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Unions in a Fragmented Society

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INTRODUCTION

In the opening paragraphs of *Democracy's Discontent*, Michael Sandel observes: "Our public life is rife with discontent. Americans do not believe they have much to say in how they are governed and do not trust the government to do the right thing."[1] He cites figures from a Gallup poll that three-fourths of Americans are "dissatisfied with the way the political process is working."[2] A similar percentage "believe[s] that government is run by a few big interests rather than for the benefit of all."[3] Additionally, Sandel sees in people the fear that "from family to neighborhood to nation, the moral fabric of community is unraveling around us."[4] Not only do Americans sense a loss of self-government, but we also lack the tools of tradition and moral belief to guide us in self-government. This said, Sandel argues, the political arguments of the day are not at fault for our anxiety. It is not as if we have made the wrong decisions about welfare or health care. Rather, Sandel contends, it is our liberal public philosophy—with its view of persons as free and independent selves, unencumbered by moral ties they have not chosen—that is to blame. That is, to come to grips with our anxiety, we must look beyond the political arguments that currently confound us to the theory that animates them. Our discontent can be attributed to the rise of a liberal public philosophy over a republican one.

Sandel does not dwell on the question of who feels discontented. His book is dedicated to explaining why people feel this way. This is unfair criticism because Sandel is not a sociologist, but a political theorist. Nevertheless, Sandel speaks broadly. Seemingly all

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1. MICHAEL SANDEL, DEMOCRACY'S DISCONTENT 3 (1996).
2. *Id.* at 353 n.1.
3. *Id.*
4. *Id.* at 3.

Americans to some extent are anxious these days. Yet, this cannot truly be the case. I doubt graduates of Harvard or Yale—the elite—feel less powerful today than they did one hundred or two hundred years ago. And I doubt the wealthy feel any less powerful today than they did in the eighteenth or nineteenth century. They may not now be mostly white Protestants, and this is for the better. But, disproportionately, they are the ones still making the important decisions. Furthermore, one wonders who is feeling a loss of community. Again, the elite, to the extent that they ever had a community, still have that community. Certain other groups are also more resistant, though not impervious, to atomization. For instance, recent immigrants tend to live together and to continue to hold onto their traditions and customs. And African Americans, perhaps because they have historically been deprived of the right of self-government, cling more strongly to their beliefs and politics. African Americans in all social strata are more religiously observant, though their church attendance, like that of whites, has recently declined.[5]

Who, then, is Sandel talking about? One obvious answer is the working class, specifically the white working class. There are two reasons for this answer. First, more so than individuals in other groups, members of the working class suffer the effects of what Michael Walzer calls the Four Mobilities: geographic mobility, social mobility, marital mobility, and political mobility.[6] Members are more likely to own a home today than a generation ago, but they spend more time commuting.[7] Blue-collar workers suffer greater job instability, and feel more anxious.[8] They endure high divorce rates.[9] And, they are politically apathetic, or at least are less likely to vote as than their parents.[10] Second, as other nodes of community life, such as the church and the neighborhood group, disappear, the workplace has become increasingly central to identity.[11] But having to work

5. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 76 (2000).

6. Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 12–13 (1990).

7. PUTNAM, *supra* note 5, at 205, 212–15.

8. *See id.* at 88–92. However, white-collar workers also increasingly suffer from greater instability. *Id.* at 89.

9. *See id.* at 277–79. As does everyone else, but those who make less surely feel the effects of divorce more.

10. Witness the 2000 election furor over independent voters in such blue-collar states as Michigan, Ohio, and Pennsylvania.

11. "The long and short of it is this: Working for pay now occupies more of the time of more of our populace than ever. The job has become a central part of most adults' lives and

lower-wage jobs, contingent jobs, and sometimes multiple jobs, members of the working class struggle to make ends meet. It is no wonder, then, that they feel disempowered and anxious. They find themselves defined by jobs in which they have little personal investment.[12]

With this in mind, Sandel's book has important things to say about unions. *Democracy's Discontent* has generated great discussion among academics.[13] But given the number of pages that Sandel spends mapping out a republican political economy, including his praise for the Knights of Labor and Samuel Gompers,[14] it is surprising how few have taken to heart his ideas in relation to unions. In republican politics, what is the role of unions? What effect does a republican public philosophy have on labor law? Certainly, we cannot, and should not, simply search to recapture the past. In our global economy, that would be impossible. Forces beyond one nation's control prevent turning back the clock. Moreover, such calls for a return to the past suggest a myopic romanticism. To be sure, the working class was once far more engaged and farsighted. But the working class could also be small minded. Certain groups of immigrants dominated their unions to their own advantage, excluding other groups to those groups' disadvantage.

Thomas Kohler, for one, has explored what I would term a "republican interpretation" of unions and labor law. I will spend much of Part I of this Note examining his understanding of unions as "seedbeds of the civic virtues."[15] I will also address the liberal view of associations in general and unions in particular, paralleling the rise of "rights talk" in recent constitutional jurisprudence and the labor laws.

being employed (by one or more employers) is the way people spend the major share of their waking hours." Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 233 (1993) [hereinafter Kohler, *The Overlooked Middle*]; *see also* PUTNAM, *supra* note 5, at 86.

12. Robert Putnam reports that Americans today are *not* working as hard as their parents did at the height of the civic boom in the 1960s. Additionally, the free time available to less-educated Americans has increased since the 1960s, while that of their college-educated counterparts has decreased. PUTNAM, *supra* note 5, at 190. Yet, Putnam finds that those with the heaviest time pressures are those who are *more* likely, not *less* likely, to be civically involved. *Id.* at 191. At first blush, this seems counterintuitive. But it may be that those who feel less invested in their work feel less invested in civil society. Interestingly enough, Putnam's research indicates that watching television is the activity most lethal to community involvement. *Id.* at 216–46. Do those with dull, menial jobs enjoy (need?) the escape of television more than those with interesting jobs?

13. *See, e.g.*, DEBATING DEMOCRACY'S DISCONTENT (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).

14. *See* SANDEL, *supra* note 1, at 123–273.

15. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 295 (1995) [hereinafter Kohler, *Civic Virtue at Work*].

Finally, I will propose that we pursue a pragmatic view, rather than a republican or liberal view, of associations based upon our fragmentation. In Part II, then, I will consider majority rule in unions, and suggest that, following a pragmatic view, it would be preferable to adopt a scheme of nonmajority, or proportional, representation.[16]

I. THEORETICAL VIEWS

Section A analyzes republican and liberal views of associations. Section B examines the role of unions in light of these views. Finally, Section C argues that taking a pragmatic view will improve efforts at reform. If social fragmentation is our problem, then that is where we should begin.

A. Republican and Liberal Views of Associations

Democracy's Discontent portrays American history as a clash of two competing public philosophies: liberalism and republicanism. Sandel's thesis is short and sweet. The liberal conception of freedom with its view of persons as free and independent selves, unencumbered by moral or civic ties that they have not chosen, is insufficient to address our current discontent. "For despite its appeal, the liberal vision of freedom lacks the civic resources to sustain self-government," and it "cannot secure the liberty it promises, because it cannot inspire the sense of community and civic engagement that liberty requires."[17] By contrast, the republican conception of freedom, which once predominated, does speak to our discontent. With its view that liberty depends upon sharing in self-government, which in turn requires certain qualities of character, the republican conception is unafraid to take up and cultivate the needs of civic life—economic, moral, or otherwise. That is, republican politics is a formative politics, willing to address the ends citizens espouse.

Though Sandel does not deeply analyze the role of associations, throughout *Democracy's Discontent* he praises Tocqueville's philosophy of using multiple and diverse civic and political bodies to fill the spaces between persons, and between persons and the state. Such a "clamorous" republican politics, Sandel contends, is preferable to any

16. Of course, statutory reform would be necessary for any such scheme. Currently, employers are only required to bargain with exclusive representatives.

17. SANDEL, *supra* note 1, at 6.

unitary vision of citizens as a single body, and is in fact necessary to the cultivation of civic virtues.[18] Tocqueville's republican politics

> does not despise differentiation. . . . [I]t fills this space with public institutions that gather people together in various capacities, that both separate and relate them. These institutions include the townships, schools, religions, and virtue-sustaining occupations that form the "character of mind" and "habits of the heart" a democratic republic requires. Whatever their more particular purposes, these agencies of civic education inculcate the habit of attending to public things.[19]

As noted above, Sandel prescribes a formative politics. For the state and each citizen to be free, the state must have a stake in the character of its citizens. Sandel admits that "bad communities may form bad characters."[20] But it is not entirely clear whether Sandel would have the government intervene in associational life to prevent the formation of bad characters. For instance, what are we to do about obstinate ascriptive affiliations, such as religious fundamentalist groups, that ferment hate? Sandel seems to walk a fine line. On the one hand, he recognizes that associational obligations can claim citizens, so that these groups in some way transcend the state.[21] On the other hand, Sandel espouses a freedom among individuals and groups that is only possible in a shared culture within a state. Thus, it seems for Sandel that freedom is only possible where associations and the democratic state arise concurrently.[22]

This said, Sandel's republicanism, with its understanding of the self claimed by community, is particularly sensitive to using certain

18. *Id.* at 319–20.

19. *Id*. at 320–21 (footnote omitted); s*ee also id.* at 347 (stressing the republican benefits of political bodies between the individual and the state, such as townships).

20. *Id.* at 321.

21. In fact, liberalism first goes wrong, Sandel argues, in its inability to account for obligations we recognize to groups above and beyond obligations we recognize to the state. If we understand ourselves as free and independent selves, by which we only owe respect to others as free and independent selves, we cannot explain why we sometimes feel more loyal to some than others. Yet, we often do. The prototypical example is Robert E. Lee, who, even though he opposed secession, chose his home, the South, over his country, the Union. *Id.* at 13–17.

22. When discussing associations, Sandel cites Hegel. *Id.* at 401 n.7 (citing G.W.F. HEGEL, PHILOSOPHY OF THE RIGHT (T.M. Knox trans., Oxford Univ. Press 1952) (1821)). Nancy Rosenblum would argue that Sandel is misreading Tocqueville and Hegel in that Sandel too closely equates associational life and citizenship. She contends that theorists taking a "mediating approach" to civil society, following Tocqueville, can only hope that associations will cultivate benign and democratic dispositions in their members. NANCY ROSENBLUM, MEMBERSHIP AND MORALS 41–45 (1998). This view, she says, "rests . . . on an airy liberal expectancy." *Id.* at 45. Moreover, this view ignores Hegel's lesson that "[a]ssociation membership is a distinctive 'moment' in social and personal life. It cannot be dissolved into citizenship." *Id.* at 46.

ties and attachments to cultivate a concern for the whole. Group life educates people in the exercise of citizenship by familiarizing them with cooperation and directing them to common ends beyond immediate self-interest. Such lessons, Sandel contends, get the short shrift today, as political liberalism, which gives priority to individual choice of values, is unwilling to address the virtues essential to citizenship. Further, under political liberalism, the work of associations has been usurped by the state. Despite the liberal view of the freely-choosing and autonomous self, relations between persons are increasingly no longer left to individuals themselves, but are guided by social legislation.[23]

Like Sandel, Thomas Kohler argues that our present public philosophy is insufficient. Kohler asks "whether modern liberalism, with its limited conception of community, ends up by undermining the social conditions necessary to sustain its noble project of enhancing individual status and personal liberty."[24] And, like Sandel, Kohler argues that a republican conception of freedom is preferable.[25] Such a conception begins with the proper understanding of the 'self.' In contrast to liberalism, which abstracts the individual, the republican conception takes humans as "situated beings" and intelligible "only in relation to those associations that fundamentally condition human existence."[26] Communities, in fact, give us our identity. They tell us "the purpose and significance of our lives." From this, it is but a small step to a formative politics that addresses ends:

> [C]ommunities have a normative function, and well-functioning communities represent an irreducible human good. In this perspective, communities and associations [of every sort] exist *only for* the individual. Yet, the social good is prior—stands at a higher level than—the individual good, because without it, the good for discrete, individual persons could not exist.[27]

Kohler also emphasizes the importance of associations. Following Tocqueville, he stresses the "importance of mediating groups and

23. SANDEL, *supra* note 1, at 116–19.

24. Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 BYU L. REV. 727, 740–41 [hereinafter Kohler, *Individualism and Communitarianism at Work*].

25. Kohler does not call himself a republican. Nevertheless, his reasoning is republican. I want to be careful not to conflate Tocqueville, republicans, and communitarians because there are essential differences between the three.

26. Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of* DeBartolo, 1990 WIS. L. REV. 149, 206 [hereinafter Kohler, *Setting the Conditions for Self-Rule*].

27. Kohler, *Civic Virtue at Work*, *supra* note 27, at 295.

their potential to act as schools for democracy."[28] In coming together, individuals must take control over their own affairs and learn to work with others. In doing so, they learn the habits essential to self-government. Associating requires a common effort to some end, and so requires that individuals deliberate and reflect upon their goals. Or, associations "set the conditions for the sort of civic friendships that hold a society together and that facilitate the civil conversations that ground self-rule."[29] Through them, we learn critical virtues such as tolerance, cooperation, and independence, and "gain some sense of the fullness of our . . . potencies."[30] Without them, we withdraw and society breaks down.

Naturally, liberal theorists do not dismiss associations. In fact, liberal theorists make them a priority. John Rawls, for one, describes the just society as "social union of social unions."[31] On its face, such a description does not seem all that different than Sandel's and Kohler's understanding of associations as mediating bodies or "schools for democracy." It recognizes that the state requires tolerant citizens, and that democracy depends upon associations to cultivate the requisite civic habits and moral dispositions. Behind this similarity, there are sharp differences. Rawls is careful to distinguish between the state and associations: "A well-ordered democratic society is neither a community nor, more generally, an association."[32] Most importantly, a democratic society "is also closed . . . in that entry into it is only by birth and exit from it is only by death" and a democratic society "has no final ends and aims in the way that persons or associations do."[33] That is, Rawls, unlike Sandel and Kohler, does not conflate citizenship with associational life. Freedom does not rest on the integration of the individual into the state through associations. Rather, separation of the state from associations preserves freedom for the individual. Typically, liberals speak of separate spheres—public and private. Any talk of aims or ends in the public sphere must fall under a political conception of justice and its public reason. This means, as indicated by the liberal conception of the self, that citizens cannot think there are certain values that justify the belief that some people have intrinsically more worth to

28. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 730–31.
29. *Id.* at 731.
30. *Id.*
31. JOHN RAWLS, A THEORY OF JUSTICE 527 (1971).
32. JOHN RAWLS, POLITICAL LIBERALISM 40 (1993).
33. *Id.* at 40–41.

society than others. Instead, society owes respect to each person equally as a free and independent self.[34] By contrast, people in the private sphere may join together to pursue other—even elitist—values. People may choose their groups and choose their values.

Sidestepping Sandel's claim, for the moment, that individuals cannot simply choose their groups and values but are sometimes chosen by groups and values, the liberal view considers the state as prior to the group or existing before the group. According to liberal theory, democratic authority is only possible once talk of aims and ends has been removed from the public sphere and relegated to the private. "The designation of a distinctive public sphere [is meant] to control the influence of private associations."[35] The state maintains a neutral stance towards associations in that it does not favor one group over another and it limits any one group's influence in the public sphere (such as that of a religious group). Further, to ensure such limits, the state may restrict the power that associations exercise over their own members.[36] That is, to some extent, the state may intervene in association policies and practices. If the state could not, and associations could, for example, compel membership or exclude whomever they wanted, then associations could deprive individuals of the very things—individual liberty and equal worth—that the state is meant to preserve and protect. For this reason, certain liberals believe that associations that exact too heavy a toll on excluded individuals may be treated as if they were arms of the state by subjecting them to the same standards of respect for individual rights as apply to the state.[37] Or, as put by others, the goal is "congruence between the internal life . . . of . . . groups" and public norms and culture.[38] For example, discriminatory private groups may be forced to accept members when exclusion results in second-class citizenship. Of course, few advocate congruence to every group and every private practice. To be viable, groups must have some authority to discipline their members. Otherwise, groups cannot protect what they stand for. But, as more and more aspects of group life are constitutionalized, groups find it increasingly harder to preserve their beliefs.

34. *Id.* at 41.

35. NANCY ROSENBLUM, ANOTHER LIBERALISM 60 (1987).

36. *Id.*

37. Voluntarists speak of the principle of symmetry. *See* SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY 52 (1992).

38. *See* Nancy Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION 75, 75 (Amy Gutmann ed., 1998).

B. The Role of Unions and Developments in Labor Law

Sandel makes brief mention of unions: "Family, neighborhood, religion, *trade unions*, reform movements, and local government all offer examples of practices that have at times served to educate people in the exercise of citizenship by cultivating the habits of membership and orienting people to common goods beyond their private ends."[39] Kohler, a labor law professor, is more explicit. Kohler argues that unions are essential because they can and do involve people in a conversation "about what ought to be valued and why."[40] Though the conversations of collective bargaining may seem trivial—concerning promotions, seniority, wage rates, health insurance, and the like—Kohler thinks it a mistake to discount the mundane. It is not so much the subject that is important, but the practice. These types of discussions force individuals to make hard choices about the rules that determine their daily work lives and then justify these decisions to others.[41] They require that we learn to compromise, and they get us in the habit of self-directed action. "Individuals and societies alike become and remain self-governing only by repeatedly and regularly engaging in acts of self-government. It is the habit that sustains the condition."[42] Certainly, employment does not wholly define the individual. Work is something that individuals often hope to avoid. But, at the very least, setting contract goals, deciding strategy, and bargaining become an important dimension of a worker's experience. Moreover, such practices require that workers learn to tolerate setbacks and differences of opinion.

Of particular interest to Kohler is the decline in union membership over the last few decades. Approximately 34 percent of the US private-sector workforce was organized in 1960. By 1992, only 12 percent was organized, and the percentage continues to fall.[43] There are countless theories explaining this phenomenon, including globalization, increasing employer opposition, and weak enforcement of labor laws. But, as Kohler astutely notes, these figures are not

39. SANDEL, *supra* note 1, at 117 (emphasis added).

40. Kohler, *Civic Virtue at Work*, *supra* note 27, at 299.

41. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 734.

42. Kohler, *Civic Virtue at Work*, *supra* note 27, at 298.

43. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 734–35 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 422 (112th ed. 1992)).

unique to unions.[44] Data suggests that over the past thirty years participation in a wide variety of civic associations has plummeted. Since 1970, Elks lodges have lost 46 percent of their members; since 1969, the League of Women Voters has lost 61 percent of its members; and, since 1966, the PTA has lost 60 percent of its members.[45]

Understanding why membership in civic associations, such as neighborhood groups, religion, reform movements, and unions, has declined is not easy. Both Sandel and Kohler agree that it has something to do with the limitations of political liberalism. Sandel states: "[T]he procedural republic is often inhospitable to claims premised on self-definitions such as these. It brackets the constitutive ties that the republican tradition sees as essential to political education."[46] And, Kohler notes: "[W]e increasingly no longer see the need for or the significance of these mediating bodies. . . . Briefly stated, we suffer from an odd sort of blindness: we can only see individuals."[47] More specifically, Sandel traces our predicament to changes in our constitutional jurisprudence and Kohler to changes in labor and employment law.

Sandel spends the first one-third of his book tracing the ascendancy of "rights talk" and the First and Fourteenth Amendments.[48] By the mid-1940s, the Supreme Court had assumed as its primary role the protection of individual rights.[49] It defined those rights according to the requirement that the Constitution be read as neutral among ends, and defended that neutrality as essential to respecting persons as free and independent selves, unencumbered by moral ties they have not chosen.[50] As a result, the Court no longer justified the rights of free speech and association on the grounds that they are important for the pursuit of truth or the exercise of self-government; the Court justified these rights in the name of individual fulfillment and self-creation.[51] Free speech and association were no longer considered to derive from the collective or ascriptive affiliations, but explained on personal and voluntary grounds. In short, the Court decreed that individuals should have the right to

44. *Id.* at 735.

45. *See generally* PUTNAM, *supra* note 5, app. at 437–44.

46. SANDEL, *supra* note 1, at 117.

47. *Civic Virtue at Work*, *supra* note 27, at 294.

48. SANDEL, *supra* note 1.

49. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that states cannot compel children to pledge allegiance to the country at the start of each school day).

50. *See* SANDEL, *supra* note 1, at 50–52.

51. *See id.* at 53–55, 79–80.

decide for themselves what they want to say and hear and what groups they want to join or not join. It is no surprise, then, to see in the Court's decisions a growing animosity towards group duties and attachments. Increasingly, the Court considers associational life as a threat to self-creation. As Kohler notes, we see this in the rise of the freedom not to associate.[52] A large part of First Amendment law is now dedicated to sheltering individuals from associational obligation.[53] Persons should have the right to contract with others to serve their ends, but should not be bound by that association beyond the contract. They should have the right to leave a group when they want, and should not be penalized by the group for exercising that right.

A brief history of the Wagner Act is useful when examining changes in the labor law. Enacted in 1935, the Wagner Act[54] was designed to protect and enhance the status of individuals by defending the right to join autonomous employee groups and to bargain with employers over the conditions of employment. The Act is unique because, unlike other liberal legislation providing private rights of action, it encourages the creation of mediating bodies "to promote individual empowerment and to foster self-determination."[55] Through collective bargaining, the Wagner Act helps to involve individuals in the process of making the rules that determine their lives. The affected parties—employees, employer, and union—alone work out their disputes with their agreement standing as "a system of industrial self-government."[56] The state is not to intervene. For example, it has long been held that the state cannot force any side to accept any specific contract terms[57] and cannot regulate the choice of economic weapons that may be used.[58]

The Wagner Act is not unlike other liberal legislation in that it serves to level the playing field. If businesspersons are allowed to

52. Kohler, *Setting the Conditions for Self-Rule*, *supra* note 26, at 181–86.

53. *Id*. A seminal case is *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), where the Court held that government employees working in a unionized workplace may be required to pay union services charges, but that the First Amendment was violated where they were forced to pay for expression of political views with which they disagreed.

54. 29 U.S.C. §§ 151–169 (1992).

55. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 732–34; *see also* Walzer, *supra* note 6, at 17 ("This was not a standard liberal law, hindering the hindrances of union organization, for it actively fostered union organization.").

56. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

57. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395 (1952).

58. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477 (1960).

organize into corporations, why should workers not be allowed to organize into unions? The Act stands in contrast to earlier attempts at political reform by groups such as the Knights of Labor.[59] Its focus is freedom of contract. It does not attempt system-wide reform; it embraces rather than challenges the wage system.[60] In adopting a system of "industrial democracy," the Act lays out means for promoting economic equality. It allows workers to organize as a check against industrial despotism and brings a rule of law to the workplace. "Industrial democracy" does not mean management by democracy, giving workers the power to remove and elect managers. It means that workers have the right to seek redress of their grievances against management.[61]

Stated succinctly, the republican view, Kohler's view, sees the union as a positive in itself, since participation in the union allows workers to develop the habits necessary for self-direction. In adopting a private system of ordering, where the parties themselves resolve their common concerns, the Act recognizes that the union is an independent association with its own personality and moral purposes. Along these lines, Kohler notes that through the Act, Congress did not invent collective bargaining, but only adopted a scheme that had been developed over time by workers and employers.[62] The Act did not create unions, but simply acknowledged their existence. By contrast, the liberal view sees the union merely as a means to secure strategic ends, such as income, for its members. The Act permits unionization for the purposes of self-help, but the union is limited to the purposes for which employees originally joined.

Like constitutional law, labor law has undergone a transformation over the past century. The Taft-Hartley Amendments are the best evidence. Originally, the Wagner Act simply stated: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

59. Following a republican view, the Knights believed that popular government depended upon the virtue of the masses for its success. In their eyes, the wage labor system was a threat to society as it bred dependence and vice. Accordingly, they called for the creation of a cooperative commonwealth to restore the independence of workers. SANDEL, *supra* note 1, at 185–87.

60. *See id.* at 197–200.

61. *See* Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 809–10 (1990).

62. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 734.

purpose of collective bargaining or other mutual aid or protection."[63] However, in 1947 Congress added that employees "shall also have the right to refrain from any or all of such activities."[64] In contrast to the old section 7, under which the government openly encouraged unionization, the new Section 7 emphasized employee choice. By putting association on equal terms with nonassociation, the new section shows a distrust of association. It inhibits the formation of unions. The organized are not as concerned if the government remains neutral. But, the unorganized, who are easily cowed by the imbalance of power between employer and employee, need the government to be proactive. There is a significant psychological difference between "the President wants you to unionize" and "the President could care less if you unionize." Moreover, the new section suggests that individuals do not need a union to get just as much out of the workplace. The union is simply an affiliation—no more, no less. Employees may ally themselves with others, but only they may make that choice. Employees may join a union with the hope of securing additional income, but those who choose not to join are only giving up on the hope that the union can secure more.

Further indications of a shift from a republican to a liberal conception of the self in labor law appear in the state's growing role in the workplace.[65] Congress and state legislatures continue to expand prohibitions against discrimination in employment decisions.[66] Where unions once took up these issues in collective bargaining, the law now dictates them. In addition, common law courts have developed a tort of wrongful termination. Typically, an employee may sue if he thinks he has been fired in violation of public policy. The aim is congruence between the workplace and public norms and culture. To protect individual choice, work life cannot deviate too far from public life. Finally, the Supreme Court has imposed upon unions a duty of fair representation of their members.[67] Noting the power of the union majority, the Court deemed it necessary to develop a doctrine to protect minority union members.[68] Because the union is so powerful,

63. 29 U.S.C. § 157 (1947).

64. 29 U.S.C. § 157 (1992).

65. *See generally* Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 737.

66. Consider, for example, the Americans with Disabilities Act, 42 U.S.C. §§ 12102–12213 (1992).

67. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

68. *See id.* at 177–78.

in that individuals who are excluded from its processes bear serious costs, the state may treat the union as an arm of the state, subjecting it to similar standards of respect for individual rights.

C. A Pragmatic View

Let us reconsider our discontent. According to Sandel and Kohler, because of political liberalism, society is now the home of isolated, egotistical agents. We are directionless and divided by our rights. We have at last shed the weight of superstition, as public reason is paramount, but find ourselves "slipping into a fragmented, storyless condition."[69] If this description were right, though, one would think that liberalism would be the best way to deal with our political predicament. If we are isolated selves, and if we have to build a society, should we not begin from Rawls's original position, where from some imaginary point we are forced to find ways to agree with one another? Given our increasing division and difference, should we not try reform based upon that division and difference? If society is so fragmented, then our first concern should be procedural justice. We must take as our guide a principle of tolerance between members of conflicting associations. So long as people have a variety of exclusive ends, government ought not to favor one group over another, but should treat each with equal respect.

The above is a pragmatic view. It contends that theorists like Sandel and Kohler should give up on a return to virtue. Their arguments take on a romantic longing, if not for the past, then for some overarching ideal. Sandel and Kohler might respond that it is not that society is hopelessly fragmented, but that liberalism misrepresents our true condition. Kohler writes: "People are by nature social beings."[70] Thus, when liberals speak of autonomous selves and argue that all obligations are contractual, they are lying to themselves. Individuals cannot escape community. We just do not see that we are bound together. However, this argument makes the mistake of granting liberalism as a public philosophy too much power. Sandel argues that public philosophy is implicit in our social practices.[71] Similarly, Kohler states, "Ideas do have consequences."[72] But is it not the case that according to Sandel's and Kohler's accounts of the

69. SANDEL, *supra* note 1, at 351.
70. Kohler, *Civic Virtue at Work*, *supra* note 27, at 299.
71. SANDEL, *supra* note 1, at ix–x.
72. Kohler, *Setting the Conditions for Self-Rule*, *supra* note 26, at 208.

liberal conception of freedom, that conception is not the cause of all our problems but simply is an expression of our problems? One wonders why the republican view lost to the liberal view. There are countless material explanations for the recent transformations in constitutional and labor law, not the least of which are the industrial revolution and, later, globalization. One wonders why republicanism, if right, cannot summon our buried social feelings, our connections, and our traditions. On this point, I think Sandel and Kohler make the mistake of forgetting that liberalism—"rights talk"—is our tradition. This country is the product of continuing aspirations for greater freedom—from the church, from other men, and from our own fears. If we really are situated beings, we should not shirk those aspirations.

Perhaps, then, Sandel and Kohler are wrong to think that once we have a correct conception of the self we can right society. As Richard Rorty argues, it is not clear that a correct conception of the self helps:

> But we minimalist liberals do not need a theory of the self to make a distinction between more reflective and less reflective people. We can just say that you get more reflective people, people better suited for the responsibilities of self-government, whenever you provide more education, security, leisure. This is not a philosophical point, but just the empirical observation that people who enjoy more of these three goods are better able to consider alternative scenarios for their personal futures, and for the futures of their societies.[73]

Rorty in fact agrees with Sandel's understanding of the self. He sees the self as a "network of beliefs and desires."[74] Pursuing such a historical view, he thinks it a mistake to try to measure society by asking whether its citizens have the right beliefs. The only means he sees that we have for measuring our society is to compare ourselves to other societies and our own history.[75] If that is the case, then our society is not doing so poorly after all, as our society has "the best track record among the regimes which we have tried so far."[76] This puts us back in the position of having to accept our society's history and traditions. In liberal societies, many people benefit from education, security, and leisure. These people generally fare well in

73. Richard Rorty, *A Defense of Minimalist Liberalism*, *in* DEBATING DEMOCRACY'S DISCONTENT, *supra* note 13, at 117, 118–19.

74. *Id.* at 119.

75. *Id.* at 118–19.

76. *Id.* Even Sandel notes our country's achievements over the last half-century, including "victory in World War II, unprecedented affluence, greater social justice for women and minorities, [and] the end of the Cold War." SANDEL, *supra* note 1, at 3.

society and often create good ideas on how to improve society. Of course, this is an American-centric history. But it is unclear whether reason can reach beyond our history. Stated differently, we might criticize religious fundamentalists as bad citizens not because their ideas are based on the wrong conception of the self, but because under our tradition their ideas cannot be taken seriously. We attempt to engage them in political debate, but they refuse to consider other viewpoints.[77]

There is considerable diversity in our country today, and a great number of distinct groups because of that diversity. It is not apparent that such groups serve society well under either a republican or liberal view. Individuals increasingly feel divided from one another, resulting in a fragmented social condition. What we need, then, is reform based upon that fragmentation. For unions, this means, for example, seriously considering the widespread use of contingent work arrangements.[78] Most unions have been undecided about how to handle contingent workers because most unions are organized around a single plant or industry where workers only get the benefit of the union once they come to that plant or industry. But, one idea is for unions to serve as temporary agencies for contingent workers. This is not a new idea in the sense that many craft unions serve as training centers and hiring halls. It suggests, though, that unions can exist for purposes other than collective bargaining. That is, we need not define the role of unions to and by the negotiation of wage rates and health benefits. We can think of unions also as serving, and developing, the whole person. Further, with the plethora of federal and state statutes now applicable to the workplace, unions are needed to watch over the workplace. Most employees do not understand regulations about employment discrimination and health and safety, but unions do. By the same token, unions may serve as political advocates. Because many contingent workers are women and minorities, unions can provide them the voice they lack in the political arena.

77. Nevertheless, republican ideas are an integral part of our tradition and we can engage republican thinkers in political debate.

78. *See* Matthew Finkin, *The Road Not Taken: Some Thoughts of Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 217–18 (1993) [hereinafter Finkin, *Road Not Taken*]. A statistical snapshot taken in February 1995 showed that contingent workers constituted between 2.2 percent to 4.9 percent of the workforce, and that somewhere between 5 and 12.8 percent of part-time workers were contingent. Further, a disproportionate number of contingent workers were female and black. *See also* Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379, 400 (1998).

II. THE PROBLEM OF MAJORITY REPRESENTATION

A healthy skepticism of republicanism, coupled with a view that collective bargaining need not be the only, or defining, concern of unions, suggests that we revisit the principles of labor law. Specifically, I want to explore the concept of exclusive representation. The current conception of majority rule is rooted in a republican view of associations, modified by a liberal concern for minority rights. I believe a better scheme of nonmajority representation may be rooted in a pragmatic view of our fragmentation.

Section 9(a) of the Wagner Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.[79]

Kohler notes that the "exclusivity principle bottoms the American model of collective bargaining."[80] He explains:

> The exclusivity principle rests on the idea of majority rule. The principle establishes the association formed by a majority of employees in the affected workplace unit as the exclusive representative of them all. The principle prohibits an employer from attempting to bypass the majority-designated representative by unilaterally changing the terms or conditions of employment, or by dealing with individuals or groups independently of the union.[81]

Prior to the Wagner Act, trade unions generally bargained just for their members. If a union wanted exclusivity, the union had to coerce it from both the employer and the employees it wanted to serve.[82] Naturally, such coercion raised doubts as to the legitimacy of the union's claim to exclusive representation. It was clearly lawful for unions to compel participation by shunning nonmembers. But it was clearly wrong for unions to prohibit employers from hiring nonmembers.[83] As a result, when Congress drafted the Wagner Act, labor leaders sought to include section 9(a) to supply a legal basis, and thereby greater legitimacy, to exclusive representation.[84] Of

79. 29 U.S.C. § 159(a) (1992).

80. Kohler, *Individualism and Communitarianism at Work*, *supra* note 24, at 733.

81. *Id.*

82. Carlson, *supra* note 61, at 791–803.

83. *Id.* at 792.

84. *Id.* at 810–11; Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 97–98 (1989).

course, the law is no less coercive; the reasons behind the principle lend it legitimacy.

It is easy to see why republicans find the exclusivity principle so appealing. For republicans, majority rule is the cardinal means of political action. Every member of the community must have the opportunity to come together and discuss the pros and cons of a certain proposal before the community may take action.[85] The people do not decide upon the common good through coercion, but through persuasion and habituation. By contrast, liberals find the principle, at least theoretically, less appealing. For liberals, majority rule poses a threat to individual freedom. It restricts choice and leads to oppression. In groups that are run by majority rule, liberals want some individual protection or the right to come and go. Liberals appreciate that the Wagner Act ensures the right to organize and protects individuals from discrimination by their employers because of their union affiliation. But they do not see why individuals must give up control of their lives to a union, especially if they feel that they can do better without one. Individuals should have the right to join a union, but also should have the right not to join.

Recall that under the republican conception of freedom, democracy is realized through a network of independent groups operating within, but independent of, the state. Often, these groups claim our allegiance. This means that our choice to ally ourselves with them is not voluntary. For example, Robert E. Lee opposed secession; yet, he concluded that his obligation to the South outweighed his obligation to the Union. Lee would have sided with the Union had he been able to make that decision free of all other considerations. But, certain factors limited his freedom of choice. Nevertheless, Sandel and Kohler praise involuntary associations because they can cultivate the virtues necessary for self-government. Lee recognized that his association with the South was, in a sense, an involuntary tie that superceded personal choice. Though we may not approve of the

85. Tocqueville writes:

> What is understood by a republican government in the United States is the slow and quiet action of society upon itself. It is a regular state of things really founded upon the enlightened will of the people. It is a conciliatory government, under which resolutions are allowed time to ripen, and in which they are deliberately discussed, and are executed only when mature. . . . What is called the republic in the United States is the tranquil rule of the majority, which, after having had time to examine itself and to give proof of its existence, is the common source of all powers of the state.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 416 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1990) (1835).

choice he made, Lee was conscious of the circumstances of his life, and conversely aware of broader possibilities. Democracy depends, then, upon involuntary associations. Citizens can be free and self-governing without having the right to leave an association just because they would prefer not to be part of that association. Similarly, then, employees may be subject to a union.

By contrast, under the liberal conception of freedom, democracy is realized through a network of groups that exist independently of the state. The classic formulation is that the interplay between various groups prevents permanent division into majority and minority.[86] The state is neutral, while groups compete for members. As such, no group can make an exclusive claim to an individual's allegiance, and every group must allow members to leave when they choose. This view is premised on the ability of individuals to choose between their groups and their values, to be unencumbered selves who can freely pursue their personal preferences. It follows that liberals advocate an open freedom of association: "The liberal separation between public and private spheres, and endorsement of pluralism within them, encourages both access to groups in which one has 'voice' and the possibility of 'exit' from them as equally important parts of freedom of association."[87] Democracy depends, then, upon voluntary association. When liberals confront a group that is not voluntary because it exercises so much power over its members and that it is impossible for them to leave, then the liberals suggest the state may remove the group's ability to sanction members or that the group should be held to constitutional standards. An employee should then have the right not to join others in a union.

Two types of arguments are made in support of the exclusivity principle. First, the principle is necessary for readjusting the balance of power between management and labor. It is easy to see how unanimous cooperation is helpful in bargaining. If even a few employees are able to bypass the union's control of collective bargaining and negotiate their own wages and benefits, then others will soon view unions as unnecessary and try to negotiate their own wages and benefits.[88] Any variation in contract terms sends the message that things could be better without the union and thus is a

86. This is Madison's method for providing against majority tyranny. THE FEDERALIST NO. 51 (James Madison).

87. ROSENBLUM, *supra* note 35, at 60 (taking the terms from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970)).

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

threat to the union. Also, without exclusive representation, disruptive competition between unions could arise. An employer might encourage a union to compromise by offering to recognize it over another union.[89] Exclusive representation is necessary to maintain orderly industrial relations. It is, at the very least, an administrative headache for an employer to deal with multiple unions representing otherwise identical employees.[90] Conversely, an employer can take seriously a union's no-strike pledge where one union is in control, since there is less of a threat of individual action like a wildcat strike.[91]

Various commentators are unpersuaded by the argument that the principle is necessary for readjusting the balance of power between management and labor. They have suggested in its place a scheme of "members only" representation. Their contentions need not be fully repeated here. Simply put, they find the benefits of exclusive representation overblown, and think alternative models not only workable[92] but also essential if unions are to survive.[93] Consider that the Wagner Act does not give unions the benefit of exclusivity in strikes, as an employee can resign her membership and cross a picket line.[94] Nor does the Act give unions the benefit of exclusivity when it comes to financial support, as states may grant employees in a unionized workplace the option of not paying union dues.[95] It may be that unanimous cooperation is not necessary for strikes and financial support. Strikes of even limited numbers can cause enough trouble to force an employer to make concessions. And many employees will want to join the union so they can participate in its governance and be involved in decisions about bargaining. But these arguments support the proposition that nonmajority unions may be as effective as majority unions. Moreover, exclusivity does not necessarily improve a union's ability to get a good contract. For example, if the union strikes when members are divided over an offer, some members may

89. However, section 8(a)(2) of the Wagner Act makes it an unfair labor practice for an employer to form its own associations or contribute support to one union over another. 29 U.S.C. § 158(a)(2) (1992).

90. Finkin, *Road Not Taken*, *supra* note 78, at 200.

91. Carlson, *supra* note 61, at 789.

92. George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 926–32 (1975) (stating that nonmajority representation would make unions more responsive); *see also* Finkin, *Road Not Taken*, *supra* note 78, at 207–18.

93. Carlson, *supra* note 61, at 849–61 (arguing that new forms of representation may be more attractive to the unrepresented).

94. *See* Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985).

95. 29 U.S.C. § 163 (1992).

choose to cross the picket line and the union might not have the internal strength to reject the offer.

The second type of argument in support of exclusivity analogizes to the political model. The drafters of the Wagner Act adapted a theory of "industrial democracy" to collective bargaining.[96] Reformists believed that collective bargaining ought to be more than the negotiation of terms and conditions of employment. It should lead to the creation of a "constitution" for the workplace.[97] If "industrial democracy" did not mean management by democracy, it at least implied majority rule, and the claim that the union, if democratically elected by a majority of employees, should have the right to speak for all.[98] In two early cases—*J.I. Case Co. v. National Labor Relations Board*[99] and *Steele v. Louisville & Nashville Railroad Co.*[100]—the Supreme Court took up the legal aspects of majority rule.

In *J.I. Case Co.*, the employer had offered each of its employees individual contracts for one year.[101] About 75 percent of the employees accepted.[102] During the time that the contracts were in effect, a union petitioned the National Labor Relations Board for an election.[103] The union won the election, but the employer refused to bargain on the grounds that its individual contracts with its employees precluded it from dealing with the union in any matter affecting the rights and obligations of its employees.[104] The Board disagreed, and the Supreme Court affirmed.[105] The Court ruled that

> [i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to the collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit.[106]

The Court reasoned that the very purpose of the statute goes to group concerns.[107] The Act has a collective rather than individual focus.

96. Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 561 (1945).
97. Carlson, *supra* note 61, at 809.
98. Weyand, *supra* note 96, at 562–64.
99. 321 U.S. 332 (1944).
100. 323 U.S. 192 (1944).
101. *J.I. Case Co.*, 321 U.S. at 333.
102. *Id.*
103. *Id.*
104. *Id.* at 333, 334.
105. *Id.* at 334, 342.
106. *Id.* at 337.
107. *Id.* at 338.

Accordingly, the Court dispelled any notion that an individual employee should have the freedom to contract if he can get better terms. Such a notion is both disruptive and selfish:

> [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.[108]

Moreover, such a notion is undemocratic in the sense of being antimajoritarian:

> The 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.[109]

The Court's ruling in *J.I. Case Co.* is extraordinary for its attention to the collective. It is a fascinating testament to the need for individual choice and the power of associations over individual choice. The Court envisions the state having to force the individual to join the collective for the good of the collective. It is only through the union that a worker obtains any real freedom in the workplace. Further, the Court indicates that the union is sovereign, and no employee can change its law to his or her benefit. This is decidedly a republican vision of democracy, one that hinges on involuntary association rather than individual consent.[110]

However, the Court was quick to qualify its position. In *Steele*, decided shortly after *J.I. Case Co.*, the union was the exclusive bargaining agent for a craft of firemen.[111] A majority of the firemen were white, but a substantial number were black.[112] All the whites were members, but blacks could not be, though they were required to

108. *Id.* at 338–39.

109. *Id.* at 339.

110. Sheldon Leader has similarly remarked that exclusivity represents a pluralist vision of democracy—a "system of interest representation in which the constituent units are organized into a limited number of *singular*, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed [if not created] by the state and granted a deliberate representational monopoly within their respective categories." LEADER, *supra* note 37, at 165 (citing Phillippe C. Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85 (1974)).

111. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 194 (1944).

112. *Id.*

accept the union as their representative.[113] The union and employer, a railroad, then entered into an agreement restricting the seniority rights of blacks.[114] The question before the Court was whether the union had a duty to represent all the employees in the craft without discrimination on account of race.[115] Although the Court did not hold that the union was a state actor, it first drew an analogy between unions and legislatures:

> [T]he representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[116]

The Court went on to find that the union had to have some duty to represent every employee, regardless of their race.[117] Otherwise, the Court held, the majority could ride roughshod over the rights of the minority:

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests, or indeed their right to earn a livelihood by pursuing the occupation in which they are employed.[118]

The Court phrased its reasoning in terms of equal protection: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed upon the representative a corresponding duty."[119] The Court did accept that unions could make rational distinctions between employees, such as differences in seniority or skill.[120] However, discriminations based upon race were automatically irrelevant.[121]

Steele is best characterized as a liberal corrective. If *J.I. Case Co.* establishes majority rule, *Steele* guards against majority tyranny by making it the job of the courts to ensure the rights of minority

113. *Id.* at 194–95.
114. *Id.* at 195.
115. *Id.* at 198–99.
116. *Id.* at 198.
117. *Id.* at 201.
118. *Id*.
119. *Id*.
120. *Id*. at 203.
121. *Id*.

members. As noted above, to protect against majority tyranny, the state may hold involuntary associations to constitutional standards. In a democracy, individuals must have the right to leave groups when they want. Of course, it can be argued that unions are not entirely involuntary in the sense that employees can always quit their jobs. But, this is unpersuasive because often the costs of leaving a job are too high for it to be considered a choice. The state, then, must intervene on behalf of the employee where the union trammels the employee's rights.

The Court in *Steele* makes plain that the union, as a legislature, may be treated as an arm of the state. The Court espouses a liberal conception of freedom. Accordingly, we also see behind its reasoning an affirmation of a liberal conception of the self. In this respect, it is interesting to note how *Steele* parallels the reasoning of *United States v. Carolene Products Co.*'s famous footnote.[122] First, judicial intervention may be required to insure access to the political process. By excluding blacks from membership, the union was denying blacks their voice. Second, intervention may be required where prejudice infects the political process, since "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[123]

Note that in *Steele* the Court separates distinctions based upon race from distinctions based upon relevant factors such as seniority.[124] The Court will allow union policies that make reasonable distinctions among employees.[125] At first blush, this difference seems difficult to defend. Why are civil liberties more important than economic liberties? The answer turns on, as Sandel argues, the liberal conception of self.[126] Perhaps in eighteenth-century America it was fair to say that individuals were free moral agents and could freely contract.[127] But today inequalities of bargaining power undercut that freedom. Individuals simply cannot quit jobs they do not like—economic conditions make doing so impossible. Thus, legislatures should be

122. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

123. *Id*.

124. *Steele*, 323 U.S. at 203.

125. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

126. SANDEL, *supra* note 1, at 47–53.

127. Underlying this view are laissez-faire assumptions: "The railroad employee required by his employer to choose between his union membership and his job is thus 'a free agent . . . at liberty to choose what was best from the standpoint of his own interests . . . [and] free to exercise a voluntary choice.'" *Id*. at 50 (citing Coppage v. Kansas, 236 U.S. 1, 9 (1915)).

allowed to regulate the market and thereby limit freedom of contract in order to realize greater freedom of contract. Government intervention facilitates freedom. It provides economic security that results in leveling the playing field and providing the equality necessary for freedom of contract. In fact, what justifies democracy is that it enables the right of every person to choose his or her own ends, regardless of social position.[128] Thus, the union as legislature must be free to make economic policy. In practice, this means that the union's political process must be open to all, and decisions must be made by majority rule. Under the liberal model, each employee has an equal right to express his or her preferences. It also means that the majority should not be able to vote into effect an oppressive or prejudiced agenda. If the union majority could vote such an agenda into effect, the democratic process would produce policies based upon beliefs that some persons are intrinsically worth less than others. That runs contrary to the notion that persons should be free to choose regardless of their position in society.

Steele is only a partial liberal correction. It does not give minority employees the choice of having their own union or even no union; that is, it does not create an absolute right of voice and exit. But, accepting the analogy of union as legislature,[129] there is no reason why democracy requires exclusive representation. Democracy can also be achieved through proportional representation. In an old Labor Board case, *Houde Engineering Corp.*,[130] such a scheme was in fact debated but ultimately dismissed in favor of exclusive representation. In *Houde Engineering Corp.*, the employer faced two employee groups, the minority an outgrowth of the company's athletic association and the majority affiliated with the United Automobile Workers.[131] At the hearing, the employer suggested that it could bargain and enter into an agreement with a "composite committee" of the representatives of the association and the union.[132] The Board conceded that such a scheme would, on its face, be "just and democ-

128. *Id*. at 52.

129. Professor Matthew Finkin has argued that the political analogy is flawed. Employees have no alternatives if they do not like the union, whereas disgruntled citizens may always swing their support to other members of the legislature. Finkin, *Road Not Taken*, *supra* note 78, at 211.

130. *In re* Houde Eng'g Corp. & United Auto. Workers Fed. Labor Union No. 18839, 1 NLRB (Old) 35 (1934).

131. *Id.* at 37.

132. *Id*. at 40.

ratic,"[133] but concluded that, even if such an agreement could be reached, it would not make much difference because a majority of the committee would have to consent to any agreement.[134] Hence the majority representative would still control.[135] The Board then added that proportional representation could also breed "dissention and rivalry" within the ranks destructive to the bargaining process.[136] Too many voices would complicate bargaining and cause the unions to undercut one another.

The Board's ruling in *Houde Engineering Corp.* was practical. Its concern was improving the status of employees, and exclusive representation seemed at the time the best way to do this. Nevertheless, there are a number of reasons why proportional representation, or a scheme of coalition bargaining, with multiple unions representing multiple employee interests, might be preferred. Most importantly, why should one union, and not the employer, have to deal with employees' conflicting interests? Exclusivity transfers to the union the responsibility of resolving employee differences before bargaining.[137] But it is not clear that the union is any better suited to resolving deep differences.

Consider, for example, *Emporium Capwell Co. v. Western Addition Community Organization*,[138] where a group of black employees, refusing to take their grievances through a joint union-management Adjustment Board, demanded that their employer negotiate with them directly over issues of employment discrimination in assignments and promotions.[139] When the employer refused, the employees picketed, and as a result were terminated.[140] The Court ruled that the employees had not engaged in concerted activity protected under the Act, and thus could be terminated because the employees had circumvented the union to engage in bargaining.[141] The Court reasoned that concerns for industrial order outweighed the right of the minority to act.[142] It noted that an employer confronted with demands from multiple groups would not necessarily be able to

133. *Id*.
134. *Id.*
135. *Id.* at 40.
136. *Id*.
137. Carlson, *supra* note 61, at 814; Finkin, *Road Not Taken*, *supra* note 78, at 208.
138. 420 U.S. 50 (1975).
139. *Id*. at 54–55.
140. *Id.* at 55–56.
141. *Id.* at 70.
142. *Id.* at 68–69.

satisfy them all at once, and that the union has a legitimate interest in presenting a united front and in not seeing its strength dissipated by subgroups pursuing separate interests.[143] Interestingly, the black employees did not raise the issue of whether the union had breached its duty of fair representation. On the one hand, this might evidence that the union was not all that divided, and thus the union, rather than the employer, could best attend to their grievances. On the other hand, the burden on the employee in a fair representation claim is heavy. The employee must show that the union action was "arbitrary, discriminatory, or in bad faith."[144] Thus, the white workers in the union may have been tolerant, but the black workers' disagreement with the whites over skilled jobs or affirmative action was so deep-seated that conflict was inevitable. And if this was the case, the black workers could never get fair representation, and they would always be worse off with a union. In such circumstances, it seems unduly harsh to say that the minority cannot bypass the majority. It was not as if the minority was attempting to speak for the majority. It simply wanted a voice of its own.

Are racial divisions unique or may other differences, such as class divisions, also benefit from a system of nonmajority representation? *Steele* indicates that unions may differentiate among workers on the basis of skill.[145] Where those who are financially better off suffer by union representation, the liberal vision of freedom undergirding the duty of fair representation is satisfied. The wealth is simply being more evenly distributed. However, where those at the bottom of the scale are always worse off, such as with a contract that provides good pensions but low wages, it cannot be argued on the grounds of distributive justice that the majority should rule. Those at the bottom may be better off without representation at all. Yet allowing those at the bottom to form their own union, that is, allowing proportional representation, could present another problem. For example, in a union of permanent and contingent workers, where the permanent workers are the minority, the contingent workers are usually better off. In such a case, the union will aim for a wage just high enough to please the permanent workers, whom the employer wants to keep, with the excess going to the contingent workers. By contrast, under proportional representation, if the permanent

143. *Id.* at 67–70.
144. Vaca v. Sipes, 386 U.S. 171, 190 (1967).
145. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944).

workers are allowed to form their own union, the permanent workers may realize their full worth on their own. The contingent workers cannot then get as much, as the employer does not need to offer them as much because the employer views them as easily replaceable. Thus, under proportional representation, the wage gap increases.[146]

Of course, we do not want greater wage inequality. But, this possibility considers that the union only exists for the sake of collective bargaining. It is entirely feasible that contingent workers may want their own voice for other reasons. They may want a union that will help them get other jobs or train them in new skills. Or, they may want a union that pushes for political change, like living-wage legislation. This is not to say economic difference is tantamount to racial or religious difference, but that differences must be tolerated. This is a pragmatic view based upon our fragmentation. As long as individuals have different ends because of their backgrounds, government ought not allow one group of individuals supremacy over another.

Note that proportional representation, in protecting individual freedom of choice, bolsters the best of what republicans and liberals see in unions as associations. Kohler argues that unions should be as small as practicable, as small groups better facilitate deliberation: "They make more likely the personal knowledge, friendship and trust among participants that ground the possibility of conversation and consensus."[147] Proportional representation allows employees to divide into smaller, more homogenous groups. Each union in the workplace may stand for an interest, such as affirmative action or lower pensions and higher wages. To be sure, proportional representation could lead to greater balkanization. Do we really want white unions and black unions? On the other hand, if there are more unions, there is more choice, and we might find that workers of different stripes share common ground on certain issues. Additionally, proportional representation might encourage greater employee participation in the inner workings of their union.[148] Under a republican view, we must hope for such debate. Under a liberal view, the state ensures such debate. But, if employees could form their own union, they could demand and expect greater responsiveness from it.

146. Professor George Schatzki outlined this situation, though his example used skilled and unskilled workers. Schatzki, *supra* note 92, at 933.

147. Kohler, *Setting the Conditions for Self-Rule*, *supra* note 26, at 204.

148. *See* Schatzki, *supra* note 92, at 921–26.

Competition for members could even arise between unions. At the least, as unions would stand for an interest, employees would know that their union would be fighting for their interest. Reciprocally, the state would not need to monitor unions' inner workings. As noted, under the liberal view, the state preserves the right of exit by limiting the power that private groups exercise over their members. But, under a pragmatic view, just because groups have to be tolerant of one another does not mean that they have to be tolerant of their members. Assuming members of groups are bound by their ends, mutual respect for political purposes only requires that groups agree to let members of other groups pursue their own ends. It does not require groups to allow their members to pursue different ends. Thus, under proportional representation, there would be no duty of fair representation. Unions would not have to respect dissent.

CONCLUSION

Michael Sandel and Thomas Kohler offer an intriguing portrait of unions as mediating bodies based upon a republican, rather than liberal, conception of the self. However, in their concern for our increasing fragmentation, they fail to consider that reform may best begin with such fragmentation. We do not need a correct conception of the self to make a good society; we need a system for connecting differently encumbered selves. Applying this view to labor law, we should adopt a system of nonmajority representation, or proportional representation, allowing smaller groups of employees to form their own unions to fulfill their own ends.