovereignty created by the Act. The third type of outcome limitation is less direct. The Act restricts the means parties can use to achieve certain outcomes. Thus, employers cannot legally fire economic strikers¹²⁵ and employees cannot legally engage in sitdown strikes to achieve favorable outcomes.¹²⁶ These three types of outcome limitations require separate consideration.

The Act's direct outcome limitations present a serious threat to democratic claims.¹²⁷ Even if labor and management representatives reach agreement, the Act prohibits closed shop¹²⁸ and hot cargo clauses,¹²⁹ clauses that require payment for services which are not to be performed,¹³⁰ and certain limitations on solicitation and distribution rights.¹³¹ The argument can be made that some, but not all, of these outcome limitations are justified as attempts to preserve the democratic process. To the extent a collective bargaining agreement infringes on the right of employees freely to choose a bargaining representative, the agreement may be struck down. Thus, in *National Labor Relations Board v. Magnavox Co.*,¹³² the Supreme Court invalidated provisions in a collective bargaining agreement which limited the solicitation and distribution rights of unions and which, therefore, infringed on the employees' ability freely to choose a representative.¹³³ Similarly, hot cargo agree-

¹²² See *supra* notes 36-48 and accompanying text.

¹²³ NLRA, §§ 8(a)(3), 8(b)(2), 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1976).

¹²⁴ NLRA, §§ 8(d), 9(a), 29 U.S.C. §§ 158(d), 159(a) (1976). See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-80 (1981); *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-11 (1964); *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 348 (1958).

¹²⁵ See, e.g., *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52 (1972); *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924, 927 (5th Cir. 1953), *cert. denied*, 346 U.S. 818 (1953).

¹²⁶ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 473-76 (1940); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 454 (4th Cir. 1969); *Peck, Inc.*, 226 N.L.R.B. 1174, 1179-81 (1976). But see *Overhead Door Corp.*, 220 N.L.R.B. 431, 431-32 (1975), *enforcement denied in part*, 540 F.2d 878 (7th Cir. 1976).

¹²⁷ See also *supra* notes 36-48 and accompanying text.

¹²⁸ NLRA, §§ 8(a)(3), 8(b)(2), 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1976). A closed shop clause would provide that only members of the union may be used by the employer.

¹²⁹ NLRA, §§ 8(e), 9(a), 29 U.S.C. § 158(e) (1976). The term "hot cargo" generally refers to products of plants employing non-union workers, strikebreakers or other workers considered hostile by the union. An employer accepting a hot cargo clause would agree not to require his employees to handle hot cargo. See *Teamsters Local 728 (Brown Transportation Co.)*, 140 N.L.R.B. 1436, 1438 (1963), *enforced in part sub. nom.*, *Teamsters Local 413 v. NLRB*, 334 F.2d 539, 547 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 916 (1964); *Teamsters Local 210 (American Feed Co.)*, 133 N.L.R.B. 214, 215-16 (1961).

¹³⁰ NLRA, § 8(b)(6), 29 U.S.C. § 158(b)(6) (1976). See *Teamsters Local 456 (J.R. Stevenson Corp.)*, 212 N.L.R.B. 968, 969-71 (1974); *Lathers Local 46 (Expanded Metals Engineer Co.)*, 207 N.L.R.B. 631, 635-37 (1973).

¹³¹ See *NLRB v. Magnavox Co.*, 415 U.S. 322, 325-27 (1974). See generally Note, *Labor Law: Employee's Solicitation-Distribution Rights Supersede Contract Waiver*, 26 U. FLA. L. REV. 908 (1974); Comment, *Protecting Employee Solicitation-Distribution Rights from Union Waiver*, 9 U. MICH. J.L. REF. 571 (1976).

¹³² 415 U.S. 322, 325-27 (1974).

¹³³ See also *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 704-06 (5th Cir. 1968).

ments and closed shop clauses may be viewed as antithetical to the NLRA's democratic processes. Hot cargo agreements may encourage boycotted employers to interfere with the free choice of their employees¹³⁴ and closed shop agreements may be viewed as improper attempts to influence the composition of the electorate.¹³⁵

This justification, however, is insufficient to preserve the model's claim to democratic processes. First, the justification does not explain all of the Act's outcome limitations. The limitation on payments for services not to be performed does not further the Act's processes in any way analogous to the solicitation and distribution limitations in *Magnavox*. Moreover, the process-oriented interpretation of the hot cargo and closed shop limitations is grossly inadequate; the limitations can be understood only by reference to substantive values other than process reinforcement.¹³⁶ Second, the justification does not adequately explain why some outcomes are prohibited, while others are not.¹³⁷ To protect the significant process right of selecting bargaining representatives, certain limitations on solicitation and distribution rights are prohibited.¹³⁸ But the right to strike is also a significant process right — it is one of the major tie-breaking mechanisms available under the Act.¹³⁹ Yet limitations on the right to strike are not prohibited.¹⁴⁰ Third, the justification violates the desired value neutrality of the NLRA model. If hot cargo agreements are to be prohibited because they may encourage boycotted employers to coerce employees, should union-organized consumer boycotts be prohibited? Should organizational pickets or organizational handouts be prohibited as well? To make these choices, appeal must be made to more than democratic channel-clearing; at the least, the calculus must also include free speech and economic freedom values.

The second type of outcome limitation is jurisdictional in nature. The Act's processes need only be followed with respect to employee wages, hours and other terms and conditions of employment.¹⁴¹ If a subject of bargaining does not fit within these terms, the party in control of the matter can simply refuse to bargain, the other party cannot "insist" upon a certain disposition of the matter,¹⁴² and, hence, the party in control can avoid the NLRA process. This jurisdictional limitation excludes major and important issues from NLRA processes. In *First National Maintenance Corporation v. National Labor Relations Board*,¹⁴³ for example, an employer's decision to discontinue a portion of its business was

¹³⁴ See Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(c)*, 113 U. PA. L. REV. 1000, 1004-06, 1015-18 (1965) [hereinafter cited as Lesnick]; Comment, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280, 1287-89, 1299-1300 (1971) [hereinafter cited as Comment, *Secondary Boycotts*].

¹³⁵ See Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 56-57 (1954) [hereinafter cited as Rosenthal].

¹³⁶ See Lesnick, *supra* note 134; Rosenthal, *supra* note 135; Comment, *Secondary Boycotts*, *supra* note 134.

¹³⁷ Cf. Klare, *Historiography*, *supra* note 26, at 475-77.

¹³⁸ See *supra* notes 134-35 and accompanying text.

¹³⁹ See *supra* notes 105-13 and accompanying text.

¹⁴⁰ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956). Indeed, the law makes waiver of the right to strike quite easy. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962).

¹⁴¹ See *supra* note 124 and accompanying text.

¹⁴² *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. South Atlantic and Gulf Coast Longshoremen*, 443 F.2d 218, 219-20 (5th Cir. 1971); *NLRB v. Hod Carriers Local 1082*, 384 F.2d 55, 56-57 (9th Cir. 1967), *aff'd*, 78 L.R.R.M. 2260 (9th Cir. 1971), *cert. denied*, 390 U.S. 920 (1968); *NLRB v. American Compress Warehouse*, 350 F.2d 365, 368-70 (5th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966).

¹⁴³ 452 U.S. 666, 686 (1981).

held to be outside the scope of the NLRA process. As a result, the employer was entitled to act unilaterally.¹⁴⁴

Jurisdictional limitations by themselves do not undermine democracy claims. Any regime with overlapping democracies must have jurisdictional rules. In the United States, for example, federal and state power overlaps. The Constitution imposes jurisdictional limitations on the federal Congress,¹⁴⁵ gives federal law supremacy over state law,¹⁴⁶ and reserves authority beyond the jurisdiction of the Congress to the states.¹⁴⁷ Analogous overlapping democracies are contemplated in the NLRA model. For example, a corporation may have employees in three different bargaining units. The NLRA's jurisdictional rules do not undermine democracy claims when they operate to minimize conflicts between the bargaining units. Thus, each unit may participate in the NLRA process with respect to the wages, hours and terms and conditions of employment of that unit's employees. But if the corporation is considering whether to close the plant, *none* of the bargaining units have a right to participate.¹⁴⁸ Instead, the NLRA's jurisdictional rules confer the power to make that decision on the employer, one of many interested groups. This operation of the jurisdictional rules challenges democracy claims. The rules in this circumstance do not allocate decision-making power to one of two or more democratic entities (for example, to Congress or to a state legislature). Rather, the rules confer some of the power to govern on a non-democratic group — on managers or unions as the case may be. It is as if the Constitution reserved certain subjects, not for other democratic forums (the states), but for the Republican Party.¹⁴⁹

The third type of outcome limitation restricts the means parties may use to achieve outcomes. As noted previously,¹⁵⁰ employees cannot legally engage in sitdown strikes to achieve favorable outcomes.¹⁵¹ Every democracy imposes analogous outcome limitations. Firebombing to achieve a political end is not permissible in any democratic system of which I am aware.

Outcome limitations in the NLRA model, however, have a special significance. Other democracies impose this type of outcome limitation to achieve the more peaceful vote-counting method of resolving issues. The NLRA model, in contrast, does not provide a peaceful vote-counting procedure for resolving disputes.¹⁵² Rather, the model contemplates reliance on "economic warfare." When the model restricts the weapons available to the parties, it is not merely bolstering peaceful vote-counting; rather, it is altering the vote-weighting scheme of the NLRA model. The model cannot simultaneously remain neutral (as democracy demands)¹⁵³ and alter the weight-voting scheme. Hence, the

¹⁴⁴ For other issues that have been classified as permissive and which, as a result, may be excluded from NLRA processes, see R. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 523-29 (1976); C. MORRIS, *supra* note 75, at 845-63.

¹⁴⁵ U.S. CONST. art. I, § 8.

¹⁴⁶ U.S. CONST. art. VI.

¹⁴⁷ U.S. CONST. amend. X.

¹⁴⁸ See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

¹⁴⁹ The Supreme Court recognized the effect of its decision on the NLRA model: "[t]he elected union representative [is not] an equal partner in the running of the business enterprise in which the union's members are employed." *Id.* at 676.

¹⁵⁰ See *supra* note 126 and accompanying text.

¹⁵¹ These, of course, are only examples of the many and varied restrictions on means imposed by the NLRA model.

¹⁵² See *supra* note 113 and accompanying text.

¹⁵³ See *supra* notes 60-61 and accompanying text.

outcome limitations of the NLRA model present serious challenges to its claim to democracy.

CONCLUSION

Industrial democracy is not a phrase that accurately describes the NLRA model. The model fails as democracy in virtually every way. Not all those governed may vote, although many not governed may. Some representatives are democratically elected, but others are not. The votes of representatives are not weighed equally or in a peaceful manner. The model is constrained by outcome limitations that are not justifiable.

Nevertheless, the industrial democracy rhetoric continues. This would be unimportant if the rhetoric did not affect the development of labor law. But it does. The effect of the rhetoric is to hinder progressive change. The rhetoric itself legitimizes, and hence renders more resistant to change, the labor relations status quo. The status quo, the rhetoric tells us, is the result of a democratic process; thus, all participants in the process are responsible for the status quo and those who argue for change outside of that process (for example, through government intervention) argue against democracy.¹⁵⁴ The rhetoric also tends to remove labor issues from broader public debate. Such issues, the argument goes, are better left to the private "democratic" processes of the NLRA. This rationale not only sequesters labor issues from related political and moral choices,¹⁵⁵ but it also fragments common labor problems and, hence, the political power of workers.¹⁵⁶

Any new approach to labor relations must begin with a new and more accurate description of the industrial world.¹⁵⁷ The "industrial democracy" description has failed. It posits an industrial world in which labor relations is isolated from the broader political process and in which the state is neutral on labor relations issues. But that is not the world in which we live. The new description should begin with precisely the opposite assumptions — that the broader political process and labor relations are intimately connected and that the state has interests in labor relations that may differ significantly from the interests of management and labor. The central labor relations issue would then shift from the issue of *whether* the state should intervene¹⁵⁸ to productive discussion on the appropriate *nature* of state intervention. Only then would the battle cry "industrial democracy" take on new life. But it would not be an industrial democracy sapped of its vitality by artificial insulation from the broader political democracy. Instead, it would be industrial policy through the broader political democracy.

¹⁵⁴ Cox, *Preserving Union Democracy*, *supra* note 25, at 610; Feller, *supra* note 27, at 764-66.

¹⁵⁵ Cf. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. REV. 975, 1059 (1982) ("The logic of rights [in this context, the bargaining rights of labor would be an example] is a human invention whose purpose is to preserve us from the notion that we must make political and moral choices.").

¹⁵⁶ On a more personal level, the rhetoric may provide a "fantasy image of community," which may compensate to some extent for the alienation experienced by many workers, but which may also divert the energies needed for a more meaningful solution. Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and The Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 372 (1983).

¹⁵⁷ See Stone, *supra* note 8, at 1580. See also H. WELLINGTON, *supra* note 2, at 158-63 (industrial democracy metaphor is misleading).

¹⁵⁸ See Klare, *Historiography*, *supra* note 27, at 480-82.