

*Ohio State University Moritz College of
Law*

The Ohio State University Moritz College of Law Working Paper
Series

Year 2004

Paper 2

Neutrality Agreements and Card Check
Recognition: Prospects for Changing
Paradigms

James J. Brudney*

*Ohio State University Moritz College of Law, jbrudney@law.fordham.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/osulwps/art2>

Copyright ©2004 by the author.

Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms

James J. Brudney

Abstract

This article is the first comprehensive treatment of neutrality agreements, which are themselves the most important development in Labor Law for decades. The labor movement's new approach to organizing displaces NLRB-supervised elections with negotiated agreements that provide (i) for employers to remain neutral during an upcoming union campaign, and (ii), in most instances, for employees to decide if they want to be represented through signing authorization cards rather than through a secret ballot election. The article demonstrates the substantial, perhaps predominant, role played by this new contractually-based approach over the past 5-10 years; it also explains why so many employers have chosen to participate. The article then considers and rejects the principal doctrinal arguments challenging the facial validity of the neutrality and card check approach. Finally, borrowing from Thomas Kuhn's famous paradigm-based analysis of how change occurs in the natural sciences, the article responds to the argument that freedom of choice in the union representation context is best realized through the elections process, and instead contends that the government-supervised election paradigm should be substantially modified if not entirely supplanted in light of the evidentiary record over the past 30 years and the development of a credible alternative model.

THE OHIO STATE UNIVERSITY
Moritz
College of Law

**Neutrality Agreements and Card Check Recognition:
Prospects for Changing Paradigms**

James J. Brudney

Forthcoming, Iowa Law Review (vol. 90, 2005)

**Public Law and Legal Theory
Working Paper Series
No. 28**

November 2004



This working paper series is co-sponsored by the
Center for Law, Policy and Social Science
at the Moritz College of Law

This paper can be downloaded without charge from the
Berkeley Electronic Press Electronic Working Paper site:
<http://law.bepress.com/osulwps>

Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms

James J. Brudney^{*}

“It is important...[to] not[e] what scientists never do when confronted by even severe and prolonged anomalies. Though they may begin to lose faith and then to consider alternatives, they do not renounce the paradigm that has led them into crisis...[O]nce it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternative candidate is available to take its place.”¹

INTRODUCTION

At the heart of the National Labor Relations Act (NLRA or Act)² is § 7, guaranteeing workers the right to band together for the purpose of bargaining collectively “through representatives of their own choosing.”³ This employee choice, including the right to refrain from selecting a union, has long been analogized to decisionmaking by voters in the political context.⁴ The resonance of the comparison between industrial democracy and political democracy has helped make elections supervised by the National Labor Relations Board (NLRB)

^{*} Newton D. Baker-Baker & Hostetler Chair in Law, The Ohio State University Moritz College of Law. I am grateful to Victor Brudney, Cindy Estlund, Fred Feinstein, Ted St. Antoine, and Paul Weiler for valuable comments and suggestions on earlier drafts. I thank Patrick Brodhead, Rebecca Fitzthum, Carla McNeil, Ken Rubin, and Sara Sampson for excellent research assistance, and Amy Beaudreault for her careful preparation of the manuscript. All remaining errors are mine. Ohio State University Moritz College of Law, and its Center for Law, Policy and Social Science, each provided generous financial assistance for this project.

¹ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77 (2d ed. 1970).

² Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)). I use “NLRA” to refer to the 1935 statute as amended in 1947, 1959, and at other later times.

³ 29 U.S.C. § 157.

⁴ See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 503-07 (1993) (discussing reliance on analogy in legislative history to 1935 Wagner Act).

the dominant explanatory structure, or paradigm, for the free exercise of employee choice under the NLRA.

The past decade has witnessed a growing challenge by organized labor to the validity of the election paradigm as a preferred approach in ascertaining which “representatives of their own choosing” employees want.⁵ A central component of unions’ challenge is their success in negotiating agreements that provide for employers to remain neutral during an upcoming union organizing campaign. These neutrality agreements generally include language specifying that the employer will recognize the union as exclusive representative, and participate in collective bargaining, if a majority of its employees sign valid authorization cards.⁶

Neutrality agreements combined with card check recognition provide a distinct mechanism enabling employees to select representatives for purposes of collective bargaining. This approach to union organizing has partially displaced Board-supervised elections, and has become the principal strategy pursued by many labor organizations.⁷ Its non-electoral focus has attracted increased attention from labor law scholars,⁸ generated resistance from segments of the

⁵ See generally Susan Sala, *Labor, Employment Laws Are Interdependent, AFL-CIO President Sweeney Tells ABA Group*, DAILY LAB. REP. (BNA) at C-1 (July 12, 2000); Michelle Amber, *AFL-CIO Asks Affiliates to Support Organizing at Comcast, Verizon Wireless*, DAILY LAB. REP. (BNA) at A-4 (March 12, 2004).

⁶ See Part I, *infra* describing neutrality agreements as utilized in American workplace since mid 1990s.

⁷ See Part I, *infra*, discussing shift in organizing focus away from NLRB elections.

⁸ Compare Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369 (2001) (supportive of new approach) and William J. Guzick, *Employer Neutrality Agreements: Union Organizing Under a Nonadversarial Model of Labor Relations*, 6 IND. REL. L.J. 421 (1984) (same) with Samuel Estreicher, *Essay: Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834-38 (1996) (questioning certain aspects of new approach) and *Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before Subcommittee on Workforce Protections of the House Committee on Education and the Workforce*, 107th Cong. 2d Sess. (2002) [hereinafter 2002 House Hearings] (Statement of Professor Jarol B. Manheim, The George Washington University) (critical of new approach).

business community,⁹ and sparked controversy in Congress.¹⁰ Legislation has been proposed to ban the new organizing technique, and supporters of that legislative effort invoke the election paradigm as the sole method appropriate for implementing employees' freedom to choose their representatives.¹¹

This article examines the rise of neutrality agreements and card check in the context of the election paradigm. The basic fault line exposed by debate over these agreements involves whether to modify or even abandon reliance on Board-supervised elections as the favored method of determining if employees wish to be represented by a union. Proponents within organized labor view neutrality agreements plus card check recognition as fundamentally preferable to the election option. Although there may be risks of misuse in particular instances, supporters contend that the new approach safeguards employee freedom of choice better than elections do, while promoting a structure for more civil labor-management discourse and encouraging stable labor relations based on respect for voluntary arrangements negotiated between unions and employers.

Opponents within the business community regard neutrality plus card check as inherently threatening to employee free choice. They maintain that privately negotiated agreements and reliance on authorization card signatures allow unions to exert undue pressure on individual

⁹ See Daniel V. Yager and Joseph J. LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*; 24 EMPL. REL. L.J. 21 (1999) (critical of new approach); *Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns, Hearing Before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce*, 108th Cong., 2d Sess. (2004) [hereinafter 2004 House Hearing] (statement of Charles I. Cohen on behalf of U.S. Chamber of Commerce) (same). See also Andrew M. Kramer et al., *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?* 23 B.C. L. REV. 39 (1981) (expressing criticism at earlier stages).

¹⁰ Compare H.R. 4636, 107th Cong. § 2 (2002) (banning recognition through neutrality agreements and card check) and H.R. 4343, 108th Cong. § 3 (2004) (same), with S. 1925, 108th Cong. (2003) and H.R. 3619, 108th Cong. (2003) (authorizing Board certification of unions chosen by majority of unit employees based on card check).

¹¹ See Part II, *infra* discussing employer community opposition in doctrinal terms.

employees, thereby undermining the importance of secrecy, confidentiality, and a non-coercive environment in determining fairly the preferences of employees. At the same time, these opponents fail to acknowledge how the current election-based structure has long presented its own inherent threats to uncoerced choice by individual employees. The aspirational model of open and fair union representation elections cannot be squared with the reality of a regulatory regime that allows, if not encourages, employers to exert inordinate pressure on employee choice in the electoral process. Accordingly, the debate over the legal and public policy implications of neutrality agreements that provide for card check recognition offers a chance to re-examine basic approaches to self-determination under the NLRA.

Part I of the article describes the proliferation of neutrality agreements, especially agreements that include card check provisions. Relying on recent empirical studies, Part I also explains why unions favor these arrangements and why many employers accept them. Part II considers the legal critique of these negotiated arrangements, focusing on § 8(a)(2) of the Act¹² and the idea of interference with employee free choice. Part II analyzes the business community's principal legal arguments related to employees' freedom to choose and concludes that they are deficient – both neutrality agreements generally and card check provisions in particular are plainly permissible under the NLRA.

Part III addresses the deeper concern about displacing the election paradigm, borrowing from Thomas Kuhn's framework for explaining change in the natural sciences to analyze the possibilities for such an underlying shift. The Supreme Court in 1969 and 1974 endorsed as reasonable the Labor Board's position that elections are the descriptively pre-eminent and

¹² 29 U.S.C. § 158(a)(2) (2000).

normatively optimal method for determining employee choice.¹³ Judicial and agency cases amplifying this position have assumed for decades that Board-supervised elections are fair and even-handed. Part III maintains, however, that it is no longer appropriate to overlook the anomalies associated with the prevailing explanatory model.

As a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation. The development of substantial alternative approaches signals a recognition that assumptions about the basic fairness of Board elections have turned out not to be realistic. Participants on both sides understand that Board-supervised election campaigns regularly feature employers' exercise of their lawful yet disproportionate authority to help shape election results, as well as employers' use of their power to affect outcomes unlawfully but with relative impunity. These patterns of conduct have helped generate alternative contractually-based approaches to organizing that appear to be used at least as widely as Board elections to determine whether employees wish to join unions. Part III concludes by suggesting ways in which the election paradigm might be restructured so as to make it more sensitive to the imbalance of power that exists between employers and employees. In the alternative, Part III allows for the possibility of abandoning altogether the notion of a single reigning paradigm.

I. THE RISE OF NEUTRALITY AND CARD CHECK AGREEMENTS

A. *Bypassing NLRB Elections Since the Mid 1990s*

Collectively bargained language providing for employer neutrality in future organizing campaigns began to appear in the late 1970s. A 1976 letter agreement between General Motors

¹³ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), discussed in Part III.

and the United Auto Workers provided that “General Motors management will neither encourage nor discourage the Union’s efforts in organizing production and maintenance employees traditionally represented by the Union elsewhere in General Motors, but will observe a posture of neutrality in these matters.”¹⁴ Other early agreement language conditioned employer neutrality on “responsible” union behavior, pledging that management would remain neutral in future organizing campaigns “providing the Union conducts itself in a manner which neither demeans the Corporation as an Organization nor its representatives as individuals.”¹⁵

By the late 1990s, as unions bargained for neutrality protection with greater frequency, these agreements had become a central component of the labor movement’s organizing strategy.¹⁶ In an important empirical study, Professors Adrienne Eaton and Jill Kriesky collected and analyzed 132 neutrality agreements negotiated by 23 different national unions; 80% of the agreements they examined were bargained during the 1990s.¹⁷ One-half of the neutrality agreements covered employees in the service sector, with the majority of these negotiated in the

¹⁴ See GM-UAW Agreement on Company Neutrality, in *Organizing Held “Sleeper” Issue*, DAILY LAB. REP. (BNA) at C-1 (Dec. 30, 1976).

¹⁵ See Neutrality Agreement of June 16, 1979, between Philip Morris, U.S.A. and Local 16-T, Bakery, Confectionery, & Tobacco Workers, *reprinted in Kramer et. al., supra* note 8, at 47.

¹⁶ See e.g. *Shipbuilding: Neutrality Agreement Between Avondale Industries and Metal Trades Dept. of the AFL-CIO*, DAILY LAB. REP. (BNA) at E-21 (Nov. 3, 1999). See generally Hartley, *supra* note 8, at 374-78.

¹⁷ See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 IND. & LAB. REL. REV. 42, 45 (2001). Eaton and Kriesky used surveys and extensive literature research to obtain information during 1997 and 1998 on organizing agreements from 36 national unions with 10,000 members or more; 23 of these unions had negotiated at least one neutrality agreement. *Id.*

hospitality, gaming, and telecommunications sectors.¹⁸ Within the manufacturing sector, most agreements were in the auto and steel industries.¹⁹

Not surprisingly, Professors Eaton and Kriesky found considerable variation in the substantive aspects of these agreements.²⁰ Certain core provisions, however, were present in the vast majority of settings. Almost all agreements included an explicit employer commitment to neutrality (93%) and some two-thirds of the agreements (65%) included both a statement of neutrality and a provision to recognize union majority status through card check procedures.²¹ Notably, card check provisions (with and even without neutrality statements) were associated with a substantial reduction in the numbers of employers running anti-union campaigns, and card check arrangements also reduced the intensity of such campaigns.²² The diminished levels of employer opposition presumably relate to unions' ability to recruit majority support in a shorter time span through authorization cards than under election arrangements, and also unions' ability

¹⁸ *See id.* at 45-46. The Hotel and Restaurant Employees' Union (HERE) had the largest single number of agreements (27.5% of the authors' sample). *Id.* at 46. Eaton and Kriesky reported that their study underrepresented HERE's activities, and also omitted sufficient service sector examples from the United Food and Commercial Workers (UFCW) and the International Longshore and Warehouse Unions. *Id.*

¹⁹ *See id.* at 45. A search of the Daily Labor Report for articles containing the phrases "neutrality agreement" or "card check" from 1997 through August 2004 yielded nearly 300 articles. Among a sample of major international unions, HERE appeared 26 times, Communication Workers of America (CWA) 25 times, United Automobile Workers (UAW) 21 times, Service Employees International Union (SEIU) 15 times, and United Steelworkers of America (USWA) 11 times. Copy of search results on file with author.

²⁰ After studying the agreements and published reports about them, and conducting structured telephone interviews of union representatives familiar with the agreements, Eaton and Kriesky collected content-specific data for 118 of the 132 agreements. *Id.* at 46.

²¹ *See id.* at 46-47. Of the 35% of agreements that did not provide both a statement of employer neutrality and card check recognition procedures, 27% included neutrality without referring to card check and 8% included card check without providing explicitly for employer neutrality. *Id.* at 47.

²² *See id.* at 49-50. The union alleged management violations of neutrality-only agreements in 90% of all neutrality-only cases, but management violations were alleged in only 43% of all cases involving card check recognition procedures. *Id.* Card check agreements were accompanied by neutrality provisions almost nine-tenths of the time. *See* note 21, *supra*, and accompanying text.

to reach large numbers of workers before employers can begin to generate pressure against the organizing effort.

The Eaton and Kriesky study reported certain other common features that were typically included in these bargained-for organizing agreements. Some two-thirds of the agreements called for union access to the employer's physical property, thereby contracting around the access restrictions established in 1992 by the Supreme Court.²³ Nearly four-fifths of the agreements imposed certain limits on the union's behavior – most often the union agreed not to attack management during its campaign, but agreements also provided for organizing to occur during a specified period of time or for unions to notify management in advance of their intention to initiate a particular organizing campaign.²⁴ Finally, more than 90% of the agreements called for some form of dispute resolution, most often arbitration, to address differences about unit determination or allegations of non-neutral conduct by one of the parties.²⁵

Organized labor's increased reliance on neutrality agreements plus card check does not mean that unions have forsaken the NLRB elections process. While the annual number of representation elections declined by roughly 50% during the early 1980s, election usage remained relatively constant at slightly under 3500 per year between 1983 and 1998.²⁶ Since

²³ *See id.* at 47-48. *See* *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (holding that under NLRA, union organizers have right of access to employees in the workplace only at physically isolated worksites such as logging camps or tourist hotels).

²⁴ *See* Eaton & Kriesky, *supra* note 17, at 47-48.

²⁵ *See id.*

²⁶ *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 81 (CCH 1994) [hereafter DUNLOP COMMISSION REPORT] (describing data through 1990). Henry S. Farber, *Union Success in Representation Elections: Why does Unit Size Matter?*, 54 IND. & LAB. REL. REV. 329, 330-31 (2001) (describing data through 1995); *Trends: Number of Elections, Union Win Rate, Declined in 1999 from Year Before*, DAILY LAB. REP. (BNA), at C-1, C-2 (May 23, 2000) (reviewing 1995-1998 data, and reporting 3229 Board representation elections in 1998).

1998, however, the number of Board elections has declined again by close to 30%.²⁷ Strikingly, as union organizing activity has increased, the annual number of Board representation elections has reached its lowest level since the 1940s.²⁸

To be sure, unions in recent times have enjoyed increased success when seeking to organize through elections. The union win rate in NLRB representation elections has climbed steadily from 47.7% in 1996 to 57.8% in 2003, its highest level since the late 1960s.²⁹ This period of success corresponds to the 1995 arrival of John J. Sweeney as new president of the AFL-CIO. Sweeney prevailed in a contested campaign after promising to focus more aggressively on organizing efforts, and both the AFL-CIO and its affiliates have committed substantial additional resources to organizing since 1995.³⁰ Comments from prominent management attorneys suggest that union organizers have become more sophisticated and effective in their use of traditional techniques during election campaigns, including direct worker contact and strategic targeting of employers within a given industry.³¹ Unions also are using

²⁷ See *Trends: Number of Elections Decreased in 2003; Union Win Rate Increases for Seventh Year*, DAILY LAB. REP. (BNA), at C-1, (June 8, 2004) (reviewing 1999-2003 data, and reporting steady decline in number of elections; 2333 Board representation elections in 2003).

²⁸ See 11 NLRB ANN. REP. 4-5 (1946) (reviewing number of elections and cross-checks (comparing union authorization cards with employers' payrolls) from 1936-1946).

²⁹ See *Trends*, note 27, *supra* (discussing union win rate in recent years); Robert LaLonde & Bernard Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHIC. L. REV. 953, 959 (1991) (summarizing NLRB annual reports data on union win rates from 1950 to 1988).

³⁰ See, e.g., Michelle Amber, *Special Report: AFL-CIO Convenes Organizing Summit to Find New Ways to Expand Membership*, DAILY LAB. REP. (BNA), AT C-1, C-2 (JAN. 14, 2003) (describing substantial commitment of funds to organizing, made by various individual unions); Elizabeth Walpole-Hofmeister et al., *Special Report: Union Boosts Funds, Develops Strategies for Organizing More Workers*, DAILY LAB. REP. (BNA), at C-1, C-3 (Aug. 18, 1999) (describing AFL-CIO's goal of having its affiliated international unions expend 30% of their budgets on organizing, and reporting that some affiliates already are exceeding that goal). See generally *AFL-CIO President Says Labor Will Make Right to Organize Civil Rights Issue of 1990s*, DAILY LAB. REP. (BNA) at A-5 (July 29, 1997).

³¹ See, e.g., Walpole-Hofmeister, *supra* note 30, at C-1 (statement by Betty Southard Murphy); *Id.* at C-6 (statement by Donald L. Dotson); Michelle Amber, *Special Report: SEIU Sees Record Growth; 64,000 New Members Organized in 1998*, LABOR REL. WEEK (BNA), at 1419, 1421 (Dec. 23, 1999) (statement by G. Roger King); Littler Mendelson, *Strategic Initiatives for the Changing Workforce* 28 (statement by prominent management-side law

some less traditional techniques in these campaigns, such as forging partnerships with religious organizations and community groups,³² and researching target companies as part of corporate campaigns that appeal to stockholders, board members, and institutional lenders.³³

At the same time, however, the proliferation of neutrality agreements that include card check provisions is part of a larger commitment on the part of unions to modify the NLRB election-based approach to organizing. The AFL-CIO organized nearly three million workers from 1998 to 2003; *less than one-fifth of these newly organized employees were added through the formerly pre-eminent Board elections process.*³⁴ Some of the recent organizing success

firm), online at www.littler.com/publications/whitepaper.htm. See generally Rachel Sherman & Kim Voss, “Organize or Die”: Labor’s New Tactics and Immigrant Workers, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 81, 84-85 (Ruth Milkman ed. (2001) (discussing intensified approaches to rank and file organizing).

³² See, e.g., Amber, *supra* note 31 (describing SEIU alliance with Catholic cardinal to intervene in organizing campaign at Catholic hospital in California); Jon Newberry, *Two Unions to Charge Discrimination at Cintas*, CINC. POST, Nov. 18, 2003 at B8 (reporting on joint press conference involving UNITE, Teamsters, and several national civil rights groups, held in midst of unions’ organizing campaign and aimed at highlighting employer’s discriminatory practices against women and minorities). See generally Tony La Russa, *Churches Reach Out to Workers*, PITTS. TRIBUNE-REVIEW, Sept. 1, 2003 at __ (discussing growing bonds between religious community and labor movement).

³³ See generally Sherman & Voss, *supra* note 31, at 85; Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, 1 PERSP. ON POLITICS 45, 54 (2003); Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 IND. & LAB. REL. REV. 505, 506-08 (1990).

³⁴ For the six year period ending in 2003, the AFL-CIO reports that its affiliates organized 500,000 employees in 1998; 600,000 in 1999; 400,000 in 2000; 400,000 in 2001; 523,000 in 2002; and 400,000 in 2003. See e-mails from Kevin Byrne and Andy Levin, Organizing Department, AFL-CIO to James Brudney, October 20, 2003, and Sept. 17, 2004, copies on file with author. During this same period, Board election victories by all unions (AFL-CIO affiliates and also small, independent unions) covered a total of 550,000 employees. See DAILY LAB. REP. (BNA) at E-1 (Dec. 29, 2003) (reporting that union wins in all Board representation elections in 1998 covered 107,000 employees); *NLRA Representation and Decertification Statistics: Yearbook 2003 Report*, Table 1 (BNA Plus 2004) (showing that union wins in all Board representation elections covered 107,000 employees in 1999; 100,000 in 2000; 78,000 in 2001; 83,000 in 2002; and 74,000 in 2003). Union wins in elections involving AFL-CIO unions (including the Teamsters for this purpose) covered roughly 12,000 fewer employees each year; from 1998 to 2003, some 475,000 employees were organized in NLRB elections won by AFL-CIO affiliated unions. See *id.* See also Kate Bronfenbrenner & Robert Hickey, *The State of Organizing in California: Challenges and Possibilities in THE STATE OF CALIFORNIA LABOR 2003*, 39, 52, 67-68 (Ruth Milkman ed. 2003) (reporting that in six years from 1997-2002, unions in California organized 61,714 new employees through NLRB elections and 209,372 through non-NLRB approaches).

The figures on newly organized workers include public sector employees who are recruited wholly outside the NLRA domain. Further, the increases in new members do not take account of offsetting decreases in union density,

involves public sector employees, and some is attributable to other contractually-based approaches, such as accretions of previously unrepresented or newly acquired facilities that build on existing bargaining units,³⁵ or negotiated elections supervised by a third party distinct from the NLRB.³⁶ Still, neutrality combined with card check has become a major weapon in the arsenal of organized labor. The Service Employees, Needle Trades Workers, Hotel and Restaurant Workers, and Autoworkers report that a plurality or majority of newly organized members have come in through contractual arrangements rather than traditional Labor Board supervised election campaigns.³⁷ For these and other unions, neutrality plus card check account for more new recruits than NLRB election victories.

resulting from retirements or economy-related job losses for unionized workers, decertification elections, overall growth of the workforce, and other factors. Since 1998, despite a substantial increase in union organizing, the number of workers represented by unions has declined slightly (from 17.9 million to 17.4 million) and the percentage of the workforce represented by unions has fallen as well (from 15.4% to 14.3%). *See* HANDBOOK OF U.S. LABOR STATISTICS, Table 10-2 (Eva E. Jacobs ed., 7th ed. 2004) (reporting union density figures for 1998 to 2002); *Union Members in 2003*, U.S. DEPT. OF LABOR NEWS, Jan. 21, 2004, at Table 1 (reporting union density figures for 2003).

³⁵ *See generally* Houston Division of the Kroger Co., 219 NLRB 388, 389 (1975); White Front Stores Inc., 192 NLRB 240, 241-42 (1971).

³⁶ *See, e.g.*, Agreement on election procedures between SEIU and Catholic Healthcare West (2001) (specifying standards of conduct and privately supervised election for up to eight separate units of employees at acute care hospitals; copy on file with author). Often, these voluntary agreements allow the employer to campaign while limiting campaign content (no anti-union communication; only positive, pro-employer messages) or methods (no captive audience speeches or one-on-one meetings). *See* Brent Garron, *The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements* 3 (Paper delivered at 2003 American Bar Association annual meeting; copy on file with author). A related contractually based approach used by SEIU involves “hybrid” election agreements, where the NLRB supervises the representation election but the union and management agree to rules of conduct during the pre-election period that (i) are more rigorous than what is required under the NLRA, and (ii) are enforceable by an arbitrator who has the power to order a new election in appropriate circumstances. *See generally* New York Health and Human Service Union, 1199/SEIU v. NYU Hospitals Center, 343 F.3d 117, 118 (2nd Cir. 2003); SEIU v. St. Vincent Medical Center 344 F.3d 977, 979-81 (9th Cir. 2003).

³⁷ *See, e.g.*, Michelle Amber, *SEIU Sees Record Growth; 64,000 New Members Organized in 1998*, LAB. REL. WEEK (BNA) Dec. 23, 1999 at 1419-21 (reporting that of 64,000 workers in newly organized bargaining units, less than 15,000 came through Board elections); observations of Judith A. Scott, General Counsel, SEIU (reporting that from 1998 to 2002, SEIU organized some 550,000 employees in new bargaining units; 82,000 came through contested government-supervised elections and more than 100,000 came as a result of negotiated agreements that include codes of conduct plus either card check or privately supervised elections) (telephone conversation, Sept. 21, 2004, notes on file with author); Garren, *supra* note 36, at 1 (reporting that Union of Needletrades, Industrial & Textile Workers (UNITE) has brought in most of its members through voluntary recognition agreements); *Card Check, Neutrality Accords Best Way for Unions to Organize, UNITE’s Raynor Says*, LAB. REL. WEEK (BNA) June

The labor movement's growing interest in organizing outside the framework of representation elections has special relevance with respect to entities that employ larger numbers of workers. It has long been true that unions' election win rates fall as the size of the contested unit rises, and as a result unions' overall win rate before the NLRB can be somewhat deceptive.³⁸ From 1999-2003, unions won nearly 60% of the more than 9,000 representation elections that involved units of fewer than 50 employees, but prevailed in only 42% of the 2200 elections involving 100-499 employees and in a mere 37% of some 260 elections in which units of more than 500 workers were at stake.³⁹ Many successes in neutrality plus card check arrangements have involved larger units, often with more than 500 employees, and some unions may be targeting these larger units for their new approach.⁴⁰

10, 2004 at 811 (reporting that 85% of new employees organized by UNITE and HERE in last year were organized through card check); observations of Daniel W. Sherrick, General Counsel, UAW (reporting that majority of new employees organized by UAW in private sector in 2002 and 2003 have come through neutrality and card check) (telephone conversation, Sept. 15, 2004, notes on file with author).

³⁸ See Farber, *supra* note 26, at 333-34 (reporting differential win rates by size of unit from 1950-1998; since 1960, win rate for units of fewer than 10 employees has averaged about 60% but win rate for units of more than 100 employees has averaged below 40%); Gordon R. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 110, 117 (Sheldon Friedman et al. eds. 1994) (reporting same sharp differential in union win rates between small and large units during 1970s and 1980s).

³⁹ See *NLRB Representation and Decertification Statistics*, *supra* note 34, at Table 8. The number of elections held for different size units also reflects unions' preference for targeting smaller units, and their reluctance to take on election campaigns in larger enterprises. See Bronfenbrenner & Hickey, *supra* note 34, at 53-54 (describing pattern in California and nationally).

⁴⁰ For recent reported examples where neutrality plus card check has led to success in organizing units of more than 500 workers, see *Casino Workers Gain Representation By Three Unions at Caesars in Indiana*, DAILY LAB. REP. (BNA) at A-10 (June 8, 2004) (Teamsters, Operating Engineers, and HERE organize unit of over 800 employees through neutrality and card check); *HERE to Begin Bargaining May 4 with First Unionized Hotel in Houston*, DAILY LAB. REP. (BNA) at A-6 (April 21, 2004) (HERE organizes unit of over 500 employees through neutrality and card check); *Manufacturing Workers at Thomas Built Buses Choose UAW Representation through Card Check*, DAILY LAB. REP. (BNA) at A-2 (March 23, 2004) (UAW organizes over 1,100 employees at North Carolina facility through neutrality and card check); Michelle Amber, *Alcoa Recognizes USW as Bargaining Agent at Cressona, Pa. Plant Following Card Check*, DAILY LAB. REP. (BNA), at A-7 (Oct. 10, 2003) (USWA organizes unit of over 700 workers through neutrality and card check); Catherine Hollingsworth, *Card Check at Kentucky Dana Corp. Plant Results in Auto Workers Representation Win*, DAILY LAB. REP. (BNA) at A-10 (Aug. 20, 2003) (UAW organizes unit of 1,000 employees through neutrality and card check).

The Eaton and Kriesky findings suggest a link between what provisions are included in a neutrality agreement and the ultimate success of union organizing efforts. Organizing campaigns that featured an employer neutrality statement without providing for card check resulted in recognition for the union 46% of the time.⁴¹ By contrast, organizing campaigns in which the parties agreed to both employer neutrality and card check ended with union recognition 78% of the time.⁴²

There are notable recent instances where organizing under a neutrality and card check arrangement has produced no union gains.⁴³ Still, the 78% success rate reported by Eaton and Kriesky is well above the union win rate in Labor Board elections since 1996, and is almost twice the level of union success in elections involving mid-size and larger units of 100 or more employees. Moreover, and importantly, the rate of achieving a first contract following recognition approached 100% in the nearly 200 successful organizing campaigns monitored by Eaton and Kriesky.⁴⁴ That degree of achievement far exceeds the roughly 60% success rate associated with first contracts following NLRB election victories by unions.⁴⁵

⁴¹ See Eaton & Kriesky, *supra* note 17, at 51-52.

⁴² See *id.* at 52.

⁴³ See, e.g., Susan R. Hobbs, *Verizon Neutrality Pact with CWA, IBEW Expires After Four Years; No Units Organized*, DAILY LAB. REP. (BNA) Aug. 24, 2004 at A-12 (reporting no new organizing at Verizon Wireless; union spokesperson asserts management thwarted several active organizing drives over four years and was not serious about abiding by the neutrality agreement); Brief of Amicus Curiae Kaiser Foundation Health Plan at 2, Dana Corp. and Clarice Atherholt (No. 8-RD-1976) (NLRB 2004) (available online at www.nlrb.gov) (reporting that of 23 neutrality-and-card-check agreements negotiated between Kaiser and various unions in nine states from 1996 to 2004, the union was not able to secure a card majority in five instances (21.7%) and the employees in those five facilities remain unrepresented). See also *NLRB Certifies CWA to Represent Oakland Kaiser Permanente Call Center Employees*, DAILY LAB. REP. (BNA) July 14, 2004 at A-7 (reporting that unit of 180 employees chose CWA in a Board election rather than selecting unions that were part of neutrality agreement with Kaiser Permanente).

⁴⁴ See *id.* at 52-53.

⁴⁵ See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354-55 (1984) (reporting that certified unions obtain first contract in only 60% of cases); LAB. REL. REP. (BNA) at C-1 (Dec. 31, 1998) (quoting union consultant's estimate that "a first contract is never reached in at least one-third of representation elections where employees vote for representation"); Pavy, *supra* note 34, at

B. *Why Unions Seek to Negotiate Neutrality with Card Check*

Given their comparative track records, it is not hard to understand why unions would prefer to organize through negotiated neutrality and card check arrangements rather than pursuing NLRB-supervised elections. The explanation for the success currently enjoyed under neutrality and card check relates in large part to the effects frequently associated with employer tactics in opposition to unions during election campaigns. Neutrality arrangements allow unions to avoid these effects – in particular to sidestep the intimidating consequences of employers’ anti-union speech or conduct, and to minimize the eviscerating impact of lengthy delays under the Board’s legal regime.

With respect to intimidation, numerous studies have demonstrated the adverse impact of employer speech and conduct opposing unionization. The greater the amount of employer communication during a campaign, the less likely a union is to prevail in the election.⁴⁶ While one could posit that this adverse impact stems primarily from the countervailing educative aspects of employer speech, research in the past two decades strongly suggests that it is the aggressive and hierarchical nature of employer communication that generates increased management success. Captive audience speeches, employer threats to act against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline

113-15 (reporting that union election wins in 1970 resulted in first contracts 78% of the time, but success rate was only 61% following election wins in 1982 and 65% following union victories in 1987); DUNLOP COMMISSION REPORT, *supra* note 26, at 73 (success rate for obtaining first contracts between 1986 and 1993 was 56%).

⁴⁶ See RICHARD B. FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO 234-36 (1984) (summarizing results from seven studies). For a well known study challenging this conclusion, see JULIUS G. GETMAN, STEPHEN B. GOLDBERG, & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). For a summary of criticisms of the Getman study, alleging flawed methodology and drawing of conclusions not warranted by the data—as well as the study authors’ response to their critics, see MICHAEL C. HARPER, SAMUEL ESTREICHER, & JOAN FLYNN, LABOR LAW 345-46 (5th ed. 2003). Apart from controversy over the Getman study examining campaigns in the early 1970s, the more recent studies referred to in notes 47 and 48 *infra* indicate a strong connection between employers’ campaign activity (lawful and unlawful) and declining prospects for union success.

lawful techniques that have proven especially effective in diminishing union support or defeating unionization over the years.⁴⁷ Employers' discriminatory conduct during campaigns – particularly the firing of active or prominent union supporters – also has substantially curtailed unions' success rate in elections.⁴⁸ The next section addresses why employers who enter into neutrality agreements decide to forego their recourse to these lawful and unlawful campaign methods. It should be clear, however, that by reducing or eliminating such tactics, neutrality agreements substantially improve unions' chances of securing majority support.

With regard to delay, there is again considerable evidence that unions fare less well as the period of time increases between the filing of an election petition and the actual election.⁴⁹ The

⁴⁷ See, e.g., Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 526-30 (2001) (reporting adverse impact of captive audience speeches and threats against employees); Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE, *supra* note 38, at 75, 80-82 (reporting adverse impact from captive audience meetings and from increasing number of company letters transmitted to employees); Richard Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 IND. & LAB. REL. REV. 351, 361, 364 (1990) (reporting adverse impact of supervisors' speaking out against union); William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law & Reality Once Again*, 36 IND. & LAB. REL. REV. 560 (1983) (reporting adverse impact of employer threats, captive audience speeches, and certain written communications). See generally FREEMAN & MEDOFF, *supra* note 46, at 234-37 (summarizing findings from 11 studies).

⁴⁸ See, e.g., Dickens, *supra* note 47, at 568-69 (reporting significant reduction in union support when employer takes action against pro-union employees); United States General Accounting Office, *Concerns Regarding Impact of Employee Charges Against Employers for Unfair Labor Practices* (GAO-HRD 82-80, June 21, 1982) (reporting diminished success for unions in campaigns during which employer discrimination occurred); Kleiner, *supra* note 47, at 528-30 (same). See generally Bronfenbrenner, *supra* note 47, at 81 (describing how studies actually underestimate negative impact from firings because they do not include the many campaigns that collapse before an election once the employer has discharged key union supporters); FREEMAN & MEDOFF, *supra* note 46, at 234-36 (summarizing findings from four studies).

⁴⁹ See, e.g., Bronfenbrenner, *supra* note 47, at 78-79 (reporting that for 261 union elections occurring in 1986 and 1987, win rate declines from 50% if election held within 60 days of petition to 31% if election held 61-180 days after petition); Myron Roomkin & Richard Block, *Case Processing Time and the Outcome of Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 88-89 (1981) (reporting that for over 45,000 union elections studied, win rate decreases steadily from 50% (if election occurs less than one month after petition is filed) to 30% (if election occurs 4-7 months after petition is filed)); Richard Prosten, *The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?* Proceedings of the Thirty-First Meeting of the Industrial Relations Research Association 240, 243-45 (1978) (reporting that union win rate declines with time delay between petition and election). See also U.S. General Accounting Office, *National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters*, 63 (1991) (reporting that from 1960 to 1989, median time to decide contested representation cases increased from 54 days to 212 days). The General Counsel had some success in the 1990s in reducing the time from petition to election. See Fred Feinstein,

impact of delay seems linked in part to employer use of intimidating speech or conduct during the extended campaign period.⁵⁰ In addition, some studies have found that employer challenges to the size or scope of the proposed election unit – which necessarily extend the period from petition to election by months if not years – are associated with decreased union chances for success.⁵¹ Neutrality agreements can avoid the NLRB elections process altogether by providing for card check recognition or for an election conducted by a third party other than the Labor Board, typically a private arbitrator or the Federal Mediation and Conciliation Service (FMCS).⁵² Either of these approaches, but especially the increasingly standard card check approach, shortens the time period within which the union attempts to secure majority support and be recognized as exclusive bargaining representative. Of perhaps even greater importance, neutrality agreements – with or without card check – minimize the prospects for delay in the

The Challenge of Being General Counsel, 16 THE LAB. LAWYER 19, 33 (2000) (as of February, 1999, half of NLRB initial elections took place within 42 days of filing petition); NLRB General Counsel Report on FY 2003 Operations (2004) (reporting that median time from petition to election was 41 days in FY 2002 and 40 days in FY 2003).

⁵⁰ See Roomkin & Block, *supra* note 47, at 76 (suggesting that “delay gives employers added opportunity to dissuade employees and increase the likelihood of turnover in the workforce” thereby undermining unions’ efforts to retain employee support); Bronfenbrenner, *supra* note 47, at 78 (observing that delays “give employers a longer time period in which to campaign aggressively”).

⁵¹ See Bronfenbrenner, *supra* note 47, at 79-80; Prosten, *supra* note 49, at 244-46; R. Seeber & W. Cooke, *The Decline of Union Success in NLRB Representation Elections*, 22 IND. REL. 33, 42-43 (1983).

⁵² See Eaton & Kriesky, *supra* note 17, at 47 (reporting that 12 organizing agreements in the authors’ dataset included provision for non-NLRB election); Erick Lekus, *H&M, Union Group Reach Agreement on Workers’ Right to Collective Bargaining*, DAILY LAB. REP. (BNA) at A-3 (Dec. 22, 2003) (reporting on neutrality agreement between UNITE and clothing retailer providing for election supervised by American Arbitration Association or similar organization); Michelle Amber, *Health Care Employees SEIU Local Wins Representation Rights for Some 2,500 Las Vegas Hospital Workers*, DAILY LAB. REP. (BNA) at A-9 (Dec. 10, 1998) (reporting on neutrality agreement between SEIU and a Las Vegas hospital providing for offsite election supervised by FMCS). See also *Agreement on election procedures*, *supra* note 36 (detailing private election agreement that includes code of campaign conduct for both sides, plus election supervision by pre-selected arbitrators).

initiation of collective bargaining once a determination has been made that the union enjoys majority support.⁵³

Unions that seek enhanced representational success through neutrality agreements tend to do so in two distinct organizing contexts. First, they may attempt to secure neutral status from employers with whom they enjoy an ongoing collective bargaining relationship. This may occur in an industrial setting when large, partially unionized companies have unorganized sectors which the existing union seeks to penetrate,⁵⁴ although it increasingly arises in the service sector as well.⁵⁵ Alternatively, unions may solicit a neutrality agreement from an employer with whom they do not have a bargaining relationship. Often, this kind of initiative arises in a service area context: HERE or SEIU may negotiate a neutrality agreement with a hotel, hospital, or airport that is unorganized at the time.⁵⁶

⁵³ The most egregious delays in the Board elections process actually occur after the votes have been cast, when challenges to the results or conduct of the election typically take years to resolve. *See* International Confederation of Free Trade Unions (ICFTU), *Internationally Recognized Core Labour Standards in the United States: Report for the WTO General Council Review of the Trade Policies of the United States 3* (2004) [hereinafter *ICFTU Report for WTO*] (reporting backlog of 25,000 employer unfair labor practice cases in 2002, and average time of 557 days for NLRB to resolve such cases, not including subsequent court proceedings). Feinstein, *supra* note 49, at 34-35 (reporting that it typically takes two years to litigate an unfair labor practice case to completion and that “[d]elay in resolving a challenge to a union election victory can seriously undermine employee support and ultimately make it impossible to achieve a collective bargaining agreement”). Neutrality and card check effectively eliminate these delays because employers agree not to contest the result.

⁵⁴ *See, e.g., Title of Article*, DAILY LAB. REP. (BNA), at D-3 (July 11, 1979) (quoting language from neutrality agreement between United Rubber Workers and Goodyear); text accompanying note 14 *supra* (quoting language from neutrality agreement between UAW and General Motors).

⁵⁵ *See, e.g., Elizabeth Walpole-Hofmeister, Trends: Card-Check Provisions in Verizon Pact Sign of Broadening Organizing Trend*, DAILY LAB. REP. (BNA), at C-1 (Sept. 6, 2000) (describing neutrality agreement between Verizon Communications and its two major unions, covering more than 30,000 employees in Verizon’s wireless operations); Michelle Amber, *Unions Launch Drive to Organize Workers of Sodexo in United States and Canada*, DAILY LAB. REP. (BNA) at C-1, C-2 to C-3 (July 12, 2004) (describing neutrality agreements between SEIU and two large nursing home chains, negotiated in each instance to cover nursing homes other than those for which union and management had already entered into a collective bargaining agreement).

⁵⁶ *See* Walpole-Hofmeister, *supra* note 55, at C-3 (reporting that 90% of HERE’s card check provisions are part of stand-alone agreements not connected to existing collective bargaining agreements); *id.* (describing recent SEIU card check success involving 650 skycaps at Los Angeles International Airport, under a stand-alone agreement).

C. *Why Employers Agree to Neutrality With Card Check*

At first glance, it is less obvious why employers would agree to negotiate neutrality and card check provisions with unions, provisions that make it far easier for their employees to become organized and pursue a collective bargaining relationship. Professors Eaton and Kriesky have explored the issue of employer motivation in a follow-up study using their same database of neutrality and card check arrangements.⁵⁷ The 34 employers who provided them with detailed information were for the most part heavily unionized already, although roughly one-fourth had low union density.⁵⁸ Eaton and Kriesky found that a majority of employers identified as their principal motive the costs they would incur if they did not agree to the neutrality and card check language; they also found, however, that a substantial minority of employers pointed primarily to the benefits derived from reaching such an agreement.⁵⁹

In terms of avoiding costs, most employers referred to the economic losses associated with a work stoppage, although many spoke of acting to avoid potentially damaging picketing by the union.⁶⁰ While the prospect of lost business from a prolonged strike or lockout is fairly clear, there is ample evidence beyond Eaton and Kriesky's database that picketing and handbilling

⁵⁷ See Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements* (Dec. 2002, unpublished manuscript, on file with author). Professors Eaton and Kriesky conducted telephone interviews with high-level human resource or labor relations executives from 34 employers that had agreed to neutrality and card check. *Id.* at 2-4. The original list of 130 agreements was reduced to 69 when the authors eliminated employers for whom the actual contract language could not be obtained, and also employers with a very small number of employees and employers the union requested they not contact. *Id.* at 3. The 34 respondents (a response rate of about 50%) included mostly employers in steel, auto assembly and supply, hotel and gaming, and telecommunications. *Id.* at 4. Interviews lasted between 30 and 90 minutes. *Id.*

⁵⁸ *Id.* at 4. Low union density meant less than 25%. *Id.*

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 9-10.

aimed at deterring customers also motivates employers to opt for neutrality agreements.⁶¹ In addition, Eaton and Kriesky found that employers would agree to remain neutral if the union was able to impose (or threatened to impose) costs through the use of third parties – such as the withholding of financial support or investment by a municipality or union pension fund, or the withholding of customer business by religious or community groups.⁶²

Management did not simply succumb to these cost-avoidance pressures. Indeed, most employers also projected costs associated with *entering into* a neutrality agreement: these included increased labor costs from the ensuing collective bargaining agreement, diminished attractiveness as a merger or takeover target due to the neutrality agreement itself, and the possible loss of a more cooperative work culture.⁶³ Many companies anticipated that such costs would be relatively minor; some expected a low level of union organizing while others believed their pre-existing good relations with the union would yield a less onerous agreement in new facilities.⁶⁴ As for employers who anticipated that increased labor-related costs would be substantial, their willingness to agree on neutrality and card check reflected either a belief that the costs of refusing to agree would be even higher, or a perception that the costs of an agreement were offset by certain benefits.⁶⁵

⁶¹ See, e.g., Steven Greenhouse, *Local 226, 'The Culinary' Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004 at A22 (reporting that employers' concern over "pickets and unhappy workers blocking [hotel] driveways" led numerous Las Vegas hotel owners to agree to neutrality and card check); Hartley, *supra* note 8, at 390 n.111 (reporting that union's threat to picket led restaurant owner in Providence, Rhode Island and hotel owner in New Haven, Connecticut to agree to neutrality agreements).

⁶² See Eaton & Kriesky, *supra* note 57, at 10. See also Erin Johansson, *Labor-Management Partnerships as a Means to Employer Neutrality* (unpublished graduate student paper at University of Maryland; copy on file with author) (discussing how major benefits company serving union members uses a separate account to invest in new enterprises in exchange for employer neutrality).

⁶³ See Eaton & Kriesky, *supra* note 57, at 12.

⁶⁴ See *id.* at 11.

⁶⁵ See *id.* at 13.

Specifically, Eaton and Kriesky described a range of business-related benefits that employers expected to realize as a result of entering into organizing agreements. As was true of the identified costs, most of these benefits, and some not mentioned in their study, are also reflected in other accounts of neutrality and card check arrangements.

For many employers, neutrality agreements offer a marketing edge that is valuable in attracting new business. One auto supply firm studied by Eaton and Kriesky embraced neutrality because the UAW – which plays an important role in sourcing decisions made by Ford, Chrysler, and General Motors – then became its advocate in pushing the Big Three to increase dealings with unionized suppliers.⁶⁶ Hotels wishing to attract substantial numbers of new visitors, and health providers seeking to expand their patient base, have made comparable decisions: the neutrality agreements negotiated include union commitments to advocate that their members purchase the products or services the employers are providing.⁶⁷ Likewise, unions' ability to convince supermarkets that they should favor producers who pledge neutrality has encouraged agricultural producers to enter into such neutrality arrangements.⁶⁸

Neutrality agreements also give rise to union-management partnerships that can more effectively extract benefits from government. For instance, Eaton and Kriesky report that a

⁶⁶ See *id.* at 7. See generally *Parts Supplier Collins & Aikman Agrees to Neutrality Pact With United Auto Workers*, DAILY LAB. REP. (BNA) at A-9 (Oct. 16, 2003) (reporting that fourth major auto parts supplier has reached neutrality and card check agreement with UAW, and that company expects agreement will help it to achieve new business). See also Johansson, *supra* note 62, at 5 (discussing CWA's support for merger activity within telecommunications industry as part of 1993 neutrality agreement with AT&T).

⁶⁷ See Johansson, *supra* note 62, at 2 (discussing Kaiser Permanente's pledge of neutrality in exchange for unions' support of Kaiser as preferred health plan for their combined 60,000 members); *Convention Center Board Seeks Neutrality from San Diego Hotel Developers, Owners*, DAILY LAB. REP. (BNA) at A-8 (May 15, 2000) (describing special economic advantages for hotels that house union conventions, and reporting on HERE's promise to steer union convention business to San Diego if neutrality agreements are signed).

⁶⁸ See Bruce Rubenstein, *Trade Group Charges Grower with Union Collusion*, CORPORATE LEGAL TIMES, Sept. 1998 at 23 (reporting that United Farm Workers has agreements with more than 4,600 supermarkets in North America, calling for the stores to favor growers or producers that have pledged to remain neutral during campaigns to organize their agricultural workers).

group of residential care facilities in Massachusetts reached organizing agreements with SEIU in order to enhance prospects for state financial assistance.⁶⁹ Further, employers have relied on the union support garnered from a neutrality agreement to assist them in passing or defeating legislation,⁷⁰ and in securing favorable regulatory results or judicial settlements.⁷¹ In addition, employers have been given incentives to maintain peaceful and largely non-adversarial labor relations during organizing campaigns in order to secure competitive advantages as suppliers of goods and services to local governments.⁷²

⁶⁹ See Eaton & Kriesky, *supra* note 57, at 7.

⁷⁰ See, e.g., Kathy Robertson, *Bill Ensures Profits for Nursing Homes*, SACRAMENTO BUS. J., Aug. 20, 2004 at ___ (reporting on efforts by coalition of SEIU and major nursing home chains in California to lobby for legislation that will increase government support for nursing homes). See generally Victoria Roberts, *Attorneys Cite Issues to Watch as Board Undergoes Political Shift*, DAILY LAB. REP. (BNA) at B-1, B-2 (March 6, 2001) (reporting management attorney and former Board member Charles Cohen's statement that many companies sign neutrality agreements in order to get help from unions in the legislative and regulatory arenas). Cf. *CWA Wins 'Neutrality,' 'Card Check' Rights from Bell Company*, 63 TELECOMM. REPORTS 11 (April 21, 1997) (reporting that CWA declined to support pricing flexibility legislation in Indiana that was favored by Ameritech-Indiana, because company did not agree to neutrality and card check; bill subsequently was withdrawn from consideration).

⁷¹ See, e.g., *HERE Local 814 Signs Initial Accord at Waterfront Hotel in Santa Monica*, DAILY LAB. REP. (BNA) at A-5 (July 12, 2001) (reporting that city government, as owner of land on which hotel is located, made neutrality agreement a condition for approving hotel's sale to new owners); Michelle Amber, *Avondale, Unions Agree to Allow Workers to Decide if They Want Representation*, DAILY LAB. REP. (BNA) at AA-1 (Nov. 3, 1999) (reporting that as part of neutrality and card check agreement, union and management would work together to resolve all pending matters before NLRB and OSHA); Daniel J. Roy, *Bahr More Receptive to Bell Atlantic, NYNEX Merger: Likes Management Team*, DAILY LAB. REP. (BNA) at D-19 (June 3, 1996) (reporting that union was withdrawing its opposition to proposed merger of two major telecommunications companies; union emphasized that merged company would be run by CEO with whom it had a constructive bargaining relationship that included a previously negotiated neutrality agreement). *Correction Notice*, DAILY LAB. REP. (BNA) at D-6 (Nov. 27, 1996) (reporting that MGM Grand Hotel in Las Vegas agreed to neutrality and card check recognition in exchange for union's agreement to settle lawsuit regarding whether sidewalk in front of hotel is private property).

⁷² See, e.g., Milwaukee Co. Ordinance 31.01 et. seq. (2000) (providing that county-funded private employers furnishing human services to county residents must sign labor peace agreement with any labor organization seeking to represent its employees, and that both private employers and labor organizations must agree to a code of conduct designed to minimize strife during an organizing campaign); Resolution No. 68900 of San Jose City Council, Section I.C.3. (1999) (providing for City office to review certain service or labor contracts in order to consider the extent of city's vulnerability from effects of possible labor unrest and the type of assurances for protections against labor discord that are offered by contractor). A number of states have enacted or are considering legislation to encourage or require neutrality as a condition for receiving state funds. See, e.g., Cal. Gov't Code §§ 16645-49 (2000); State of New Jersey Executive Order #20 (2002); Missouri House Bill No. 308 (introduced Jan. 29, 2003); Mass. House Bill No. 630 (introduced 2003). Some or all of these statutes may be preempted by the NLRA. See *U.S. Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir.) (2004). But cf. Michelle Amber, *California Compacts with Indian Tribes Include Provisions on Union Organizing*, DAILY LAB REP. (BNA) Aug. 25, 2004 at A-2 (reporting California Governor's negotiation of compacts with 10 Indian tribes that already operate or plan to build

Apart from expanding their base of customers and angling for more favorable relations with government, employers have determined in certain instances that neutrality agreements may enhance their ability to attract qualified workers. Eaton and Kriesky report that language in the collective bargaining agreements for many casinos in the Atlantic City market provides for union recognition to be handled through card check when the casinos add new properties.⁷³ According to the employers, the language was inserted and retained because, when casinos have been desperate for skilled labor, the unions involved (HERE and the building trades) have been able to supply that labor, thereby adding value to the industry.⁷⁴

Finally, employers report that negotiating over the details of the organizing agreement often promotes some of their larger labor-management relations goals. Eaton and Kriesky found that following employer promises of neutrality and card check, management has been able to obtain a sympathetic union response to certain bargaining priorities, such as allowing for subcontracting or accepting monetary concessions.⁷⁵

In sum, employers, through their statements and actions, attest to a wide range of business reasons for acceding to neutrality and card check. One concern potentially triggered by these diverse motivations is whether neutrality arrangements tend to arise where management is relatively “soft” on unions, and accordingly whether unions might have prevailed anyway in

casinos; compacts include neutrality and card check as part of provisions outlining how casino workers can unionize, and U.S. Department of Interior has approved the new language).

⁷³ See Eaton & Kriesky, *supra* note 57, at 8 (describing management’s emphasis on the need for skilled labor); telephone conversation with Professor Eaton, Sept. 21, 2004 (notes on file with author) (identifying Atlantic City as the market referred to in article).

⁷⁴ *Id.* The union representatives reported the same history. *Id.*

⁷⁵ See *id.* at 8-9. In addition, tradeoffs in bargaining may lead to union concessions within the organizing agreement itself, such as banning home visits. See *id.* at 8. Another bargaining objective often sought by management in connection with neutrality agreements is a willingness to combine or streamline job classifications. See *Greenhouse*, *supra* note 61 (describing Las Vegas hotel owner’s interest in having small number of job categories for dishwashers, maids, and other hotel workers).

most of these settings by utilizing the traditional Board elections process. While it is difficult to prove that neutrality agreements actually make a difference, Professors Eaton and Kriesky tried to address the concern head-on by soliciting employers' views on the matter. Employer responses indicated overwhelmingly that neutrality and card check did affect their behavior.⁷⁶

In particular, most employers stated that they had wanted to preserve non-union status whenever possible rather than build a cooperative relationship with existing unions, and a large majority reported strenuous opposition to neutrality and card check within their own managerial hierarchy.⁷⁷ Yet despite such resistance and opposition at the front end, employers stated that neutrality and card check made a substantial difference in terms of management's behavior during organizing campaigns.⁷⁸ Indeed, while some employers reported that they were not the most aggressive anti-union campaigners to begin with, 81% responded – often with specific examples – as to how their behavior had changed after signing neutrality agreements.⁷⁹ Eaton and Kriesky concluded that the best explanation for why the employers they had studied chose not to oppose unionization was simple economic rationality.⁸⁰ In this respect, the decision to

⁷⁶ *See id.* at 14-18. What concerns scholars and policymakers sometimes seems more straightforward to “those on the ground.” Eaton and Kriesky noted at the outset of their discussion on this matter that “[m]ost respondents found it odd that anyone would think that the agreements don’t make a difference.” *Id.* at 14.

⁷⁷ *See id.* at 17-18. A substantial number of management respondents also stated they had been criticized within the labor relations community of their own industry for agreeing to neutrality and card check. *Id.* at 21-22.

⁷⁸ *See id.* at 14-15, 22.

⁷⁹ *See id.* at 15-16, 22. Employers explicitly referred to abandoning all use of videotapes, employee meetings, outside consultants, presentations on the pros and cons of unionization, “cheap shots [on which] we used to pride ourselves,” and informal supervisor discussion of advantages and disadvantages. Employers who reported that their response to organizing had not changed usually had signed agreements with weak definitions of neutrality. *Id.* at 15.

⁸⁰ *See id.* at 22.

accede to the prospect of a union, like the decision to resist that prospect, is at root a matter of business judgment.⁸¹

As the studies and accounts discussed in Part I indicate, neutrality agreements – generally accompanied by card check – have become a central feature of the labor organizing landscape over the past decade. Unions find them attractive for fairly obvious reasons. More intriguing is the fact that a substantial number of employers have been persuaded to abandon the aggressive stance they are entitled to adopt as part of an adversarial election campaign. Indeed, an important aspect of what is distinctive about the neutrality and card check approach is precisely its nonconfrontational character. Whereas the “regulated” environment of a Board-supervised election is highly competitive and adversarial, the self-regulated regime under neutrality and card check is predicated on a pre-commitment to restraint: both labor and management agree to reduce, if not eliminate, their powers to challenge (and hence injure) the reputation and prospects of their opposite number. I now consider whether such agreements to forego the informational and combative advantages traditionally associated with campaign speech and conduct are themselves inherently suspect under the NLRA.

II. THE BUSINESS CRITIQUE: DEFENDING EMPLOYEE FREE CHOICE

To put it mildly, not all employers or those sympathetic to the employer position have accepted organized labor’s new approach. Concern or opposition has been expressed by a number of management attorneys and business lobbyists, by certain members of Congress, and by some labor relations scholars. Their challenges to the lawfulness of neutrality and card check

⁸¹ See, e.g., Freeman & Kleiner, *supra* note 47, at 364 (concluding that firms behave in a rational profit-maximizing manner when deciding to oppose unionization); ARCHIBALD COX ET. AL., *LABOR LAW* 240-41 (13th ed. 2001) (discussing economically-based rationales that trigger employer hostility to unions).

revolve around the claim that such arrangements usurp or undermine the § 7 rights of individual employees.

A. Current Congressional Opposition

In May 2002, seven Republican members of the House, including the majority leader, introduced a bill to prohibit card check recognition.⁸² A similar bill introduced in May 2004 garnered 57 Republican cosponsors.⁸³ The proposed legislation seeks to modify § 8(a)(2) so as to make it unlawful for an employer to recognize or bargain collectively with a union that had not been selected through a Board-supervised election.⁸⁴ At two House hearings that considered the legislation during the summer and fall of 2002, and a third hearing on the issue in the spring of 2004, the central theme among witnesses favoring the bill has been the importance of employee free choice. Testimony focused on the need to protect such free choice through secret ballot elections following a contested campaign in which employers as well as unions have spoken.

Professor Jarol Manheim, a political scientist, referred to card check and neutrality as “a form of ‘wholesale’ organizing, in which the union needs to convince the company itself, in a sense, to turn over its workers – which is to say, to withdraw from the contest.”⁸⁵ Manheim acknowledged that organizing would not succeed unless a majority of individual workers chose

⁸² See H.R. 4636, 107th Cong. § 2 (2002). The lead sponsor, Rep. Norwood, was chair of the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce. In addition, to Majority Leader DeLay, another key sponsor, Rep. Johnson, chaired the Subcommittee on Employer-Employee Relations.

⁸³ See H.R. 4343, “Secret Ballot Protection Act of 2004,” 108th Cong. § 3 (2004) (sponsor count as of October 19, 2004). The two lead sponsors, Reps. Norwood and Johnson, continue to chair key subcommittees of the House Committee on Education and the Workforce. See n. 82 *supra*.

⁸⁴ See *id.* at § 3(a). The 2004 legislation also proposed to modify § 8(b) so as to prohibit a union from causing or attempting to cause an employer to recognize or bargain collectively in the absence of a Board-supervised election. See *id.* at § 3(b).

⁸⁵ 2002 House Hearings, *supra* note 8, at ___ (Statement of Jarol B. Manheim) (July 23, 2002).

to request union representation by signing cards, but he decried the absence of a “regulated and competitive environment.”⁸⁶ Attorney and former NLRB member Charles Cohen, representing the Chamber of Commerce, emphasized that when neutrality and card check arrangements are in place, the NLRB is effectively excluded. In Cohen’s view, the inevitable consequence of a process which has as its “ultimate goal...obtaining representation status without a fully informed electorate and without a secret ballot election” is to “undermine the right of free choice.”⁸⁷

The most comprehensive attack on neutrality and card check came from business lobbyist Daniel Yager, on behalf of the Labor Policy Association.⁸⁸ Yager’s testimony included a chart contrasting the procedural safeguards available in Board elections with the absence of such protections in the card check process, as well as a list of over 100 Board cases since 1938 that allegedly involved union deception and/or coercion in obtaining card signatures.⁸⁹ In concluding his testimony, Yager stressed that “the American industrial relations system is founded on th[e] principle” that union representation decisions “should be made by a majority of...individual employees after hearing views on as many sides of the issue as possible,” and that the Board-supervised secret ballot elections process, while not perfect, “guarantees confidentiality and

⁸⁶ *Id.*

⁸⁷ *2002 House Hearings*, *supra* note 8, at ___ (Statement of Charles I. Cohen) (Oct. 8, 2002). *See also 2004 House Hearing*, *supra* note 9, at ___ (statement of Charles I. Cohen) (April 22, 2004) maintaining that neutrality/card check agreements amount to “‘gag orders’ on lawful employer speech [that] limit employee free choice by limiting the information upon which employees make their decision”).

⁸⁸ Yager testified in support of the 2002 bill and also wrote a detailed letter of support to Rep. Ballenger shortly after the bill was introduced. *See 2002 House Hearings*, *supra* note 8, at ___ (Statement of Daniel V. Yager) (July 23, 2002). The Labor Policy Association, recently renamed the Human Resources Policy Association, represents 200 large companies that employ some 12% of the U.S. private sector workforce. *Id.*

⁸⁹ *See id.* at ___ (July 23, 2002).

protection against coercion, threats, peer pressure, and improper solicitations and inducements by either the employer or the union.”⁹⁰

Like many congressional hearings in the labor relations arena, testimony regarding the comparative virtues of union and management approaches featured anecdotal accounts that were conflicting and less than conclusive.⁹¹ Further, although some supporters of the legislation emphasized the union’s use of corporate campaigns as *the* key technique for pressuring employers into neutrality and card check arrangements,⁹² Eaton and Kriesky’s research suggests that employers do not view such campaigns as an important strategy to secure either neutrality or card check.⁹³ It also is worth noting the rather pointed irony of employers advocating passionately the virtues of employee choice⁹⁴ while expressing “shock, shock”⁹⁵ at the prospect of coercion or pressure being brought to bear on individual workers. Still, what emerges from House hearings in the past two Congresses that is most relevant for our purposes is the rhetoric as well as the substance of the business challenge to neutrality and card check. The labor movement’s approach to organizing is perceived as an assault on the longstanding paradigm

⁹⁰ *Id.* at ____ (July 23, 2002).

⁹¹ At the 2002 House Hearings, an individual employee and a mid-level manager testified about their experiences of union pressure and intimidation to secure card signatures, while several other employee witnesses described the employer pressure and intimidation they faced both before and after an NLRB election, adding that neutrality plus card check was peaceful and productive by contrast. Compare statements of Bruce G. Esgar (employee favoring bill) and Ron Kipling (manager favoring bill) with statements of Mario Vidales, Eric Vizior, and Terry Getler (employees opposing bill).

⁹² See 2002 House Hearings, *supra* note 8, at ____ (Statements of Jarol Manheim and Daniel Yager).

⁹³ See Eaton & Kriesky, *supra* note 57, at 9-10 (describing employer responses that list corporate campaigns as a minor anticipated cost of not agreeing to neutrality and card check); Adrienne E. Eaton & Jill Kriesky, *No More Stacked Deck: Evaluating the Case Against Card-Check Recognition*, 7 PERSPECTIVES ON WORK no. 1, at 19 (June 2003) (reporting, based on interviews with both union and management representatives, that corporate campaigns are not a frequently used strategy to secure neutrality or card check).

⁹⁴ Compare *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) (observing that “there is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom”).

⁹⁵ Compare CASABLANCA (Warner Bros. 1942) (remarks of Capt. Louis Renault).

reflective of democratic employee choice – the confidential, Board-regulated election that is claimed to be at once competitive and unpressured.

There are members of Congress who do not share the belief that the NLRB elections process should be the exclusive means for securing genuine employee free choice. The “Employee Free Choice Act,” introduced with considerable support in the House and Senate, would require the Board to certify a union that it determines has received majority support through authorization cards, thereby precluding employers from insisting on a Board-supervised election.⁹⁶ Bill supporters contend that Board elections are too often tainted by the inherently coercive environment of the workplace, and that it is time for Congress to credit in formal terms the decision by a majority of employees to choose union representation without the need for an election.⁹⁷

With two sizable groups of legislators proposing dramatically opposing public policy solutions, it is likely that no legislative change will occur in the near future. At the same time, it is clear that the election paradigm continues to structure debate at the political level. This paradigm also configures the terms of doctrinal disagreement as to whether neutrality and/or card check are illegal under current NLRA law.

B. Basic Challenges to the Lawfulness of Neutrality and Card Check

The fact that critics of neutrality and card check are promoting legislation to prohibit this organizing approach raises a modest inference that the approach may be permissible under

⁹⁶ See H.R. 3619, 108th Cong. (2003) and S. 1925, 108th Cong. (2003). As of October 19, 2004, the House bill, introduced by Rep. Miller (D-Calif.), had 208 cosponsors although only seven Republicans; the Senate bill, introduced by Senator Kennedy (D-Mass), had 36 cosponsors, including two Republicans. Neither bill is likely to be given a hearing in a Republican-controlled Congress.

⁹⁷ See 2004 House Hearing, *supra* note 9, at ____ (Statement of Nancy Schiffer, AFL-CIO Associate General Counsel).

existing law. There are, however, at least three distinct aspects to the argument that employer agreements to remain neutral and abandon the elections process are presumptively unlawful under the NLRA.⁹⁸ I consider each of these aspects, and conclude that none is ultimately persuasive in light of the settled doctrine or underlying purposes and policies of the Act.

1. *Neutrality Agreements and § 8(a)(2)*

Section 8(a)(2) makes it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”⁹⁹ Some employer advocates have maintained that an employer’s agreement to refrain from saying anything negative about the consequences of unionization, to allow union representatives to enter its facility and express pro-union views to its employees, and to accept authorization card signatures as convincing evidence of majority union backing, is tantamount to contributing unlawful support or assistance toward a labor organization’s success. In essence, their argument is that such agreed-upon benefits, provided in advance of any showing of employee support,

⁹⁸ This article addresses only challenges to the *per se* or presumptive lawfulness of neutrality agreements and card check. If such arrangements are presumptively lawful, many derivative or “as applied” issues remain. Examples with respect to neutrality include whether unions may insist that employers bargain about neutrality; how neutrality arrangements are to be enforced before arbitrators, the courts, or the Labor Board; and the impact of NLRA preemption principles on efforts by state or local governments to promote neutrality in their dealings with employees or contractors. For thoughtful discussion of these issues, see Hartley, *supra* note 8, at 396-401, 404-08; Guzick, *supra* note 8, at 447-452, 460-67; George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAWYER 215, 216-22 (2000).

Recently, the NLRB announced it was considering whether to modify its well-settled “recognition bar” doctrine in the context of neutrality and card check. See *NLRB Order Granting Review in Dana Corp. and Metaldyne Corp.*, DAILY LAB. REP. (BNA) June 9, 2004 at E-1. The proposed modification would allow employees to demand a decertification election in a shortened time period in order to challenge their employer’s voluntary recognition of the union based on a card majority. Although my position on this proposed change is foreshadowed by the analysis presented in Part II. B., I do not address the issue directly in this article.

⁹⁹ 29 U.S.C. § 158(a)(2) (2000).

confer upon the union in question a “favored status” that operates to its continuing and unfair advantage in the organizing process.¹⁰⁰

Preliminarily, any contention that such favored status might unlawfully interfere with the rights of a rival union is problematic. In its 1945 *Midwest Piping* decision, the Board determined that an employer violated § 8(a)(2) by recognizing one of two competing unions after both had filed election petitions.¹⁰¹ However, this “strict neutrality” standard has since been softened when reviewing an employer’s determination to choose between competing unions. In the decades following *Midwest Piping*, the courts of appeals declined to follow the Board’s approach in settings where there were two competing unions and one had demonstrated majority support.¹⁰² In 1982, the Board itself modified what had become a more expansive *Midwest Piping* doctrine.¹⁰³ Specifically the Board held that it would no longer find § 8(a)(2) violations in initial organizing settings where an employer rejected the “colorable claim” of a rival union in order to recognize a union that represented an uncoerced majority of employees.¹⁰⁴ As the Board explained, *Midwest Piping* had operated to frustrate the development of stable collective

¹⁰⁰ See Kramer et al., *supra* note 9, at 63-66.

¹⁰¹ *Midwest Piping & Supply Co.*, 63 NLRB 1060, 1069-70 (1945). Any union recognized by the employer must have majority support, whereas a petition for election requires a showing of only 30% support. See 29 U.S.C. §§ 159(a), 159(e)(1).

¹⁰² See, e.g., *NLRB v. Newport Div. of Wintex Knitting Mills Inc.*, 610 F.2d 430 (6th Cir. 1979); *Buck Knives Inc. v. NLRB*, 549 F.2d 1319 (9th Cir. 1977); *Playskool, Inc. v. NLRB*, 477 F.2d 66 (7th Cir. 1973); *Modine Mfg. Co. v. NLRB*, 453 F.2d 292 (8th Cir. 1971). From the courts’ standpoint, an employer who recognized a majority-backed union was not rendering unlawful support or assistance but rather “obey[ing] the duty imposed upon him to recognize the agent which his employees have designated.” *Playskool Inc. v. NLRB*, *supra*, 477 F.2d at 70.

¹⁰³ See *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982); *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982).

¹⁰⁴ *Bruckner Nursing Home*, 262 NLRB 955 (1982). The Board continued to apply its “strict neutrality” approach when two or more unions actually had pending election petitions. *Id.* at 957. It is worth noting, however, that such competition between unions in the election process is very rare. Typically, elections involving two or more unions comprise only 3% of all representation elections. See e.g., 60 NLRB ANN. REP. 152 (1995) (Table 13); 61 NLRB ANN. REP. 132-33 (1996) (Table 13); 62 NLRB ANN. REP. 136 (1997) (Table 13). In addition, as noted above, most circuits have rejected *Midwest Piping* altogether. See note 102, *supra*.

bargaining relationships by delaying recognition of majority unions while according minority unions the time to gather support or simply to obstruct their rivals.¹⁰⁵

Both the Board and the appellate courts have thus concluded that an employer's determination to recognize a union based on majority card support does not qualify as unlawful assistance against a minority union that is already on the scene. It would seem apparent that an employer's less intrusive decision – to remain neutral while a union seeks to garner such majority card support – is similarly not an unlawful preference for one union over another. It is not irrelevant in this regard that the projected threat to competing unions rests on a rather imaginative premise of inter-union rivalry in the neutrality setting. Many neutrality agreements arise in the context of long-term relationships between unions and partially organized firms, where union jurisdiction over the unorganized components is well settled.¹⁰⁶ Even for neutrality agreements that anticipate new bargaining relationships, the AFL-CIO Constitution strongly discourages any organizing competition among unions,¹⁰⁷ and the highly unusual occurrence of inter-union rivalries in the election setting suggests that unions will be comparably reluctant to compete over neutrality agreements.¹⁰⁸

In the absence of a competing union, there remains the contention that the “favored status” conferred by neutrality agreements directly undermines employee free choice. Critics

¹⁰⁵ See *Bruckner Nursing Home*, *supra* note 104, 262 NLRB at 956-57. See also *RCA del Caribe*, 262 NLRB 963 (1982) (holding that an employer may continue to recognize and bargain with an incumbent union despite a valid election petition from a rival union).

¹⁰⁶ See notes 54-55 *supra* and accompanying text (discussing examples).

¹⁰⁷ See Michelle Amber, *AFL-CIO Policies Allow Imposition of Further Sanctions Against Affiliates that Violate Articles XX, XXI*, DAILY LAB. REP. (BNA) at A-5 (March 27, 2000) (describing procedures, and sanctions, intended to discourage competing organizing among unions). The Labor Board is committed to minimizing competition between AFL-CIO unions, consistent with the goals of the AFL-CIO Constitution. See NLRB Casehandling Manual, §§ 11017-19 (CCH 2004).

¹⁰⁸ See note 104 *supra* (reporting that elections involving two or more unions occur only 3% of the time).

maintain that a binding agreement to forego opposition effectively signals that the union enjoys a special status, and that the employer's contractual expression of deference subtly but inevitably constrains his employees in their decision about whether to support the union.¹⁰⁹ This argument questions the very legitimacy of an employer's *de facto* effort to facilitate arm's length union organizing. For several reasons, the argument cannot withstand analysis.

Initially, it is difficult to understand why the contractual nature of an employer's decision to refrain from objecting to a union should have an unlawfully inhibiting impact on employees in their freedom to choose a bargaining representative. Employers have the right to oppose unions in their facilities, but they do not have a duty to do so. The NLRA permits an employer to recognize a particular union voluntarily or to remain silent while that union campaigns among his employees, just as it allows employers to express vigorously their opposition to unionization. The fact that an employer's indifference – or even implicit receptivity – toward the union are expressed in writing rather than through *ad hoc* oral declarations hardly transforms the employer's voluntary stance into a coercive signal.

If anything, the NLRA for over 50 years has not only tolerated but promoted contractual arrangements between management and unions as conducive to labor peace. A key provision of the Taft-Hartley Act was § 301, making collectively bargained contracts between unions and employers enforceable in federal court.¹¹⁰ While the provision was inspired by a desire to assure that unions, as unincorporated associations, could be held responsible for contractual agreements comparably to employers,¹¹¹ the baseline congressional understanding was that national labor

¹⁰⁹ See Kramer et al., *supra* note 9, at 68.

¹¹⁰ Pub. L. No. 80-101, § 301 (a), 61 Stat. 136, 156 (1947), codified at 29 U.S.C. § 185 (a) (2000).

¹¹¹ See, e.g., S. REP. No. 80-105 at 15-16 (1947); H.R. REP. No. 80-245 at 46, 108-09 (1947).

policy is best served when collectively bargained arrangements are deemed binding on both parties.¹¹² Respect for such arrangements, including employer agreements to recognize a union upon proof of majority support secured outside the elections context, has long been a centerpiece of peaceful and stable labor relations.¹¹³ It is therefore not surprising that the Labor Board and the circuit courts have regularly encouraged voluntary recognition and bargaining as a constructive alternative to elections.¹¹⁴

The Supreme Court in the *Bernhard-Altman* case did refer to the possibility that a premature contractual agreement between employer and union might provide a “deceptive cloak of authority with which [the union could] persuasively elicit additional employee support.”¹¹⁵ But in *Bernhard-Altman*, the employer had actually granted exclusive representative status to a union supported by only a minority of employees.¹¹⁶ The Court expressed a justifiable concern that in light of such premature recognition, any subsequent support garnered from employees would likely be influenced by the erroneous perception that the union was already their designated representative. By contrast, a neutrality agreement involves no deception at all: the employer is simply stating its readiness to allow union efforts to secure majority support, and its

¹¹² See S. REP. NO. 80-105 at 15-16; H.R. REP. NO. 80-245 at 46; 93 CONG. REC. 4265 (1947) (remarks of Sen. Taft), *id.* at 4410 (remarks of Sen. Smith); *id.* at A3232 (remarks of Sen. Ball); *id.* at 7690 (remarks of Sen. Taft).

¹¹³ See generally Raley’s, 336 NLRB 374 (2001); Goldsmith-Louison Cadillac Corp., 299 NLRB 520 (1990); Alpha Beta Corp., 294 NLRB 228 (1989); CAM Indus., 251 NLRB 11 (1990), *enforced* 666 F.2d 411, 412-13 (9th Cir. 1982); S.B. Rest of Framingham Inc., 221 NLRB 506 (1975).

¹¹⁴ See, e.g., Goodless Electric Co., 332 NLRB 1035, 1038 (2000), *enf. denied on other grounds*, 285 F.3d 102 (1st Cir. 2002); MGM Grand Hotel Inc., 329 N.L.R.B. 464, 466 (1999); UAW v. Dana Corp. 278 F.3d 548, 558-560 (6th Cir. 2002); Hotel & Restaurant Employees Union Local 217 v. J. P. Morgan Hotel, 996 F.2d 561, 566-68 (2nd Cir. 1993); Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp. 961 F.2d 1464, 1468 (9th Cir. 1992).

¹¹⁵ International Ladies Garment Workers’ Union v. NLRB, 366 U.S. 731, 736 (1961).

¹¹⁶ See *id.* at 734. The employer acted in the good faith but mistaken belief that the union had secured majority support; the Court considered the employer’s state of mind irrelevant to § 8(a)(2) liability in this setting. See *id.* at 738-39.

willingness to recognize and bargain with the union should those efforts succeed. Even if the neutrality agreement conveys by fair implication the employer's belief that a union contract would be "mutually beneficial,"¹¹⁷ such predictive expression is surely no more inhibiting than protected employer statements that a union contract will impose costs and disharmony.¹¹⁸

Moreover, from a practical standpoint the employees themselves are not bound by neutrality agreements between employers and unions. Employees who wish to express opposition to the union remain free to do so. Such opposition may on occasion trigger hostility from the union or its supporters, but instances of unlawful misrepresentation, pressure, or reprisal can be fully addressed through existing Board procedures.¹¹⁹ In addition, trade associations and interested groups like the Chamber of Commerce or the Human Resources Policy Association¹²⁰ also are not covered by neutrality agreements. Such third parties are therefore in a position to respond to employees seeking information on the disadvantages of unions, or to initiate the dissemination of such information to all employees covered by a neutrality agreement. To be sure, the Human Resources Policy Association and the Chamber of Commerce will not have the

¹¹⁷ *Coamo Knitting Mills Inc.*, 150 NLRB 579, 595 (1964).

¹¹⁸ *Compare* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969) (holding that employer statements as to probable adverse consequences of unionization that are beyond his sole power to implement are protected expression, not violative of § 8(a)(1)).

¹¹⁹ *See, e.g.*, *Bookland, Inc.*, 221 NLRB 35, 36 (1975) (union's misrepresentations regarding the purpose or effect of signing a card result in its invalidation); *Planned Building Services Inc.*, 318 NLRB 1049, 1062-63 (1995) (union's use of threatening or intimidating conduct when soliciting cards is unfair labor practice and cards may not be used to establish majority support). *See also* *United Stamford Employees, Local 680, SEIU v. NLRB*, 601 F.2d 908, 983 (9th Cir. 1979) (union's implied threat of lawsuit as reprisal against employee for not becoming full union member is unfair labor practice); *NLRB v. United Mineworkers of America*, 429 F.2d 141, 146-47 (3rd Cir. 1970) (union agents' threats, participation in violence, and failure to discourage or repudiate violence by union members in retaliation against employees holding a rival union meeting, is unfair labor practice).

¹²⁰ *See* note 88, *supra* (describing this Association).

same ready access to the employees as the employer would. Still, their access is comparable to what unions traditionally experience in our legal regime.¹²¹

Accordingly, there is no basis for inferring that neutrality agreements systemically inhibit the expressive options of employees who wish to oppose unionization. In this regard, Professors Eaton and Kriesky found that unions lost one out of five campaigns in which they relied on both neutrality and card check, and lost more than one-half of all campaigns involving neutrality agreements alone.¹²² While some of these results may be less favorable for union opponents than results obtained through Board elections, they do suggest that employees resisting unions retain an effective voice.

Stepping back, the argument that an employer's formal neutrality stance compromises employee free choice seems to rest, at bottom, on the notion that § 8(a)(2) contemplates a fundamentally adversarial relationship between management and labor.¹²³ If § 8(a)(2) is understood to condemn as "collusive"¹²⁴ any form of union-management cooperation that eliminates management's expression of opposition, then neutrality arguments would indeed be troubling. In historical terms, however, it is worth recognizing the narrower or more focused setting in which § 8(a)(2) arose. The provision was self-consciously aimed at eliminating in-house labor organizations referred to as company unions, in order to permit the growth of truly

¹²¹ See generally *Lechmere Inc. v. NLRB*, 501 U.S. 527 (1992); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

¹²² See *Eaton & Kriesky*, *supra* note 17, at 53. See also *Hobbs*, *supra* note 43 (reporting unions' failure to organize a single new bargaining unit over a four year period in which neutrality agreement covered thousands of Verizon Wireless workers).

¹²³ See *Kramer et al.*, *supra* note 9, at 64 (analogizing the NLRA structure to the adversarial system of American justice, and claiming that even though unions and employers have some incentives to cooperate, their clash of interests is an essential element to a fair accommodation between them).

¹²⁴ See *id.*

autonomous organizations that would engage in collective bargaining.¹²⁵ While company unions were characterized by a notable absence of adversarial relations, it does not follow that the provision banning them embraced such an adversarial stance.

As Senator Wagner observed in 1934 when introducing the bill that eventually resulted in the NLRA, employer-dominated unions had “multiplied with amazing rapidity since the enactment of the [1933] recovery law.”¹²⁶ These organizations, initiated by management, were called “works councils” by some company executives¹²⁷ but more often identified as “employee representation plans” (ERPs).¹²⁸ They reflected a workplace-specific system of representation, generally restricted to a single plant and ordinarily not involving collective contractual relations.¹²⁹

A centerpiece of the 1934 bill was the proposed abolition of these ERPs, which Senator Wagner and his allies viewed as a sham that undermined meaningful collective bargaining.¹³⁰

¹²⁵ See, e.g., 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 15-16 [hereinafter NLRA LEG. HIST.]; *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Committee on Education and Labor* 73d Cong. 80 (1934) (exchange between Sen. Wagner and William Green, President of American Federation of Labor) (*reprinted in* 1 NLRA LEG. HIST. 27, 110); *id.* at 9 (statement of Sen. Wagner) (*reprinted in* 1 NLRA LEG. HIST. 39); H.R. REP. No. 74-972 at 16-17 (1935) (*reprinted in* 2 NLRA LEG. HIST. 2944, 2972); H.R. REP. 74-1147 at 16-19 (1935) (*reprinted in* 2 NLRA LEG. HIST. 3046, 3065-68). See generally David Brody, *Section 8(a)(2) and the Origins of the Wagner Act in RESTORING THE PROMISE*, *supra* note 38, at 29, 34-36, 41-43.

¹²⁶ Statement of Sen. Wagner, *supra* note 125, at 3443 (*reprinted in* 1 NLRA LEG. HIST. 15).

¹²⁷ See *Hearings on S. 2926*, *supra* note 125, at 721 (statement of Arthur H. Young, Vice President, United States Steel Corp.) (*reprinted in* 1 NLRA LEG. HIST. 757, 759).

¹²⁸ See, e.g., *id.* at 732 (statement of Charles R. Hook, President, American Rolling Mill Co.) (*reprinted in* 1 NLRA LEG. HIST. 767, 770); *id.* at 759 (statement of Ernest T. Weir, Chairman, National Steel Corp.) (*reprinted in* 1 NLRA LEG. HIST. 795, 797); *id.* at 813 (statement of Thomas M. Girdler, Chairman and President, Republic Steel Co.) (*reprinted in* 1 NLRA LEG. HIST. 810, 813).

¹²⁹ See Brody, *supra* note 125, at 34; Leon H. Keyserling, *Why the Wagner Act?* in *THE WAGNER ACT: AFTER TEN YEARS* 19 (Louis G. Silverburg ed. 1945). See generally *Hearings on S. 2926*, *supra* note 125, at 819 (statement of J.M. Larkin, Vice President, Bethlehem Steel Co.) (*reprinted in* 1 NLRA LEG. HIST. 818, 819).

¹³⁰ See, e.g., Statement of Sen. Wagner, *supra* note 125, 78 CONG. REC. at 3443 (*reprinted in* 1 NLRA LEG. HIST. 15-16); *Hearings on S. 2926*, *supra* note 125, at 100-01 (statement of William Green) (*reprinted in* 1 NLRA LEG. HIST. 100-01).

The business community strenuously objected to the proposed ban. Top executives testified in 1934 in support of ERPs as genuinely democratic and supportive of labor stability.¹³¹ Employee members of the ERPs echoed this testimony, insisting that their organizations were not interfered with or controlled by their employers.¹³²

Senator Wagner and other bill proponents were wholly unpersuaded. The 1935 revised bill that became law actually strengthened the language prohibiting employer domination or control.¹³³ Senator Wagner explained that over two-thirds of the existing ERPs, or “spurious unions,” had been inaugurated since passage of the 1933 Recovery Act.¹³⁴ He also detailed the various ways in which these ERPs undermined genuine freedom of self-organization.¹³⁵ The Congress that enacted § 8(a)(2) as part of the NLRA voted for the Wagner framework, rejecting

HIST. 130-31); Statements of Reps Marcantonio, Taber, Connery and Bean, 79 CONG. REC. 3151-52 (1935) (*reprinted in 2 NLRA LEG. HIST.* 3151-52).

¹³¹ See *Hearings on S. 2926, supra* note 125, at 719-793 (statements from six top executives in steel industry) (*reprinted in 1 NLRA LEG. HIST.* 757-831). For example, the Vice President of U.S. Steel Corporation extolled the “sincerity of purpose [and] freedom of action and speech” promoted by the ERPs (*id.* at 759), the Chairman of Republic Steel insisted that ERPs were free from undue employer influence or pressure (*id.* at 813), and the Vice President of Bethlehem Steel praised ERPs as creating a “friendly and constructive atmosphere” (*id.* at 819).

¹³² See *Hearings on S. 2926, supra* note 125, at 795-882 (statements from 16 ERP members at various steel companies) (*reprinted in 1 NLRA LEG. HIST.* 833-920).

¹³³ See SEN. COMM. PRINT: COMPARISON OF S. 2926 (736 CONG.) AND S. 1958 (74TH CONG.) 2-3, 27 (clarifying that new version of provision that became § 8(a)(2) prohibits employer from forming, not just administering, a labor organization, and bars employer from contributing “financial or other support,” not just financial support) (*reprinted in 1 NLRA LEG. HIST.* 1319, 1322, 1352).

¹³⁴ See *National Labor Relations Board: Hearings on S. 1958 Before the Senate Committee on Education and Labor*, 74th Cong. 40 (1935) (statement of Sen. Wagner) (*reprinted in 1 NLRA LEG. HIST.* 1373, 1416).

¹³⁵ See *id.* (identifying four key deficiencies of company unions: (i) employees are unable to band together with workers from other companies to deal “intelligently and effectively with problems of wages and hours that are regional or even national in scope”; (ii) employees’ selection of representatives is restricted to those working for same company, imposing limitations on experience and expertise; (iii) employer financial and logistical support for employee representation effort puts employer on both sides of table; (iv) employer participates in internal management, or in formation of bylaws of the labor organization, sapping the organization’s independence).

the business community's alternative workplace representation system.¹³⁶ Congress's purpose, however, was not to oppose cooperation or accommodation between labor and management. Rather, Congress opted to channel all labor-management relations – whether cooperative or adversarial – through independent labor organizations, especially those powerful enough to bargain collectively from a regional or national perspective.¹³⁷

The NLRA's opening declaration of policy emphasized the role that collective bargaining could play in minimizing industrial unrest and increasing employees' purchasing power, objectives that in turn would bolster the then-fragile condition of the economy.¹³⁸ Although such statutory policy statements typically feature as much rhetoric as substance, there is no doubt that Congress in 1935 regarded the advent of genuine collective bargaining as likely to reduce the pervasive and costly effects of labor-management conflict while also promoting the democratic virtues of meaningful self-government in the workplace.¹³⁹ Consistent with these aspirations, the legislative history includes statements from supporters indicating that § 8(a)(2) would not prohibit employers from "influencing" their employees in a pro-union direction through non-threatening communication in the workplace.¹⁴⁰ The same legislative history also conveys

¹³⁶ See SEN. REP. No. 74-573 at 9-11 (1935) (*reprinted in* 2 NLRA LEG. HIST. at 2309-10); H.R. REP. No. 74-972 at 15-17 (1935) (*reprinted in* 2 NLRA LEG. HIST. at 2944, 2971-73).

¹³⁷ See Brody, *supra* note 125, at 39-44 and sources cited therein; Wagner statement, *supra* note 134. See generally IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 94, 108-09, 136 (1950); Keyserling, *supra* note 129, at 19.

¹³⁸ See 29 U.S.C. § 151.

¹³⁹ See generally James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N. CAR. L. REV. 939, 948-51 (1996) and sources cited therein.

¹⁴⁰ See, e.g., *Hearings on S. 1958*, *supra* note 134, at 305 (statement of Chairman Walsh) (*reprinted in* 2 NLRA LEG. HIST. at 1691); SENATE COMMITTEE PRINT, *supra* note 133, at 27 (*reprinted in* 1 NLRA LEG. HIST. at 1352). See also *Hearings on S. 2926*, *supra* note 125, at 60-62 (statement of Professor Sumner Slichter) (describing collective bargaining as effort by each party to influence the positions and policies of the other) (*reprinted in* 1 NLRA LEG. HIST. 88, 90-92).

Congress's sense that employers wishing to move in this cooperative direction should have to deal with unions that are truly independent rather than labor organizations that rely on the employer for their existence.¹⁴¹

This historical perspective is not meant to suggest that neutrality agreements automatically fall outside the ambit of § 8(a)(2). The line between employer-union cooperation (which is encouraged) and employer support constituting undue interference (which is prohibited) remains important and is at times difficult to identify.¹⁴² Employers may inhibit their employees' choice in unlawful ways, by helping the union to solicit signed authorization cards,¹⁴³ by designating particular employees to assist the union in its organizing effort,¹⁴⁴ or by convening a meeting between the union and employees at which supervisors are present and are viewed as monitoring employees' reactions.¹⁴⁵ Moreover, an employer's unlawful assistance to a union organizing campaign may justify the voiding of a recognition agreement even if the General Counsel fails to establish "with mathematical certainty" that the union lacked majority support at the moment it was recognized."¹⁴⁶

¹⁴¹ See SEN. REP. NO. 74-573 at 10 (1935) (*reprinted in* 2 NLRA LEG. HIST. at 2309-10). See generally Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1465-89 (1993).

¹⁴² See *NLRB v. Keller Ladders Southern Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (discussing need to find balance between encouragement of cooperation that fosters stable and peaceful industrial relations and discouragement of interference that undermines employee freedom of choice).

¹⁴³ See *Windsor Place Corp.*, 276 NLRB 445, 448-49 (1985) (finding § 8(a)(2) violation when employer assisted in efforts to solicit signed cards during worktime); *B.F.G. Gourmet Foods*, 236 NLRB 489, 491 (1978) (same); *Packing House & Indus. Serv. v. NLRB*, 590 F.2d 688, 694 (8th Cir. 1978) (same).

¹⁴⁴ See *NLRB v. Keller*, *supra* note 142, at 667 (finding § 8(a)(2) violation).

¹⁴⁵ See *NLRB v. Vernitron Elec. Components*, 548 F.2d 24, 27 (2d Cir. 1977) (finding § 8(a)(2) violation); *Duane Reade*, 338 NLRB No. 140 at 1 (2003) (same).

¹⁴⁶ See *Duane Reade*, *supra* note 145, at 13.

On the other hand, simply arranging for a meeting between union and employees on company premises, or allowing the union to solicit cards during the workday, do not constitute unlawful employer support, and in fact fall within permissible instances of employer-union cooperation.¹⁴⁷ The Board for decades has eschewed adopting a rule that would prohibit employer consent to any on-site organizing efforts. Instead, it has followed a “totality of the circumstances” approach on these matters, considering as relevant factors the pattern of conduct manifesting employer support, management’s direct involvement in any on-site exchanges between the union and employees, and whether a rival union is present on the scene and therefore subject to being disfavored.¹⁴⁸

The doctrinal position adopted by the Board, and the appellate courts as well, indicates there is nothing presumptively suspect about employer statements that encourage employees to look favorably on an imminent organizing effort by an outside labor organization.¹⁴⁹ It would seem even clearer that employer communications expressing a neutral stance toward such imminent organizing, or announcing a refusal to participate in the organizing campaign, are likewise not suspect as unlawful support violative of § 8(a)(2). The relevant legislative history,

¹⁴⁷ See, e.g., *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 3, 6 (2001) (finding no § 8(a)(2) violation by employer who convened mandatory meeting of employees during which an official from new management told employees that new owners liked to work with unions, then introduced a union representative and left the room; cards were solicited during meeting that followed); *New England Motor Freight Inc.*, 297 NLRB 848, 851-52 (1990) (finding no § 8(a)(2) violation by employer who advised half his employees that union representatives were on premises and allowed these representatives to address employees for organizational purposes on the premises during working hours).

¹⁴⁸ See *Coamo Knitting Mills*, 150 NLRB 579, 582 (1964) (articulating totality of circumstances approach, and noting that absence of a rival union makes finding of unlawful support less likely); *New England Motor Freight*, *supra* note 147, at 851 (reaffirming this approach as supported by repeated Board precedents).

¹⁴⁹ See, e.g., *NLRB v. Midwestern Personnel Services, Inc.*, 322 F.3d 969, 977-78 (7th Cir. 2003) (discussing multifactor approach for distinguishing between lawful cooperation and unlawful interference); *NLRB v. Vernitron Elec. Components*, 548 F.2d 24, 26 (1st Cir. 1997) (same); *NLRB v. Keller Ladders Southern Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (holding that the NLRA is not violated “so long as the [employer’s] acts of cooperation do not interfere with the freedom of choice of the employees”).

discussed above, strengthens this inference by locating neutrality agreements between employers and independent unions presumptively on the lawful side of the division between cooperation and support. While there may be instances of abuse in terms of implementation, an employer's announced willingness to allow his employees to debate on their own the merits of whether to support these independent unions in their pursuit of collective bargaining is simply not the kind of "mischief" that § 8(a)(2) was designed to address.¹⁵⁰

2. *Neutrality Agreements and Waiver of the § 8(c) Right to Communicate*

Section 8(c) protects employers' freedom to speak out against unionization, so long as this sharing of views "contains no threat of reprisal or force or promise of benefit."¹⁵¹ Enacted in 1947 after the Supreme Court had warned that Board restrictions on noncoercive employer speech raised constitutional questions,¹⁵² § 8(c) was meant to permit and indeed encourage employer debate on issues related to union organizing and bargaining.¹⁵³ It has been contended that neutrality agreements are incompatible with the letter and spirit of § 8(c), because they

¹⁵⁰ Importantly, this historical perspective distinguishes neutrality agreements from another form of labor-management cooperation, workplace-specific employee participation programs that have been supported by management and opposed by organized labor. Because those efforts at cooperation have arisen outside the framework of autonomous labor organizations, the Board and courts have found them to be almost inevitably in violation of § 8(a)(2) – the employer support structure is simply too analogous to the ERP framework rejected by Congress in 1935. *See, e.g.*, *Electromation Inc. v. NLRB*, 35 F.3d 1148, 1161-70 (7th Cir. 1994), *enforcing* 309 NLRB 990, 999 (1992); *E. I. DuPont de Nemours* 311 NLRB 893, 895-96 (1993); *Keeler Brass Automotive Group Div.* 317 NLRB 1110, 1114-16 (1995).

¹⁵¹ 29 U.S.C. § 158(c). The text of § 8(c) sets forth an evidentiary rule more than an actual right: while employer communication "shall not constitute or be evidence of any unfair labor practice," such communication may still serve as grounds for the Board to order a new election under its § 9 powers. *See generally* *Excelsior Underwear*, 156 NLRB 1236, 1345 (1966). For present purposes, however, I assume that the protection confers a positive right to speak.

¹⁵² *See NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477-79 (1941). *See generally* *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945).

¹⁵³ *See Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966). As the Court in *Linn* observed, Congress in 1947 was specifically focused on preventing the Board from imputing an anti-union motive to employers' conduct based on their earlier speeches or publications. *Id.* at 62-63, n.5. *See* H. R. Rep. No. 93-510 at 45 (1947) (Conference Report).

amount to the waiver of a fundamental employer right, a waiver that runs contrary to federal labor policy.¹⁵⁴ This subsidiary challenge to the lawfulness of neutrality provisions is without merit.

Accepting *arguendo* that employers' right to engage in noncoercive speech during a union campaign implicates First Amendment considerations,¹⁵⁵ such a right may be waived if done "voluntarily, intelligently, and knowingly . . . with full awareness of the legal consequences."¹⁵⁶ Neutrality agreements that are sufficiently explicit typically satisfy this standard without difficulty. Waiver provisions negotiated by relatively sophisticated, institutional parties, between whom there is little or no disparity of bargaining power, are regularly deemed voluntary.¹⁵⁷ They also will be found knowing and intelligent, especially given that the union ordinarily has foregone other demands, or has made specific promises, in exchange for the employer's neutrality pledge, and the agreement will be enforceable by the employer should the union fail to honor its commitments.¹⁵⁸ While there may be circumstances in which an employer's agreement to remain neutral during an organizing campaign was delivered under duress, or without an adequate understanding as to its meaning, such occurrences are likely to be exceptional.

¹⁵⁴ See Kramer et al., *supra* note 9, at 72-76; Int'l Union, UAW v. Dana Corp, 278 F.3d 548, 558 (6th Cir. 2002) (stating company's argument).

¹⁵⁵ See NLRB v. Gissel, 395 U.S. 575, 617 (1970).

¹⁵⁶ D.H. Overmyer Co. Inc. v. Frick Co., 405 U.S. 174, 187 (1972) (setting forth standards for waiver of due process rights in civil context).

¹⁵⁷ See *Overmyer*, *supra*, 405 U.S. at 187-88. See generally Guzick, *supra* note 8, at 458-59.

¹⁵⁸ See *Guzick*, *supra* note 8, at 458-59. Compare *Boys Markets, Inc. v. Retail Clerk's Union* 398 U.S. 235 (1970) (holding that union may waive certain statutory rights, acting as collective bargaining agent to relinquish rights that had been available to employees); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983) (holding that sophisticated employees negotiating individually at arm's length may waive Title VII rights as part of litigation settlement).

There remains the possibility that even a voluntary, knowing, and intelligent waiver may be invalid on public policy grounds. Here, it has been asserted that any agreement by an employer to remain silent during union organizing should be held to contravene federal labor policy, principally because it undermines the § 7 rights of employees. The argument is that to permit the employer to be silent compels employees to choose for or against unionization without adequate information.¹⁵⁹ The problem with this contention is that federal labor policy – as expressed in statutory and decisional law – does not command employers to resist unionization in order to educate employees about its vices or virtues. As the Ninth Circuit has succinctly observed, “[n]othing in the relevant statutes or NLRB decisions suggests employers may not agree to remain silent during a union’s organizational campaign – something an employer is certainly free to do in the absence of such an agreement.”¹⁶⁰ If anything, neutrality agreements, as employer-sponsored communications, would seem themselves to be protected by § 8(c). Moreover, honoring collectively bargained neutrality agreements actually *promotes* federal labor policy, by respecting both parties’ decisions to forego reliance on a potentially

¹⁵⁹ See *International Union UAW v. Dana Corp.*, 278 F.3d 548, 559 (6th Cir. 2002) (reciting employer’s argument); *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992) (same).

¹⁶⁰ *Hotel Employees*, *supra* note 159, 961 F.2d at 1470.

more divisive elections process¹⁶¹ and by signaling more generally a preference for voluntary (and peaceful) resolution of union-management differences.¹⁶²

Finally, the employer's waiver is of *its own* statutorily protected right to speak during a union campaign; the waiver does not deny employees' § 7 rights to organize or refrain from doing so. Section 7, of course, conveys no right to receive any particular information from one's employer; if it did, an employer's ad hoc decision not to participate in an organizing campaign would be suspect. Nothing in the Act requires an employer to oppose or speak against unions. That an employer is protected in doing so under § 8 (c) is a response to congressional pressure to allow employers to speak, not employee demands to be informed.¹⁶³ In any event, as discussed earlier, both employees and interested business groups remain free to express or exchange views as to why unionization should be opposed.¹⁶⁴ There is simply no basis for believing that employees opposed to unionization are unable to assert their own § 7 rights, even if one were to

¹⁶¹ See, e.g., *Verizon Info. Systems*, 335 NLRB 558, 559-61 (2001) (holding that union must abide by neutrality agreement and dismissing its representation petition); *Baseball Club of Seattle (Seattle Mariners)*, 335 NLRB 563, 564-65 (2001) (holding that employer must abide by neutrality agreement and dismissing its decertification petition). See generally, sources cited at nn. 113-114 *supra*. See also *New York Health and Human Service Union, 1199/SEIU v. NYU Hospitals Center*, 343 F.3d 117, 119 (2nd Cir. 2003) (compelling employer to arbitrate its dispute with union regarding alleged violations of special rules of conduct, pursuant to parties' agreement that governed pre-election campaign communications).

¹⁶² See notes 110-112 *supra*, and accompanying text (describing origins of § 301, and congressional emphasis on desirability of honoring and enforcing labor-management agreements through the legal system). See generally *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 78 (1991).

¹⁶³ The legislative history to § 8(c) reflects the clear understanding of both supporters and opponents that the purpose of this provision was to protect employers' right of free speech, by prohibiting the Board's past practice of using employers' speeches and publications concerning labor organizations or collective bargaining as evidence that a subsequent employer act was undertaken with illegal motive. See H.R. CONF. REP. No. 80-510 at 45 (1947). The record is replete with indications that the provision was meant to allow employers to be heard, at their discretion, without being penalized; there is no evidence at all that Congress contemplated an audience right to receive information. See, e.g., H.R. REP. No. 80-245 at 33 (1947); S. REP. No. 80-105 at 23-24 (1947); 93 CONG. REC. 7502 (1947) (veto message of President Truman), 93 CONG. REC. 3853 (1947) (remarks of Sen. Taft), *id.* at 4261, 4266 (1947) (remarks of Sen. Ellender), *id.* at A3233 (1947) (remarks of Sen. Ball).

¹⁶⁴ To the extent that an employer claims his § 8(c) rights must be preserved in order to vindicate the § 7 interests of third party employees, he would seem to lack standing to assert and litigate such a claim. See *Dana*, *supra* note 154, 278 F.3d at 559. See generally *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

indulge the rather strained premise that an employer's interest in renouncing a voluntary agreement reflects his role as benevolent champion for these third party employees.¹⁶⁵

3. *Card Check Recognition and Actual or Presumptive Coercion*

As noted earlier, roughly two-thirds of all neutrality agreements include a provision for recognizing union majority status through card check procedures.¹⁶⁶ Critics have suggested that reliance on signed authorization cards to determine employee choice should be only a last resort, because card signatures are obtained in presumptively unreliable circumstances.¹⁶⁷ Unlike NLRB elections, there are no formal conditions or procedures that can help structure a card solicitation campaign. In particular, several attributes of Board elections – the privacy of the voting booth, the anonymity of a secret ballot, oversight by a federal agency – seem dedicated to protecting freedom of choice when compared with the group-oriented, face-to-face, and relatively open-ended nature of the card signature process.

Taking note of such differences, the Supreme Court in its 1969 *Gissel* decision declared that cards were “admittedly inferior to the election process” as a means of reflecting employee choice.¹⁶⁸ At the same time, the *Gissel* Court made clear that authorization card signatures may serve as an adequate reflection of employee sentiment.¹⁶⁹ In reaching this conclusion, the Court relied in part on the fact that Congress – when enacting the Taft-Hartley amendments in 1947 –

¹⁶⁵ See *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) (expressing doubts as to the “benevolence” of an employer acting “as its workers’ champion against their certified union”).

¹⁶⁶ See *Eaton & Kriesky*, *supra* note 17, at 46-47, discussed in text accompanying notes 20-21 *supra*.

¹⁶⁷ See *Yager & LoBue*, *supra* note 9, at 28-30, 41-44.

¹⁶⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

¹⁶⁹ See *id.* at 603.

had debated and deliberately rejected a proposal to eliminate the use of authorization cards.¹⁷⁰ The Court also considered and dismissed claims that the card-signing process was inherently unreliable due to group pressure, lack of sufficient information being shared, or the presence of misrepresentation and coercion.¹⁷¹ Four years later, in *Linden Lumber*, the Court held that employers were not required to accede to a card majority showing, but could instead force the union to invoke the Board's election procedure.¹⁷² Employers, however, were still *permitted* to recognize a union based on its card majority. Indeed, the *Linden* Court emphasized the importance of "getting on with the problems of inaugurating regimes of industrial peace," and it implicitly viewed voluntary recognition as furthering that laudable objective.¹⁷³

More broadly, non-electoral pathways to securing representative status have been approved under the NLRA virtually since its inception. Employers whose unfair labor practice conduct disrupts the Board's election process or otherwise vitiates clear evidence of union support have long been required to bargain based on a card majority.¹⁷⁴ Employers may also be required to recognize a union based on evidence of majority status that they themselves have

¹⁷⁰ *See id.* at 598-600 (detailing history of Taft-Hartley amendments, including express decision to allow for two tracks of securing majority support: certification following a victory in a Board-supervised election; and voluntary recognition based on card check, without the special privileges accorded to certified unions).

¹⁷¹ *See id.* at 602-04 (holding that card drive will typically be accompanied by some employer information-sharing, and that group pressures on individual employees that accompany card-signing effort are equally present in typical election campaign).

¹⁷² *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 309-10 (1974).

¹⁷³ *See id.* at 306-07 (observing that unions faced with *unwilling* employers will promote stable labor relations more quickly by filing for election than by pressing unfair labor practice charges). Similarly, it may be inferred that unions faced with *willing* employers will "inaugurate . . . regimes of industrial peace" more quickly by reaching voluntary agreement rather than filing for election.

¹⁷⁴ *See Franks Bros. v. NLRB*, 321 U.S. 702, 702-04 (1944) (employer disrupted election process); *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 339-40 (1940) (employer unfair labor practices undermined previously stipulated majority support). *See also United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 71-75 (1956) (holding that union supported by card majority may lawfully engage in recognitional picketing and strike when employer fails to accord recognition).

solicited or collected – such as a third party card check or an employer-conducted poll or interrogation.¹⁷⁵ Thus, while the “preferred” status of recognition via election is reflected in the benefits that accompany Board certification,¹⁷⁶ there are a range of circumstances in which a card showing or other proof of majority support is sufficient to require that employers bargain with their union.

In addition, employers have always been *permitted* to enter voluntarily into a bargaining relationship with a union that possesses a card majority.¹⁷⁷ An employer may do so spontaneously, in response to the union’s presentation of signed cards from a majority of employees. Alternatively, an employer may contract in advance to accord representative status to the union if and when a majority card showing is made.¹⁷⁸ One recurring example of this latter type of contractual arrangement involves collective bargaining agreements that provide for employees in newly acquired facilities to become part of the existing bargaining unit through the majority choice mechanism of card signatures. When reviewing legal challenges to such “additional facility” clauses, the Board has made clear that it will give full effect to the parties’ contractual commitments so long as there is a valid card check process that protects the new

¹⁷⁵ See, e.g., *Rockwell Int’l Corp.*, 220 NLRB 1262, 1263 (1975) (third party card check); *Nation-Wide Plastics Co.*, 197 NLRB 996, 996 (1972), (employer poll); *E.S. Merriman & Sons*, 219 NLRB 972, 973 (1975), *enforced* 570 F.2d 351 (9th Cir. 1978) (interrogation).

¹⁷⁶ See *Brooks v. NLRB*, 348 U.S. 96 (1954) (upholding as reasonable Board’s requirement that a certified union’s status must be honored for a full year as against claims that the union no longer represents majority of employees); *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267 (10th Cir. 1980) (certified union’s status must also be honored by successor employer during this one year period); 29 U.S.C. § 159(c)(3) (establishing one year bar on new election petitions by rival unions or employees seeking decertification); 29 U.S.C. § 158(b)(4)(C) (establishing protection against recognitional picketing by rival unions). See generally *Gissel*, 395 U.S. at 599 n. 13

¹⁷⁷ See generally *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318 (1940); *Franks Bros. v. NLRB*, 321 U.S. 702 (1944). The language of section 9(a), providing that representatives may be “*designated or selected*” (emphasis added) by a majority of employees, contemplates that employers and employees may agree to enter into a collective bargaining relationship without waiting for a Board-supervised election.

¹⁷⁸ See generally *Goodless Electric*, 332 NLRB 1035, 1038 (2001) and cases cited therein.

employees' right to self-determination.¹⁷⁹ In its leading case on this subject, the Board concluded that employers who enter into such card check agreements have effectively waived their right to a Board election:

To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements.¹⁸⁰

This basic national policy – deferring to labor-management bargains that waive the right to utilize the Board's election machinery – also applies to unions when they attempt to escape from the provisions of card check agreements. In *Verizon Information Systems*¹⁸¹ a union and employer that had bargained for a neutrality and card check provision later disagreed on the scope of the applicable unit. The union, frustrated with the employer's position in the unit scope dispute, filed an election petition with the Board, but the Board dismissed the petition.¹⁸² Noting that the union had already invoked the neutrality and card check provisions in seeking to organize the employees, and that the employer had shared useful information regarding employee names and locations, the Board concluded that “the fundamental policies of the Act can best be effectuated by holding the Petitioner to its bargain.”¹⁸³

¹⁷⁹ See e.g., *Houston Div. of the Kroger Co.*, 219 NLRB 388 (1975); *Central Parking System, Inc.*, 335 NLRB 390 (2001).

¹⁸⁰ *Kroger*, *supra* note 179, 219 NLRB at 389. See also *Central Parking*, *supra* note 179, 335 NLRB at 390 (quoting *Kroger*).

¹⁸¹ 335 NLRB 558 (2001).

¹⁸² See *id.* at 559-61.

¹⁸³ *Id.* at 560. See also *Lexington House*, 328 NLRB 894, 895 (1999) (holding union to its express promise to refrain from organizing certain employees, and dismissing union's election petition).

The well-settled line of authority holding card check agreements to be valid and enforceable is consistent with the broader principle that both labor and management should be held accountable for their contractual undertakings. Indeed, encouraging management and unions to resolve their differences on a voluntary and peaceful basis – through agreements that are individually tailored and privately enforceable – has long been a fundamental tenet of federal labor policy.¹⁸⁴ This tenet reflects the special role that Congress assigned to collective entities under the NLRA. Unions (acting on behalf of a substantial number of employees) and management (responding to a group claim for recognition) have the power to invoke the Board’s election machinery.¹⁸⁵ They also may forego the exercise of this power and agree on other means for determining majority preferences. While card check agreements cannot waive individual employees’ rights under § 7, those statutory rights do not include the right of an individual employee to demand a secret ballot election. As the Board recently reiterated in this regard “voluntary recognition based upon a card majority is a favored element of national labor policy and the Board has expressly stated that there are no countervailing policy considerations that preclude enforcing such agreements.”¹⁸⁶

In addition to having no right to a secret ballot election, individual employees have no “statutory privacy” right to keep their union sentiments secret from the union. The Board in 1966 concluded that a union showing enough support to file an election petition had the right to obtain lists of employee names and addresses, because of its legitimate need to communicate with, and

¹⁸⁴ See generally *NLRB v. American National Ins. Co.*, 343 U.S. 395, 401-02 (1952); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241-42 (9th Cir. 1978); *MGM Grand Hotel*, 329 NLRB 464, 466-67 (1999).

¹⁸⁵ See 29 U.S.C. §§ 159(c)(1)(A), 159(c)(1)(B).

¹⁸⁶ *Cello Partnership d/b/a Verizon Wireless*, 2002 WL 254221 (N.L.R.B. Gen. Counsel, Jan. 7, 2002) (rejecting individual employee’s claim that he had a right to a secret ballot election). The established absence of such a statutory right is presumably one of the motivations for the bills requiring elections as the sole approach to employee choice. See Part II-A *supra*.

identify, potential supporters during an organizing campaign.¹⁸⁷ The employees' relatively modest privacy interest in not having to be visited at home by union representatives was required to yield to the union's need.¹⁸⁸ The same reasoning applies with respect to the even more modest privacy intrusion of being asked to sign an authorization card at work.¹⁸⁹

The fact that recognition of valid card majorities – and contractual agreements to be bound by such majorities – are presumptively lawful does not mean that card majorities themselves are always lawfully obtained. Those soliciting employees' signatures may provide inaccurate information as to the content or import of the cards, they may exert considerable pressure on employees to sign, or they may promise benefits as an inducement for signatures. The Supreme Court, the circuit courts, and the Board have all been attentive to such concerns, and have established that signed cards may be rejected based on sufficient showings of misrepresentation,¹⁹⁰ coercion,¹⁹¹ or improper promise of benefits.¹⁹²

¹⁸⁷ *Excelsior Underwear*, 156 NLRB 1236 (1966).

¹⁸⁸ *See id.* at 1241 n.10, 1244 & n.20.

¹⁸⁹ *See Cellco Partnership*, *supra* note 186, at 3-4 (rejecting individual employee's claim that card majority recognition provision interferes with his "right" to keep his representational preferences secret from his union). *See generally* *Randall Warehouse of Arizona*, 328 NLRB 1034, 1035-38 (1999) *remanded on other grounds*, 252 F.3d 445 (D.C. Cir. 2001) (citing numerous decisions supporting union's right "to determine the identity and leanings of employees" during organizing campaigns).

¹⁹⁰ *See, e.g., Burlington Indus. Inc. v. NLRB*, 680 F.2d 974, 976 (4th Cir. 1982) (holding that certain cards were improperly solicited based on oral misrepresentations, and accordingly, bargaining order premised on majority support would not be enforced); *Brookland*, 221 NLRB 35, 36 (1975) (holding that card was improperly solicited based on oral misrepresentations).

¹⁹¹ *See, e.g., Pulley v. NLRB*, 395 F.2d 870, 877 (6th Cir. 1978) (holding that union coerced certain employees into signing cards, and accordingly employer's good faith doubt as to majority status justified refusal to bargain). *Planned Building Services Inc.* 318 NLRB 1049, 1062-63 (1995) (holding that union intimidated employees while soliciting cards, and accordingly the cards could not be used to establish majority support).

¹⁹² *See, e.g., NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-81 (1973) (holding that union offer of fee waiver in exchange for authorization card signatures warranted invalidating election results under Board's § 9(c) authority); *Claxton Mfg. Co.*, 258 NLRB 417, 417 (1981) (holding that ambiguous union statements indicating no initiation fee for cards signed before election but possible initiation fee for cards signed after election warranted setting aside election results).

At the same time, the Board and the circuit courts have been cautious when evaluating signers' testimony that relies on earlier circumstances or states of mind, especially when that subjective testimony conflicts with the overt action of having signed cards.¹⁹³ In this respect, they have perhaps been mindful of the Supreme Court's belief that "employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union."¹⁹⁴ Over the years, the Board's position has basically remained that clearly expressed authorization cards are presumed valid, but the presumption may be overcome by proof that signatures resulted from misrepresentation or coercion.¹⁹⁵ This two-step approach has allowed the Board and the courts to invalidate card authorizations obtained by means of excessive pressure, deceptive information, or improper benefits while rejecting such challenges as factually unsupported in other instances.¹⁹⁶

More recently, courts reviewing the enforceability of neutrality and card check agreements have been sensitive to the importance of assuring employee freedom of choice. When deciding that such agreements are enforceable under § 301 of the LMRA, courts have been careful to consider whether an agreement provides employees with a fair opportunity to

¹⁹³ See generally *Marie Phillips Inc.*, 178 NLRB 340, 341 (1969) (discussing *NLRB v. Cactus Petroleum Inc.*, 355 F.2d 755, 760 n.8 (5th Cir. 1966)).

¹⁹⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969). See *Crystal Art Gallery*, 323 NLRB 258, 259 (1997) (relying on *Gissel* in this regard).

¹⁹⁵ See *Bookland Inc.*, 221 NLRB 35, 36 (1975) (finding misrepresentation that overcomes presumption); *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968) (finding no misrepresentation); *Glomac Plastics*, 194 NLRB 406, 409-10 (1971) (finding coercion that overcomes presumption); *Boston Pet Supply, Inc.* 227 NLRB 1891, 1899-1900 (1977) (finding no coercion).

¹⁹⁶ Compare e.g., *Burlington Indus.*, *supra* note 190 (finding unlawful misrepresentation) and *Pulley*, *supra* note 191 (finding unlawful coercion) with *VanDorn Plastic Machinery Co. v. NLRB*, 756 F.2d 343, 348 (6th Cir. 1984) (finding no unlawful peer pressure) and *Dayton Hudson Dept. Store Co.*, 314 NLRB 795, 797-805 (finding no unlawful forgery) and *Gaylord Bag Co.*, 313 NLRB 306, 307 (1993) (finding no unlawful promise of benefits).

decide for themselves to accept or reject the union.¹⁹⁷ The presence of a card check arrangement qualifies as such an opportunity, again absent proof that the particular implementation of this arrangement was somehow coercive or otherwise suspect.¹⁹⁸

In the end, there is no evidence of widespread or systemic misconduct associated with card signatures, and no reason to believe that existing instances of misconduct are not being adequately addressed through case-specific review of alleged abuses. When combined with the history of reliance on cards in a range of settings – including when conditions for a fair election exist – and the strong policy favoring voluntary labor-management agreements in general, it seems clear that employers’ willingness to recognize unions based on a card majority does not raise any serious problem of legality under the NLRA.¹⁹⁹

A common theme to the legal contentions reviewed in this Part is the assumption that employers and unions are meant to oppose one another as adversaries, at least until the union wins its majority. Implicit in this theme is the notion that the union’s legitimacy stems from its having prevailed in a spirited contest for the minds of employees, characterized by the free flow of competing information and arguments. These legal contentions, and their implicit

¹⁹⁷ See, e.g., *Hotel & Restaurant Employee Union, Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993); *Hotel & Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992).

¹⁹⁸ See *HERE Local 217, supra*, 996 F.2d at 566 (citing cases from several circuits); *HERE, Local 2, supra*, 961 F.2d at 1468 (distinguishing unlawful agreement imposing union representation on all employees of facilities acquired in future from lawful agreement to accept results of a card check).

¹⁹⁹ As was true for neutrality itself (see note 98 *supra*), there are derivative or “as applied” issues with respect to card checks. One involves whether an employer-union agreement may address specific terms or conditions of employment that the parties agree will be set in place once a majority of employees choose to be represented (via cards or even election). *Majestic Weaving* and some related decisions suggest that such pre-recognition provisions violate § 8(a)(2) when a rival union is present, but other developments cast doubt on these holdings, at least where no rival union is present. See, e.g., *Coamo Knitting Mills Inc.*, 150 NLRB 579, 580-83 (1964); *Bd. Advice Memo on Saturn* (6/2/86). A second issue is whether a union’s request for a neutrality plus card check arrangement constitutes a recognition demand, triggering the employer’s right to insist on a Board election. The NLRB has answered this question in the negative. See *Brylane L.P.*, 338 NLRB No. 65 (2002); *New Otani Hotel & Garden*, 331 NLRB 1078 (2000). The article does not address these interesting issues – they do not go to the underlying lawfulness of neutrality plus card check.

justification, do not survive scrutiny. Neutrality agreements and card check fit within an exceptional but always available doctrinal alternative, premised on the idea that employees can make genuinely free choices when management and union decide together to modify or forego the traditional Board-supervised election campaign.

As Part I indicated, however, reliance on neutrality and card check over the past decade has in practice gone well beyond the exceptional. The widespread use of a lawful approach predicated on contractually based cooperation rather than relatively unbridled competition thus presents a challenge to the long-prevailing notion that Board-supervised elections are the best and most accurate method of ascertaining what employees want. Accordingly, despite the weakness of the various doctrinal contentions raised by business advocates, their underlying conceptual arguments warrant further attention.

III. CHALLENGING THE ELECTION PARADIGM

Historically, elections have long been the primary mechanism relied upon to determine whether employees wish to be represented by a union. Even after Congress in 1947 declined to identify election victories as the *exclusive* avenue for requiring that employers engage in collective bargaining,²⁰⁰ the Board in the ensuing 20 years concluded that the absence of an election was itself sufficient grounds for employers to refuse to bargain.²⁰¹ The Supreme Court in *Gissel* and *Linden Lumber* endorsed the reasonableness of the Board conclusion, observing that “[e]lections have been . . . and will continue to be held in the vast majority of cases.”²⁰²

²⁰⁰ See discussion at text accompanying note 170 *supra*; Becker, *supra* note 4, at 513 (citing sources).

²⁰¹ See *Aaron Bros. Co.*, 158 NLRB 1077, 1078 (1966); Becker, *supra* note 4, at 513-14 (reviewing development of Board position from 1947 to 1966). This sufficient grounds was subject to employers not having engaged in serious misconduct during the election campaign. See generally, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 591 (1969).

²⁰² *Gissel Packing Co.*, *supra* note 201, at 607.

This description of the predominance of the elections process in the organizing context is linked to the normative position of elections as the morally legitimate pathway to vindicate employees' freedom of choice. The Board over a period of decades has recognized certain instances in which the employer's unlawful conduct, or its independent initiative to assess employee desires, triggers a binding role for authorization cards. Notwithstanding such exceptions, however, the Board's preference for the elections process rests on the belief that elections are most likely to reflect the well-informed, uninhibited, and genuine choices of individual employees. As recently as 1997, the NLRB Chairman appointed by President Clinton reaffirmed this fundamental behavioral premise at a congressional hearing.²⁰³

In short, the use of Board-supervised elections to determine what employees really want has been established as our reigning explanatory theory or paradigm. For decades, this paradigm has been accepted as descriptively accurate and normatively satisfying within the relevant public policy community. In order to understand why the election-driven approach may warrant modification or abandonment, I invoke by analogy the work of Thomas Kuhn, a historian of science who has offered an account of how significant change occurs in the structure of the natural sciences. By referencing Kuhn's sociological explanation for major shifts in perception within the scientific community, I hope to shed light on the need to rethink our election-centered approach to ascertaining employees' true preferences regarding the identity, or presence, of their collective bargaining agent.

A. Kuhn's Theory of Paradigms and Scientific Change

²⁰³ *Hearing Before House Government Reform and Oversight Subcommittee on Human Resources, 104th Cong. (1997) (testimony of NLRB Chairman William B. Gould IV) (reprinted in DAILY LAB. REP. (BNA) at E-8 (July 25, 1997)).*

According to Kuhn, experimentation or puzzle-solving in normal science takes place against the backdrop of an accepted theory or organizing set of beliefs – a paradigm. There are always anomalies or unsolved puzzles; the highly precise and intrusive techniques of scientific discovery are applied to work out the problems defined in the paradigm. At some critical level, however, a tolerable amount of anomaly turns into an intolerable amount.

Movement from one paradigm to another is rarely straightforward, because the established consensus around a given paradigm is an obstacle to rapid or even predictable change.²⁰⁴ Further, scientists are not all struck simultaneously by a bolt of paradigm-related lightning; there must have been some heretical thought occurring in advance. When enough anomalies cannot be solved, or when different practitioners reach enough conflicting solutions, the scientific community begins to disagree about the conceptual and procedural rules of the game. What emerges from such quarrels is ultimately a mobilization of the community to embrace a new paradigm, an event partly accounted for in sociological and psychological terms, not simply by reference to rational or neutral experimental techniques.²⁰⁵

Kuhn's emphasis on the social psychology surrounding scientific discovery has been vigorously challenged.²⁰⁶ At the same time, his theory has obvious relevance to the social

²⁰⁴ See KUHN, *supra* note 1, at 10-35 (discussing formation of paradigms, and puzzle solving as part of normal science); *id.* at 52-78 (discussing the emergence of anomalies and scientific discoveries that can stimulate challenges to a reigning paradigm). Kuhn's book first appeared in 1962; the enlarged second edition, to which reference is made here, was published in 1970. My brief presentation draws principally on Kuhn's work, as set forth in his book and in contemporary exchanges with other scholars. See generally, CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds. 1970); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (revised ed. 1968).

²⁰⁵ See generally KUHN, *supra* note 1, at 77-83, 94-95, 109-10, 148-50, 154-59, 166-67.

²⁰⁶ See, e.g., John Watkins, *Against 'Normal Science'*, in Lakatos & Musgrave, *supra* note 204, at 25, 33 (criticizing Kuhn's view of scientists as constituting a religious community in which revolutionary change is tantamount to a spiritual catastrophe); Stephen Toulmin, *Does the Distinction Between Normal and Revolutionary Science Hold Water?* in Lakatos & Musgrave, *supra* note 204, at 39, 44-46 (contending that major shifts in scientific perceptions occur without significant disruption of the research programs or sociological structure of the scientific community).

sciences, where the objects of study are events experienced and given importance by other human actors, rather than data generated and defined within the research community itself.²⁰⁷

Growth of knowledge in law, as in the social sciences, involves attempts to describe events that are generated and assigned significance by nonacademic actors.²⁰⁸

As Professor Edward Rubin has observed, our efforts to understand and evaluate a pattern of legal events – in this instance agency and court decisions implementing certain legislative enactments – involve normative as well as descriptive elements.²⁰⁹ Knowledge in the law is inevitably influenced by the backgrounds and motivations of both the participants who shape the law’s direction and the observers who seek to explain and evaluate that direction; decisionmakers and scholars are “involved” in the events they describe in a way that chemists or physicists are not.²¹⁰ In this setting, Kuhn’s theory of how paradigm shifts may contribute to fundamental changes in our understanding has something to offer.

There is room to debate whether the election paradigm reflects a vision of labor relations as requiring an election in order to assure employee free choice, or simply a recognition that an

²⁰⁷ See Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WISC. L. REV. 521, 525-26 (1997) (describing *data*, on which natural scientists rely, as a passive subject of research that must be produced by the discipline itself (even in fields that rely heavily on observation as opposed to experimentation), and contrasting this with *events*, on which social scientists and law professors rely, and which are not “discovered” in laboratories or nature but produced by other human beings).

²⁰⁸ See Rubin, *supra* note 207, at 525-26, 539-40 (discussing similarities between legal methodology and social science in this “reactive” respect). Such similarities do not mean that legal and social science models necessarily assess judicial decisions or other legal events in the same way. See generally Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

²⁰⁹ See Rubin, *supra* note 207, at 542 (identifying the “defining feature” of legal scholarship as its prescriptive voice).

²¹⁰ See *id.* 544-45. See generally Cross, *supra* note 208, at 309-11 (contending that descriptive and normative research into judicial decisionmaking should take account of the attitudinal model advanced by political scientists as well as neutral reasoning factors relied on by legal scholars). Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. ____ (2005) (contending that judicial behavior is best understood as a function of incentives and constraints imposed on judges by various legal systems, and discussing how incentives and constraints for administrative law judges will differ from those for appellate judges).

election is the best of many fallible mechanisms available in an imperfect world. In either case, the discussion that follows maintains that the election-centered vision has failed to address the increasingly anomalous results associated with its invocation as the structure on which to predicate employee free choice. Accordingly, as Kuhn's famous analysis of scientific revolutions suggests, the increased intellectual, political, and practical tension between Board-supervised elections and neutrality-plus-card-check may well reflect an emerging recognition of the need to change paradigms when explaining and justifying employees' right to bargain collectively through "representatives of their own choosing."²¹¹

B. *The Election Paradigm and Impediments to Employee Free Choice*

1. *The Elections Regime as a Kuhnian Paradigm*

The regime of Board-supervised elections furnishes both a descriptive account of how employees decide whether to be represented by a union and a justification as the fairest means for the exercise of freedom of choice. Over more than 50 years, the election paradigm has guided the labor-management community in its development of supplemental hypotheses, and in its pursuit and resolution of various puzzles or anomalies arising under these hypotheses.

Initially, the Labor Board, in the late 1940s and early 1950s established the "laboratory conditions" doctrine.²¹² Under this 'scientific' approach, the Board viewed the representation election as an "experiment," invoking its supervisory authority over such elections to identify and cultivate optimal settings for determining the uninhibited preferences of employees.²¹³

²¹¹ 29 U.S.C. § 157 (2000).

²¹² See *General Shoe Corp.*, 77 NLRB 124 (1948), *enforced* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952).

²¹³ See *General Shoe*, *supra* at 137. See generally Becker, *supra* note 4, at 547-50; THE DEVELOPING LABOR LAW 446-95 (Patrick Hardin & John Higgins Jr. eds., 4th ed. 2001).

During the 1960s, 1970s, and 1980s, the Board and courts addressed the complex implications of the laboratory conditions approach, delineating in fine-grained detail the contours of objectionable campaign conduct. Among the puzzles that the Board and courts investigated under laboratory conditions were the precise line to be drawn between lawfully predictive and unlawfully threatening employer speech,²¹⁴ the coercive implications of employer or union promises of benefits during an election campaign,²¹⁵ and the impact on employee free choice of employer misrepresentations.²¹⁶

Apart from the laboratory conditions doctrine itself, the Board has dealt with problems involving various procedures that govern the elections process, including the criteria for determining appropriate election units.²¹⁷ Well into the 1990s, agency and judicial decisionmakers also struggled with issues of competitive access to the electorate, establishing a framework that they believed would afford employers and unions sufficient contacts with employees as voters while not unfairly advantaging one side or the other.²¹⁸ Beyond the

²¹⁴ See, e.g., *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969).

²¹⁵ See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) (examining employer's promised benefits); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (examining union's promised benefits).

²¹⁶ See, e.g., *Midland National Life Ins. Co.*, 263 NLRB 127 (1982); *General Knit of California Inc.*, 239 NLRB 619 (1978); *Shopping Kart Food Market Inc.*, 228 NLRB 1311 (1977); *Hollywood Ceramics Co. Inc.*, 140 NLRB 221 (1962).

²¹⁷ See, e.g., *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978) (Regional Director not required to share with employer the authorization cards used to justify calling of election); *Town & Country*, 194 NLRB 1135, 1136 (1992) (stating that Board will not require election to proceed while substantial unfair labor practice charges are pending); *NLRB v. Purnell's Pride Inc.*, 609 F.2d 1153 (5th Cir. 1980) (identifying 11 factors on which Board relies when deciding if there is appropriate "community of interest" to approve a requested election unit); *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (approving as reasonable the Board's rule defining types of employee units appropriate for collective bargaining in hospitals).

²¹⁸ See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (limiting access of union organizers); *NLRB v. Town & Country Elec. Co.*, 516 U.S. 85 (1997) (granting access to union salts); *Peerless Plywood*, 107 NLRB 427 (1952) (allowing employer to deliver "captive audience" speeches except in last 24 hours of campaign); *Excelsior Underwear*, 156 NLRB 1236 (1966) (allowing union access to list of employees with home addresses once election schedule has been set).

organizing context, the Board and courts continue to probe the circumstances that justify elections as a means to test employers' subsequent doubts regarding whether the union they have bargained with still enjoys majority support from their employees.²¹⁹

Both the NLRB and the federal courts have explored this array of public policy challenges from within the framework of the elections model. The long-invoked but problematic analogy between union democracy and political democracy lends rhetorical authority to this model, reinforcing the presumption that Board-supervised elections will accord the most durable form of protection for untrammelled employee choice. Yet, if one views reliance on Board-supervised elections as a paradigm under Kuhn's account, one can see how this basic approach has remained unchallenged even as many serious anomalies have arisen. The assumption that an election-based regime provides the only, or the most satisfactory, basis for promoting and protecting the employee free choice that the statute seeks has long since lost its validity in the U.S. labor law setting. The reasons for this failure have been well documented by others; I will simply summarize them here.

2. Deterioration of the Election Paradigm

Preliminarily, there is the uncertainty and delay associated with scheduling the representation election and determining voter eligibility. Unlike political elections, which occur on fixed dates, established well before and independent of the campaign itself, union elections may occur anywhere from several weeks to some months after a petition is filed.²²⁰ The election

²¹⁹ See *Levitz Furniture*, 333 NLRB 717, 717 (2001) (establishing elections as the preferred means for employers to withdraw recognition, by establishing lower standard that employers must meet to trigger a decertification election than the standard that must be met to withdraw recognition unilaterally from an incumbent union).

²²⁰ See DUNLOP COMMISSION REPORT, *supra* note 26, at 68, 82 (reporting median time from petition to election of roughly 50 days in 1993, about the same as in late 1970s and 1980s; 20% of elections occur more than two months after petition); NLRB General Counsel Summary of Operations, Memorandum GC 04-01, Dec. 5, 2003 (reporting median time from petition to election of roughly 40 days in 2002; 7.5% of elections occur more than 56 days after filing of petition).

date typically is not set until some time after both sides have begun officially campaigning.²²¹ In addition, the initial date may be postponed for months by employer challenges to the scope or precise definition of the unit, and post-election objections by the employer may delay any action on the results for years.²²² These delays and challenges tend to involve questions about which employees should be allowed to vote, questions resolved by the Board on a case-by case basis under a rather flexible “community of interest” standard.²²³ Uncertainty as to election timing and voter eligibility contributes to the contentious atmosphere that so often surrounds the elections process. Employers who oppose unionization understand that election delay and litigation challenges diminish the ultimate chances for union success.²²⁴ Employees, made aware of the uncertainties and obstacles accompanying efforts to modify the status quo, may be subtly yet unmistakably discouraged from maintaining interest.²²⁵

²²¹ The Board encourages employers and unions to agree on the scope of the election unit and other election details in order to avoid the time and cost involved in a hearing. Still, the election campaign will be well under way by the time such an agreement is reached. If the parties cannot agree, the Regional Director conducts an investigation, often including a hearing; by the time an election date is fixed, the campaign will have been going on for weeks if not months. *See generally* NLRB FY 2003 Annual Performance Report 19-20 (2004).

²²² *See* UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSN. IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 23 (Human Rights Watch 2000) (hereinafter UNFAIR ADVANTAGE) (discussing unit scope challenges and consequent delays); Feinstein, *supra* note 49, at 34-35 (reporting two year delays due to litigation in late 1990s).

²²³ *See* 29 U.S.C. § 159 (b) (2000) (authorizing NLRB to determine what is an appropriate bargaining unit on case-by case basis); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 576 (1st Cir. 1983) (discussing Board’s weighing of eight distinct factors when applying its community of interest standard). *See generally* HARPER, ESTREICHER, & FLYNN *supra* note 46, at 281-95.

²²⁴ *See* John Logan, *Consultants, Lawyers, and the ‘Union Free’ Movement in the U.S.A. Since the 1970s*, 33 IND. REL. J. 197, 200-01 (2002) (reporting that anti-union consultants and law firms regularly advise management on how to object to the size and composition of the bargaining unit, and teach managers how to file frivolous complaints with the NLRB in order to delay the elections process, thereby eroding employees’ confidence in the effectiveness of both the union and the Labor Board).

²²⁵ *See, e.g.*, UNFAIR ADVANTAGE, *supra* note 222 at 69-70, 82-85 describing how “the slow unfolding of the legal mechanisms and the availability of appeal after appeal” undermine majority support for unions); Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention in RESTORING THE PROMISE*, *supra* note 38, at 61, 64-66 (providing examples). Moreover, because unions have come to understand the importance of securing employers’ consent in order to hold elections in a “timely” fashion, they

More important than delay, however, is the impact on employee free choice during campaigns of employer speech and conduct that is approved under the Board-administered election paradigm. The law as interpreted permits employers to restrict employees' speech with co-workers,²²⁶ while forcing them to attend meetings at which carefully scripted managers "predict" various dire consequences if their employees decide to form a union.²²⁷ Not surprisingly, employers make use of the intense pressure tactics at their disposal in an overwhelming majority of election campaigns.²²⁸ Union organizers who might be expected to counter employers' dire predictions, and to offer their own arguments, may be excluded from the worksite altogether in almost all circumstances.²²⁹ The stark inequality between employer "incumbents" and union "challengers" regarding rights of access to, or speech aimed at, the voters would be unthinkable in an ordinary partisan election setting. In light of these conditions, individual employees attending sophisticated captive audience speeches, or participating in one-on-one encounters with their immediate supervisors, may understandably feel intimidated if not coerced by a series of oral, written, or electronic communications linking "union presence" to reductions in force, facility closings, and violence at the workplace.²³⁰

often must yield to employers on issues involving the size or scope of the bargaining unit and the length of the campaign so as to avoid endless litigation. *See* Becker, *supra* note 4, at 533-35.

²²⁶ *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945). *NLRB v. United Steelworkers of America*, 357 U.S. 357, 364 (1958).

²²⁷ *See* Peerless Plywood Co., 107 NLRB 427, 428-29 (1953) (allowing captive audience speeches); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (allowing predictions but not threats).

²²⁸ *See ICFTU Report for WTO*, *supra* note 53, at 3 (reporting that 92% of employers in contested campaigns force employees to attend closed-door meetings, and 78% subject employees to one-on-one meetings with their supervisors).

²²⁹ *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992).

²³⁰ *See, e.g.,* UNFAIR ADVANTAGE, *supra* note 222, at 71-74 (reporting that employers threatened to close workplace in 50% of U.S. organizing campaigns); *ICFTU Report for WTO*, *supra* note 53, at 3 (reporting that employers threaten to relocate their business in 71% of all campaigns involving "non-mobile" manufacturing industries).

The role of unlawful employer campaign activity – notably employers’ willingness to terminate or otherwise discipline union supporters – further damages the possibilities for a genuinely free choice in the elections context. Academic observers have relied on annual Board reports to demonstrate that discriminatory conduct against employees increased at an astounding rate between the late 1950s and 1980; this remarkable pattern of employer misconduct persists in robust form today.²³¹ By 1990, there were incidents of unlawful termination in fully 25% of all organizing campaigns: one out of every 50 union supporters in an election campaign could expect to be victimized by such conduct.²³² A more recent study estimated that by the late 1990s, one out of every 18 workers who participated in a union organizing campaign was the object of unlawful discrimination.²³³ It is also notable that over the past two decades, employer

Unions can respond with home visits, but the worksite is where the real campaign action occurs; access to workers’ homes is a poor substitute given the reality of increasingly anonymous suburban residential patterns and individuals’ concerns about privacy and security when they are visited at home by strangers. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 331-32 (1994); Jay Gresham, *Note: Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 159-60 (1983).

²³¹ See Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779-80 (1983) (reporting that unfair labor practice charges against employers rose 750% from 1957 to 1980 while the number of elections rose only 50%; the fraction of such charges found meritorious rose from 29% in 1960 to 39% in 1980). See also Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & POL’Y J. 327, 331 (1998) (showing that between 1992 and 1997, more than 125,000 workers received back pay under NLRA because they had been retaliated against for union activity). The strikingly high level of unlawful conduct by employers has not abated since 1980. Indeed, while the annual number of representation elections declined by 64% between 1980 and 2003 (from 7,296 to 2,333) the number of unfair labor practice charges against employers fell by less than half that proportion, 30% (from 31,281 to 21,765). Compare Weiler, *supra* (presenting 1980 data) with note 26 *supra* (reporting 2003 election figures) and 68 NLRB ANN. REP. Table 2 (2003) (reporting 2003 employer ULP figures). Similarly, the average of 21,000 employees per year receiving back pay from 1992-97 (see Morris *supra*) remains at least that high today. See 68 NLRB ANN. REP. Table 4 (2003) (reporting 23,144 employees received back pay from their employer in 2003).

²³² See DUNLOP COMMISSION REPORT, *supra* note 26, at 70. The incidence of illegal firings rose from one in 20 elections in the 1950s to one out of four as of 1990. These firings affected one in 700 union supporters in the 1950s, but one in 50 by 1990. *Id.*

²³³ See Morris, *supra* note 231, at 330.

unfair labor practices have become more heavily concentrated in mid-size and larger establishments, where union election win rates remain substantially lower.²³⁴

Given the pervasive employer practices of lawful and unlawful resistance to unionization – practices that have intensified in recent decades – it is hardly surprising that *40% of all non-union, non-managerial employees believe their own employer would fire or otherwise mistreat them if they campaigned for a union.*²³⁵ In addition, more than half of all employees who say they want to be represented by a union report that management resistance is the principal reason they do not have one.²³⁶ A recent study of worker attitudes nationwide estimated that 44% of all private sector employees in the U.S. would opt for union representation if given a genuinely free chance to exercise their choice.²³⁷

Finally, the absence of any effective remedy protecting employee free choice in the face of such practices reinforces the ominous message for union supporters. In principle, when the

²³⁴ See NLRB Annual Reports, Table 18 (1982, 1988, 1994, 1997) (showing ULP charges against employers with fewer than 10 employees comprised 26% of all charges in 1982 but only 10% of all charges in 1997, whereas charges against employers with more than 100 employees comprised 35% of all charges in 1982 but 48% in 1997); text accompanying notes 38-39, *supra* (reporting differential union win rates by size of establishment).

²³⁵ See DUNLOP COMMISSION REPORT, *supra* note 26, at 75 (reporting 41% figure based on 1991 Fingerhut-Powers poll); See also PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 117 n. 25 (reporting that 43% of employees responding in 1984 Harris Poll thought their employer would fire, discipline, or otherwise retaliate against union supporters).

²³⁶ See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 30-37, 60-62, 86 (1999) (discussing methods for conducting national Worker Representation and Participation Study in 1994-95, and reporting that 55% of non-union employees who said they wanted a union gave management opposition as the main reason for there not being one). See also Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, in RESTORING THE PROMISE, *supra* note 38, at 90, 91, 98 (reporting, based on over 150,000 interviews of employees involved in organizing campaigns during 14 year period in 1980s and 1990s, that 36% attributed votes against union representation to pressure from management, including specifically fear of job loss); Paul Weiler, *Milestone or Tombstone: The Wagner Act at 50*, 23 HARV. J. LEG. 1, 11 n.18 (1986) (reporting, based on 1983 polling data, that 38% of all employees surveyed would not join a union because of company pressure). Managers in non-union firms often perceive themselves as effectively compelled to maintain this intense anti-union climate. See FREEMAN & ROGERS, *supra* at 88 (reporting that one-third of non-union managers believe it would hurt their career if the employees they manage successfully form a union; more than half of that number think it would hurt their career a great deal).

²³⁷ See FREEMAN & ROGERS, *supra* note 236, at 89.

employer's unlawful conduct is severe enough to have "interfere[d] with the elections process and tend[ed] to preclude the holding of a fair election," the Board may compel the employer to bargain based on the union's pre-election showing of a card majority.²³⁸ Apart from serving as a deterrent against employer misconduct, these initial recognition bargaining orders were described by a unanimous Supreme Court as the best way to "effectuat[e] ascertainable employee free choice" based on conditions as they existed before the employer's pattern of firings and unlawful threats.²³⁹ Yet, since the 1960s, the appellate courts have severely restricted the availability of this remedy by repeatedly reversing Board-issued bargaining orders.²⁴⁰ The persistent hostility to bargaining orders reflects in large part the courts' faith in elections as a more legitimate form of determining what employees really want.²⁴¹ The Board's appetite for pursuing this remedy has diminished sharply in the face of widespread judicial resistance, and the number of bargaining orders imposed each year has fallen from over 100 annually (when *Gissel* was litigated and decided in the late 1960s) to a mere 15 per year by the early 1990s.²⁴²

²³⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969) (stating Board's current practice as of late 1960s).

²³⁹ *See id.* at 612, 614.

²⁴⁰ *See, e.g.*, Brudney, *supra* note 139, at 985-87, 1002-05 (describing reversal rate for 42 bargaining orders as 28.1% in cases decided between 1986 and 1993, significantly exceeding reversal rate for any other remedial issues during same period); Terry A. Bethel & Catherine A. Melfi, *Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?*, 22 U.C. DAVIS L. REV. 139, 173-75 (1988) (describing appellate courts' lack of respect for or deference to Board decisions to impose bargaining orders between 1979 and 1982).

²⁴¹ *See, e.g.*, *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991) (describing bargaining order as "not a snake-oil cure for whatever ails the workplace [but] an extreme remedy that must be applied with commensurate care"); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990) (characterizing bargaining orders as having the "drastic consequence of forcing union representation on employees"). *See generally* Brudney, *supra* note 139, at 1006-08.

²⁴² *See* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1587 (1996) and sources cited therein. This stunning decline of 85% since *Gissel* approved the bargaining order remedy substantially exceeds the 50% decline in election activity over the same period. Given the 28% increase in § 8(a)(3) charges filed between 1970 and 1990, one can hardly attribute the decrease in bargaining orders to heightened levels of law-abiding conduct by the employer community. *See id.*

The election paradigm in its current form is no longer descriptively accurate or prescriptively justified. The findings and studies referenced here indicate that, far from protecting or advancing employee free choice, the Board-supervised elections regime regularly tolerates, encourages, or effectively promotes a range of coercive conditions that preclude the attainment of such employee choice. Even in formal terms, the elections process is in certain respects less sensitive to employee autonomy in choosing for or against union representation than are the rules governing recognition through card check. For example, the elections regime authorizes employees' representation preferences to be determined under a less rigorous majority support standard;²⁴³ it tolerates misrepresentations of fact and law in an elections context that would likely invalidate card signatures;²⁴⁴ and it offers employees a narrower window in which to challenge the effects of coercive speech or conduct that occurred during the organizing campaign.²⁴⁵

One could argue that the elections paradigm was flawed as a theoretical matter from its inception, in that employer-union competition differs fundamentally from the electoral contest between political candidates.²⁴⁶ An employer has the authority to set wages and benefits, assign tasks, monitor performance, and impose discipline – all on a daily basis. This power to create

²⁴³ While card check recognition requires support from a majority of all employees in the bargaining unit, the rules governing elections require union support only from a majority of all employees who decide to cast votes. *See* NLRB Casehandling Manual, *supra* note 107, at § 11340.4(a).

²⁴⁴ *Compare* Midland Life Ins. Co. 262 NLRB 127 (1982) (holding that misrepresentations of law or fact by employer or union during election campaign do not violate laboratory conditions) *with* Bookland, Inc., 221 NLRB 35, 36 (1975) (holding that misrepresentations about the purpose or effect of signing a card may lead to card being invalidated in unfair labor practice case).

²⁴⁵ *Compare* 29 C.F.R. § 101.19 (b) (providing that election results will be certified within seven days after ballots are tallied unless union or employer objects to conduct of the election; employee's unfair labor practice charge does not block certification) *with* 29 U.S.C § 160(b) (following voluntary recognition under card check, employee has six months in which to file unfair labor practice charge that can contest and invalidate card-based majority status). *See generally* THE DEVELOPING LABOR LAW, *supra* note 213, at 578-85.

²⁴⁶ *See generally* Becker, *supra* note 4, at 569-70, UNFAIR ADVANTAGE, *supra* note 222, at 18-25.

and convey a dependent relationship inevitably invigorates an employer's persuasive campaign statements.²⁴⁷ By contrast, the union – even if it prevails on election day – holds neither economic nor legal power over its potential constituency of workers, and its relationship to unrepresented employees must therefore be a relatively contingent one. Unlike political elections, a union election is not a precursor to assuming powers of governance; it is simply a precursor to initiating a collective bargaining process.²⁴⁸

Perhaps the election paradigm was more accurate, and even more normatively satisfying, in the era following World War II, when employers acceded more readily to the possibility of becoming unionized, and analogies between industrial and political democracy reflected in part a shared societal impulse to celebrate recent national triumphs.²⁴⁹ Yet, assuming *arguendo* that the parallel guidelines and restrictions imposed on employers and unions under the election paradigm were at one point defensible in principle, the serious and pervasive practical difficulties of the past 30 years have rendered the paradigm inapplicable. The law regulating union election campaigns has developed since 1970 to exacerbate many of the inherent inequalities between labor and management in this setting.²⁵⁰ Relying heavily on hordes of “union avoidance”

²⁴⁷ See Logan, *supra* note 224, at 201-03 (describing pervasive role of supervisors in undermining support for unions); *id.* at 203-04 (describing importance of convincing employees that their real choice is between the union and their jobs). See generally Becker, *supra* note 4, at 552-69, UNFAIR ADVANTAGE, *supra* note 222, at 21-22, 94-98.

²⁴⁸ See generally PAUL WEILER, HOW THE LAW SHOULD BE ENHANCING WORKER LIVES, 13 (2004) (unpublished manuscript; copy on file with author).

²⁴⁹ See generally Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKLEY J. EMP. & LAB. L. 1, 11-18 (1999) (linking rise of pluralist political theory in post-World War II period to industrial pluralist description of the workplace as a mini-democracy). Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L. J. 1509, 1525 (1981) (discussing industrial pluralism's celebratory metaphor of modern industry as a mini-democracy); William M. Wiecek, *America in the Post-War Years: Transition and Transformation*, 50 SYR. L. REV. 1203, 1217 (2000) (discussing how new regime of industrial pluralism, along with huge postwar gains in workers' productivity, encouraged management to accept an increasingly unionized workplace).

²⁵⁰ See *Lechmere Inc. v. NLRB*, 502 U.S. 527, 535 (1992) (restricting union organizer access); *Midland National Life Ins. Co.* 263 NLRB 127, 133 (1982) (relaxing rules against employer misrepresentation); Weiler, *supra* note

consultants and advisers, employers have taken greater advantage of what the law permits or does not sufficiently deter.²⁵¹ As succinctly expressed by one eminent labor law scholar, “[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.”²⁵²

3. *Tenacity of the Election Paradigm*

The deterioration of the election paradigm has not been enough to trigger its rejection in favor of something new. Borrowing from Kuhn’s analysis, the relevant public policy community’s consensus around this paradigm is an impediment to predictable change. Studies identifying serious problems in the operation of the Board-supervised elections regime are not new. Academic observers and government commissions have documented multiple anomalies over the past several decades.²⁵³ Congress sought to rectify some of the anomalies in the late 1970s, proposing expedited union election procedures and stronger remedies for employer

231, at 1787-93 (1983) (discussing ineffectiveness of backpay awards and reinstatement remedy); notes 240-242, *supra* (discussing appellate courts’ action to place severe limits on availability of bargaining orders).

²⁵¹ See Logan, *supra* note 224, at 200-09 (discussing in detail the vast array of union-avoidance tactics utilized by management and its hired aids during organizing campaigns); MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* 56-58, 73-76, 90-117, 132-51, 227-58 (1993) (describing proliferation of aggressively anti-union employer associations and individual consultants during 1970s and early 1980s); *ICFTU Report for WTO*, *supra* note 53, at 3 (reporting that 75% of employers hire outside consultants and security firms to run anti-union campaigns). See also Richard McGill Murphy, *The Persuaders: Worried that Your Employees will Join a Union? Perhaps These Gentlemen Can Help*, *FORTUNE* May 22, 2004 at ___ (presenting union avoidance techniques as a form of enhanced personnel relations). A leading management lawyer aptly captured the law’s favorable treatment of employers in this regard, observing that management “can do so much within the confines of the law to combat unionism that they need not...break the law.” Logan, *supra* note 224, at 217.

²⁵² Theodore St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 *CHIC. KENT L. REV.* 631, 639 (1985).

²⁵³ See sources discussed *supra* at notes 46-51, 222-236 (identifying tendency of elections regime to permit and promote intimidation, coercion, and lengthy delays, all of which substantially compromise employees’ freedom of choice).

misconduct during campaigns.²⁵⁴ This effort at legislative reform lacked the necessary supermajority to survive a Senate filibuster, and the likelihood that Congress will revisit such a polarized issue any time soon seems remote.²⁵⁵

At one point during the 1980s, organized labor proposed abandoning not only Board-supervised elections but the NLRA as a whole. Although AFL-CIO President Lane Kirkland spoke of returning to the “law of the [economic] jungle,” his threat was viewed as largely rhetorical.²⁵⁶ The steady erosion of private sector union membership since the 1970s is attributable to many factors in addition to outmoded aspects of federal labor law. Deregulation, technological advances, and foreign competition have transformed the economic realities in U.S. product and labor markets.²⁵⁷ These larger forces will continue to present serious challenges to organized labor’s efforts at reversing the long-running decline in union density. Even with new

²⁵⁴ See H.R. REP. No. 95-637 at 5, 7 (1977) (describing key provisions of Labor Law Reform Act of 1977, requiring that many representation elections be conducted within 15 days of the filing of the petition, and providing for double back pay and preliminary injunctions when workers are illegally fired during an organizing campaign).

²⁵⁵ The bill gained House approval by a vote of 257-163 but garnered only 58 votes in the Senate, short of the 60 needed to cut off debate. See 123 Cong. Rec. 326173 (1977) (passing the House); 124 Cong. Rec. 17749, 18398 (1978) (failing to achieve cloture, leading to withdrawal of the Senate bill). There has been no significant change in the NLRA since 1959, despite occasional efforts at reform. See generally Brudney, *supra* note 242, at 1571, 1592-93.

²⁵⁶ See Cathy Trost & Leonard M. Apcar, *AFL-CIO Chief Calls Labor Laws a ‘Dead Letter’*, WALL ST. J. Aug. 16, 1984 at 8 (quoting Kirkland’s “law of the jungle” statement, adding that Kirkland viewed repeal as simply an option, unlikely to be approved by Congress); Barry Cronin, *Historic Labor Act Under Increasing Fire*, CHIC. SUN-TIMES, Sept. 1, 1985 at 51 (reporting that Kirkland’s rhetorical call to shift worker demands from legal process back to the streets is due in large part to frustration with the current makeup and conduct of the NLRB). See generally THE FAILURE OF LABOR LAW – A BETRAYAL OF AMERICAN WORKERS, REPORT OF THE SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMMITTEE ON EDUCATION & LABOR, 98th Cong. (1984).

²⁵⁷ See generally DUNLOP COMMISSION REPORT, *supra* note 26, at 1-27; Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 6-10 (1993); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 102-110 (1993).

leadership's substantial commitment to invest in organizing,²⁵⁸ the percentage of workers represented by unions nationally has dropped slightly from 1998 to 2003.²⁵⁹

In the context of our legal paradigm, however, organized labor's shift in practices is noteworthy and clearly beyond the rhetorical. Some three million members have been added by AFL-CIO unions since 1998. Because over 80% of this new organizing over a six year period has occurred outside the domain of Board-supervised elections,²⁶⁰ the Court's statement in *Gissel*, that such elections "will continue to be held in the vast majority of cases,"²⁶¹ no longer reflects reality. Further, given that so many major unions, with employer acquiescence, are relying successfully on neutrality plus card check, and that the approach readily survives any facial legal challenge, there is good reason to believe that it will continue to be pursued as a basic organizing strategy.

Whether neutrality and card check should supplant elections as a prescriptive matter continues to be a subject of intense debate.²⁶² Supporters of secret ballot voting worry that too many individuals will sign cards without giving the matter enough thought, or from fear of being criticized by their fellow employees. It is not at all clear that workers will succumb so readily to indifference or socially generated peer pressure.²⁶³ Assuming they do, however, a union seems

²⁵⁸ See note 30 *supra* and accompanying text.

²⁵⁹ See HANDBOOK *supra* note 34; *Union Members in 2003*, *supra* note 34. There has been growth in union density in certain sectors of the economy, such as health care and the public workforce, and in certain geographic areas, notably California which is home to more than one of nine persons in the U.S. labor force. See Bronfenbrenner & Hickey, *supra* note 34, at 39, 41, 47.

²⁶⁰ See notes 34-36 *supra* and accompanying text.

²⁶¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969).

²⁶² See generally Part II A, *supra* (summarizing terms of the public policy and political debate in Congress).

²⁶³ Any pressure more direct or overt than what is socially generated is already prohibited by law. See notes 190-196 *supra*, and accompanying text.

unlikely to retain employees' allegiance while negotiating a contract with their employer unless it can persuade them that its bargaining priorities and demands deserve majority support and even a commitment to apply group pressure if warranted.

Supporters of the secret ballot approach also contend that if employees are unable to hear the employer's side of the story, they will not be equipped to make a suitably informed and reasoned choice. This position may be challenged as hyperbolic on two separate grounds. One is that the employer already has both the opportunity and motive to present reasons in favor of an individual bargaining regime before the union ever makes an appearance, and is likely to have done so over a period of months if not years. A second is that the optimal time for informed choice about the merits of a particular union's ongoing presence will occur during contract negotiations – when employees must focus on precisely what a collectively bargained workplace would look like.²⁶⁴

In principle, it is widely acknowledged that election campaigns of some duration tend to promote information-sharing, reasoned debate, and fairness in decisionmaking. Such advantages, however, presuppose an idealized version of the elections process. The past several decades of NLRB elections experience has undermined this ideal, by establishing that employer coercion, in all its subtlety and magnitude, inevitably exerts enormous influence during the traditional six or seven week Board-supervised campaign.

Accordingly, it seems worth asking in normative terms whether the potential risks for employee choice from a broadly implemented neutrality and card check approach may on balance be less than the risks that have been amply demonstrated with respect to the Board-supervised elections regime. Defenders of the election paradigm presumably will continue to

²⁶⁴ See Weiler, *supra* note 231, at 1815-16 (discussing arguments in favor of an extended election campaign to assure that employees opposing unionization can be adequately defended and supported in informational terms).

invoke its virtues – idealized or otherwise – to justify its traditional priority status. At the same time, an increasing number of participants and observers whose faith has been disrupted by the paradigm’s “severe and prolonged anomalies” must decide if there is “an alternative candidate [] available to take its place.”²⁶⁵

In this context, neutrality plus card check has emerged as a serious option. By displacing the central role of Board-supervised elections while remaining committed to the Act’s underlying goal of protecting employee freedom of choice, the neutrality/card check approach challenges the explanatory and prescriptive force of the election paradigm. This new approach has become in effect a counterpoint to the decades of sharp-edged employer practices (both lawful and unlawful) that have undermined the descriptive and normative persuasiveness of the election paradigm. The proliferation of neutrality plus card check arrangements thus presents the question of whether the election paradigm should be modified, or even abandoned.

C. Future Prospects

This article is meant to initiate a more open conversation about the need to re-think our dominant conceptual framework; it is not the place to formulate detailed options for alternatives to the election paradigm. I do want to suggest, however, that several plausible models exist, drawn from comparable legal cultures in which the promotion of collective bargaining is integrated with the recognized importance of protecting employee choice. It may not be necessary or even advisable to embrace a single option; given our federal structure and a tradition of encouraging voluntary agreements that promote stable workplace relations, several alternatives may coexist as part of a revised conceptual approach.

²⁶⁵ See text accompanying note 1, *supra* (quoting Kuhn on prospects for changing paradigms).

One possibility is to follow the Canadian law model, prescribing card check certification as a basic method for establishing collective bargaining rights. Under the Canadian national labour code, as well as four Canadian provincial labour codes, a union will be certified by the relevant labour board if a majority of employees in the unit (for two provinces, a supermajority) have signed cards authorizing the union to represent them.²⁶⁶ The willingness to defer to card majorities as a reflection of employee free choice does include certain safeguards. Provincial labour boards typically investigate surrounding circumstances to assure the absence of direct or tacit management support, or of union fraud or intimidation.²⁶⁷ In addition, statutes require card signers to complete a membership application and make a nominal monetary payment to the union to confirm the voluntary nature of their decision.²⁶⁸ Further, some provincial boards will order an election when the card signers represent a relatively narrow majority of the employees in a unit, or conditions otherwise suggest a closely contested outcome.²⁶⁹

²⁶⁶ See R.S.C. 1985, c. L-2, § 30-3 (Canada labour code, applicable only to industries of national concern such as transportation and communications industries, and banks); R.S.Q. 1977, c. C-27, § 21 (Quebec labour code); R.S.B.C. 1996, c. 244, § 23 (British Columbia labour relations code – requires 55% of bargaining unit members for certification); R.S.N.B. 1973, c. 1-4, § 14(2)-(5) (New Brunswick industrial relations act – requires 60% of bargaining unit members for certification); R.S.P.E.I. 1998, c. L-1, § 13(4) (Prince Edward Island labour act) [**check citations formats**]. See generally DOUGLAS G. GILBERT ET. AL., CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER 13, 32-33, 44-46, 400-403 (2003) (hereinafter cited as GILBERT ET. AL.).

²⁶⁷ See GILBERT ET. AL., *supra* note 266, at 45 (discussing labour boards' rigorous monitoring to guard against improper management support); Plateau Mills, Ltd. and Int'l Woodworkers, Local 1-424 1 CAN. LAB. REL. BD. REP (Butterworth) 82, 88-89 (1977) (discussing Board monitoring to protect against unions' use of fraud or intimidation to secure signatures).

²⁶⁸ See Sheila Murphy, *Comment: A Comparison of the Selection of Bargaining Representatives in the United States and Canada*: Linden Lumber, Gissel, and the Right to Challenge Majority Status, 10 COMP. LAB. L. 65, 82-84 (1988) (discussing initiation fee and membership application); Weiler, *supra* note 231, at 1809 & n. 146 (same).

²⁶⁹ See British Columbia Labour Relations Code, *supra* note 266, at § 23 (secret ballot election required if authorization cards filed by union reflect more than 45% but less than 55% of all unit members); Plateau Mills, *supra* note 268, at 89 (provincial board may order election in circumstances where narrow majority of card signers exists and minority of employees actively opposes union). See generally *Fabricland Pacific Ltd. v. I.L.G.W.U. Local 287*, p. 3, 1999 WL 33461541 (B.C.L.R.B. 1999) (noting need to exercise special caution in relying on membership cards as evidence, and stating that Board “must insist on a high degree of integrity and precision in the cards presented to it” as membership evidence).

Still, the presumption under these Canadian statutes is that signed authorization cards are a legitimate and indeed preferred means of ascertaining the will of the majority, with the secret ballot vote used “as a reserve instrument rather than as a frontline weapon.”²⁷⁰ This approach to certification of bargaining representatives reverses the priorities formally established under current NLRA law.²⁷¹

A second option – also borrowed from Canadian law – is to retain elections as the primary employee choice mechanism while compressing the campaign period so as to minimize the possibility of employer intimidation or coercion. Four provincial labour codes require the labor board to hold an election within five to seven days of receiving a certification petition supported by a card majority.²⁷² The assumption behind such an “instant ballot” approach is that it is neither necessary nor appropriate for employers to play the same role as the union does in a representation campaign.²⁷³

The instant ballot approach, although presumably less attractive to card check proponents, is similar in important respects to what now occurs under a neutrality agreement. Employers agreeing to neutrality voluntarily limit their power to oppose. Employers in an instant ballot setting are limited by law as to the time for – and therefore extent of – expressing

²⁷⁰ Weiler, *supra* note 231, at 1809, n. 146.

²⁷¹ Certification based on card majorities was available in the early years of the Wagner Act, but after 1939 the NLRB formally shifted to elections as the preferred means of determining employee choice. *See* Weiler, *supra* note 231, at 1806 n.137 and sources cited therein.

²⁷² *See* S.O. 1995, c. 1, § 8 (Ontario labour relations act, election within five days); Manitoba Labor Relations Act, § 48(1) (election within seven days); R.S.N. 1990, c. L-1, § 47 (Newfoundland Labour Relations, election within five days); R.S.N.S. 1989, c. 475, § 25(1)-(2) (Nova Scotia Trade Union Act, election usually within five days).

²⁷³ *See* GILBERT ET. AL., *supra* note 266, at 47-48 (reporting that short time frame reflects legislatures’ intent to minimize employer’s opportunity to mount a countercampaign); Weiler, *supra* note 231, at 1812-1814 (analogizing employer’s role in a representation election to role played by an interested foreign government in a U.S. political election).

their opposition.²⁷⁴ Under either approach, employees considering arguments in favor of or opposed to unionization must decide – in the face of their own employer’s muted stance – if the terms and conditions that exist under the current individual-bargaining regime are worthy of continued support.²⁷⁵

Whether through card check recognition or expedited election, the Canadian legal system has accepted the principle of limiting employer opportunities to campaign against unionization as consistent with the goal of effectuating meaningful employee free choice. Win rates for unions that seek to organize under these two approaches are broadly comparable to successes reported for U.S. organizing campaigns involving neutrality and card check.²⁷⁶ Canadian unions have remained reasonably strong during the past several decades, registering steady growth in union

²⁷⁴ At least one U.S. union has pursued a comparable approach by contracting for neutrality-type standards to govern an election campaign. The SEIU often negotiates private election procedure agreements, providing for “consent elections” administered by the NLRB but accompanied by special codes of employer and union campaign conduct, codes enforced through prompt and binding private arbitration. *See* Judith A. Scott, *Workers’ Rights to Organize as Human Rights: The California Experience*, 10-11 (Speech to L.A. County Bar, Feb. 26, 2004) (copy on file with author).

Supporters of the current election paradigm will likely regard expedited election laws as too rigid or formalistic, even if the five day period were to be somewhat extended. Congress considered a version of the instant ballot approach in its debate over labor law reform in 1977 and 1978. The original bill would have required an election within 15 days of the petition being filed. This was extended in successive modifications to 35 days until the bill itself failed to muster the necessary 60 Senate votes. *See* Weiler, *supra* note 231, at 1812 (identifying successive versions of House bill).

²⁷⁵ *See generally* Weiler, *supra* note 231, at 1815-16 (considering and rejecting argument that instant ballot unfairly deprives employees of access to valuable information as to reasons for voting against union).

²⁷⁶ *See, e.g.*, Chris Riddell, *Union Suppression and Certification Success*, 34 CAN. J. ECON. 396,400-01 (2001) (reporting that in British Columbia, unions organizing private sector employers had 73% average success rate when operating under province’s expedited 10 day election statute from 1984 to 1992, and 92% average success rate when operating under province’s card check recognition statute from 1979 to 1984 and from 1993 to 1998); Weiler, *supra* note 231, at 1812 n. 153 (reporting that in Nova Scotia, unions had 80% win rate in instant elections during early 1980s). Success rates under either approach are comparable to the 78% rate reported by Eaton & Kriesky for campaigns involving neutrality and card check (*see supra* note 42 and accompanying text), and they well exceed the 40% success rate for NLRB elections involving units of 100 or more employees (*see supra* note 39 and accompanying text).

membership at a time when support for unions in the United States has precipitously declined.²⁷⁷

Further, in contrast to the considerable evidence that the NLRB elections framework does not promote genuine freedom of choice, there is little evidence that the Canadian options described here have undermined employees' ability to express their true preferences.²⁷⁸

A third alternative involves borrowing from recently revised British labor law. Until 1999, union recognition in the U.K. was part of a purely voluntary regime: unions that had sufficient support would either persuade an employer that it was in his best interest to recognize

²⁷⁷ See GILBERT ET. AL., *supra* note 266, at 27 (Canadian unions as of 2001 continued to represent about 32% of nonagricultural workforce, compared to 14% in U.S.; recent successful campaigns at Wal-Mart and McDonald's highlight differences); *U.S. Based Unions Lost Ground in Canada from 1977 to 2003, New Study Determines*, DAILY LAB. REP. (BNA) Sept. 1, 2004 at A10-11 (reporting 43% growth in Canadian union membership from 1977 to 2003, roughly parallel to increases in Canadian employment levels; unionization was at 32.6% in 1977 and is at 30.5% as of June 2004). Support for unions in Canada also has kept pace with substantial changes in the nature of the workforce. See, e.g., *id.* (reporting that 48% of Canadian union members were female in 2003, compared with 12% in 1977; proportion of women in workforce belonging to unions is now equal to proportion of men).

²⁷⁸ Canadian and provincial labor boards monitor use of both card check recognition and expedited elections, and they have imposed penalties for the serious misuse or exploitation that has occasionally occurred. See R.C. Purdy Chocolates Ltd. and C.E.P. Local 2000, 77 C.L.R.B.R. (2d) 1, 21 (Can. Lab. Bd. 2001) (noting that certification of union was obtained with forged cards, and emphasizing this was only such known instance since Labour Code provision was enacted 28 years earlier; Board cancels union's certification); *Fabricland*, *supra* note 269, at pp. 4-5 (reporting that provincial labour board cancelled union certification because an employee signed the card of fellow employee who was away on vacation; Board stressed need to preserve integrity of card-based system).

Riddell's studies do indicate that unions in British Columbia are less successful under a mandatory election procedure (even an expedited procedure) than under card check. See Riddell, *supra* note 276; Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1988*, 57 IND. & LAB REL. REV. 493, 497 (2004) (hereinafter Riddell II). See also Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success* 12 THE ECON. J. 344, 344 (2002) (studying union recognition procedures in nine Canadian provinces from 1978 to 1996, and reporting that mandatory votes reduce certification success rates by about 9% below rates for card check). Notwithstanding the enforced brevity of the campaign, some employers apparently appreciate the value of using unlawful coercion or pressure to reduce the chances for union success. See Riddell II, *supra*, at 498, 509 (concluding that management opposition, measured by number of unfair labor practices, had substantial adverse impact on union support in expedited elections). Nonetheless, employer unfair labor practice activity in Canadian expedited campaigns is far less frequent than what occurs during the NLRB's protracted election campaigns. See, e.g., Riddell, *supra* note 276, at 401 (comparing studies of NLRB elections to British Columbia experience); Terry Thomason, *The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario*, 47 IND. & LAB. REL. REV. 207, 224-25 (1994) (comparing study of NLRB elections to Ontario experience in 1980s). It is therefore not surprising that union organizing success under Canada's expedited elections procedures is greater than under the NLRB elections framework. See Joseph B. Rose & Gary N. Chaison, *Unionism in Canada and the United States in the 21st Century: The Prospects for Revival*, 56 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 34, 36 (2001) (observing that substantially higher levels of organizing activity and organizing success rates in Canada are "to a considerable extent ... associated with differences in the legal environment").

and bargain with the union, or strike for such recognition.²⁷⁹ The Employment Relations Act of 1999 comprehensively reformed this traditional voluntarist approach, providing for a statutory recognition procedure.²⁸⁰ Although loosely patterned after the NLRA, the British statute effectively provides for non-electoral recognition as the primary option, with elections as a fallback; in this respect it also bears some resemblance to the Canadian card check recognition model.

When a union formally requests recognition, and the employer does not accede voluntarily within 30 days,²⁸¹ the new British statute provides for two possible pathways. The union will first apply to the Central Arbitration Committee (CAC), a governmental entity charged with determining whether there is in fact majority support for an appropriately identified unit.²⁸² If the CAC is satisfied that the union enjoys majority status, it is authorized to declare the union as recognized without an election.²⁸³ As with the Canadian model, there are exceptions. The CAC must hold an election, even where a majority of unit employees are union members, in three situations: (i) when an election is in the interest of good industrial relations; (ii) when a significant number of workers inform the CAC that they do not want the union; and (iii) when “evidence” regarding the circumstances in which union members became members

²⁷⁹ See generally Nicholas Robertson, *Compulsory Trade Union Recognition: New Rights for Trade Unions*, 10 INT’L CO. & COMM. L. REV. 303, 303 (1999); Jared S. Gross, *Recognition of Labor Unions in a Comparative Context: Has the United Kingdom Entered a New Era?*, 78 CHI.-KENT L. REV. 357, 360 (2003).

²⁸⁰ Employment Relations Act 1999 (inserting Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992). See generally Bob Simpson, *Trade Union Recognition and the Law — A New Approach*, 29 INDUS. L. J. 193, 194-212 (2000); Gross, *supra* note 279, at 369-78; Robertson, *supra* note 279, at 304-07.

²⁸¹ See Simpson, *supra* note 280, at 199; Gross, *supra* note 279, at 374.

²⁸² See Simpson, *supra* note 280, at 201-02; Hazel Oliver, *Trade Union Recognition: “Fairness at Work”?* 20 COMP. LABOR LAW & POL’Y J. 33, 35 (1998).

²⁸³ See Simpson, *supra* note 280, at 208; Robertson, *supra* note 279, at 306-07.

creates sufficient doubts about whether a significant number of workers really want the union to bargain for them.²⁸⁴

These rather broadly worded exceptions, limiting the CAC's authority to recognize unions without an election, may in the long term invite employers to seek a larger number of elections.²⁸⁵ On the other hand, the British statutory scheme includes certain provisions that arguably create incentives for employers to explore voluntary recognition. An employer that resists a union request for recognition accompanied by strong membership support, and instead opts for a CAC-supervised election, must grant the union reasonable access to its employees during the campaign.²⁸⁶ In addition, if the union prevails, the CAC is authorized to impose a procedure setting forth detailed standards for conducting collective bargaining negotiations.²⁸⁷

Initial returns under the new law indicate that employers are inclined to sign voluntary agreements and avoid the CAC process entirely if there is majority support for the union. Over 90% of U.K. recognition arrangements established between 2000 and 2002 resulted from voluntary agreement between the employer and union, with no government supervision.²⁸⁸ One British commentator, noting employers' frequently neutral or receptive attitudes when confronted with well-supported claims for recognition, has suggested that these employers

²⁸⁴ See Simpson, *supra* note 280, at 209; Gross, *supra* note 279, at 376.

²⁸⁵ See Simpson, *supra* note 280, at 208-09 (suggesting this possibility, and noting especially that employer insistence on an election could be viewed as justifying the holding of one "in the interest of good industrial relations")

²⁸⁶ See *id.* at 210-11 (discussing implications of this union access requirement).

²⁸⁷ See generally Oliver, *supra* note 282, at ___; Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the U.S.?* 19 (2004) (unpublished paper, on file with author).

²⁸⁸ See Peters, *supra* note 287, at 11-12 (reporting, based on Trades Union Congress data, that from November 2000 to October 2002, 732 of 776 recognition agreements were voluntary between unions and management; only 44 were imposed by CAC). See also Gregor Gall, *Trade Union Recognition in Britain, 1995-2002: Turning a Corner?* 35 IND. REL. J. 249, 251, 254, 268 (2004) (reporting substantial increases in new recognition agreements since 1999, and attributing increase to 1999 Act's "shadow effect" in fostering new industrial relations climate).

perceive certain business advantages to unions in helping to promote stable industrial relations, advantages that include enhanced employee flexibility, productivity, and satisfaction.²⁸⁹ Such business-related benefits are strikingly similar to the advantages cited by U.S. employers when they enter into neutrality plus card check arrangements.²⁹⁰

Each of the options summarized here stems at least in part from legislators' periodic willingness to rethink their basic approach when promoting and protecting workers' ability to choose whether to support a union. In the U.S., however, such rethinking would require substantial movement from Congress, an unlikely development.²⁹¹ The myriad factors that have made so many U.S. employers fiercely resistant to unions will continue to fuel strong opposition to any legislative reforms that would tend to facilitate unionization. While the election paradigm no longer reflects descriptive reality, it remains useful, in strategic and rhetorical terms, to explain and justify the status quo.

Absent any prospect of imminent change in the statutory framework, it falls to the interested community of non-legislative actors – including Board personnel, union-side and management-side experts, and labor relations academics and commentators – to address the shift that is occurring within existing legal boundaries. A growing number of employers have concluded, in light of modern competitive realities, that neutrality-based contractual arrangements with independent unions interested in representing their workforce will operate to

²⁸⁹ See Gall, *supra* note 288, at 255-56.

²⁹⁰ See Part IC *supra* (discussing U.S. employers' motivations).

²⁹¹ As noted earlier, Democrats in the Senate and House have taken some initiative in this regard, by introducing bills that would require the Labor Board to develop procedures for certifying unions with card majorities. See H.R. 3619 (2003) and S. 1925 (2003), discussed *supra* at n. 96 and accompanying text; 149 CONG. REC. E2421 (daily ed. Nov. 22, 2003) (statement of Rep. Miller); 150 CONG. REC. S. 15805 (daily ed. Nov. 24, 2003) (statement of Sen. Kennedy). In the current highly polarized congressional climate, neither the Norwood bill introduced in 2004 (banning card check altogether) nor the Kennedy-Miller proposals introduced in 2003 have much prospect of being enacted into law.

their economic advantage. These contractual understandings have not wholly supplanted Board-supervised elections, nor are they likely to do so. Yet, when properly structured – with safeguards to ensure that cards are signed voluntarily and a neutral reviewer to verify the achievement of majority support²⁹² – they may well grow into the primary option exercised by employees and unions under our federal labor law framework.

There are ample policy-related reasons to encourage such growth. As demonstrated earlier, neutrality plus card check poses no serious doctrinal challenge to employee freedom of choice. From a practical standpoint, neutrality agreements would seem to promote employee free choice at least as effectively as the faltering elections-based regime – by minimizing the obstacles posed by lengthy election-related delays and by reducing the corrosive impact of lawful and unlawful employer pressure.

Neutrality plus card check also advances two distinct values that are fundamental to our national labor laws. By transforming union organizing campaigns from bitter and divisive contests into relatively civil and “positive” exchanges, neutrality and card check arrangements encourage more stable and peaceful labor relations. This promotion of industrial peace – the “overriding policy of the NLRA”²⁹³ – relates in important respects to the fact that neutrality agreements typically set limits on unions as well as employers.²⁹⁴ In addition, neutrality plus card check celebrates voluntary and separately negotiated solutions to labor management

²⁹² See UNFAIR ADVANTAGE, *supra* note 222 at 88-89 (identifying employee free choice protections available in card check setting); Eaton & Kriesky, *supra* note 17, at 47-48 (discussing limitations on union behavior and inclusion of arbitration provision as common features of neutrality agreements studied by authors).

²⁹³ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (citing to *Brooks v. NLRB*, 348 U.S. 96, 103 (1954)).

²⁹⁴ See Eaton & Kriesky, *supra* note 17, at 48.

disputes. Such voluntary contractual arrangements have long been a favored element of national law policy.²⁹⁵

CONCLUSION

The development of neutrality and card check as a competing paradigm indicates its emerging importance in structuring the organizing process. A series of challenges or puzzles are being explored by the Labor Board and the federal courts,²⁹⁶ as unions and employers probe the opportunities and risks that accompany the new approach. This puzzle-solving activity has increased substantially in the past five years, and there is good reason to expect such growth to continue. Assuming that Congress neither ratifies nor disapproves the non-electoral alternative framework, it seems likely that both Board supervised elections and neutrality plus card check will coexist as potentially preeminent descriptive and normative accounts of the employee self-determination process.

Further discussion regarding these competing paradigms will take place against a backdrop of growing economic uneasiness. The sharply diminished role played by unions in the U.S. economy since the 1960s has been accompanied by a substantial growth of inequality in our labor market. Earnings for non-supervisory employees have been largely stagnant for the past

²⁹⁵ See, e.g., *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952); *Houston Div. of the Kroger Co.*, 219 NLRB 388, 389 (1975).

²⁹⁶ See, e.g., *Pall Biomedical Prods. Corp.*, 331 NLRB 1674 (2000), *enf. denied* 273 F.3d 116 (D.C. Cir. 2002) (addressing whether neutrality agreements are a mandatory or permissive subject of bargaining); *Hotel & Restaurant Employee Union, Local 217 v. J. P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (addressing challenges to enforceability of neutrality agreements under § 301 of LMRA); *New Otani Hotel & Garden*, 331 NLRB 1078 (2000) (addressing whether unions' request for neutrality and card check constitutes a demand for recognition that would give employer the right to insist on a Board election); *U.S. Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004) (addressing whether state laws encouraging or requiring neutrality are preempted by NLRA).

three decades,²⁹⁷ employees work longer hours as their vacation and holiday time has declined,²⁹⁸ the gap between workers in the upper and lower tiers has widened,²⁹⁹ and the divide between salaries for top CEOs and average workers has become simply breathtaking.³⁰⁰

The possibility of a shift in paradigms does not signify that overall union density will increase. Despite polls showing a heightened interest in joining unions among employees from across the economy,³⁰¹ there has been no real growth in unionization during recent times.³⁰² Absence of growth may be attributed to many factors – weaknesses of the legal regime, but also

²⁹⁷ See DUNLOP COMMISSION REPORT, *supra* note 26, at 19 (discussing stagnation of real earnings as of early 1990s); FREEMAN & ROGERS, *supra* note 236, at 13 & n. 16 (1999) (discussing various studies on stagnation of earnings); WEILER, *supra* note 248, at 4 (reporting less than 12% increase in real median hourly earnings from 1973 to 2003, as contrasted with over 100% increase from 1943 to 1973). Full-time workers near the bottom of the U.S. labor market are noticeably worse off than their peers in the European Union or Japan. See FREEMAN & ROGERS, *supra* at 13; DUNLOP COMMISSION REPORT, *supra* at 18.

²⁹⁸ See DUNLOP COMMISSION REPORT, *supra* note 26, at 19 (reporting modest decline in length of vacation and holiday time for fully employed U.S. workers from early 1970s to early 1990s; U.S. workers averaged 200 more hours of work per year than workers in Europe, with amount of vacation time a major reason for difference); WEILER, *supra* note, 248, at 5 (reporting that in 2002, the average individual U.S. worker put in 1994 hours, compared to 1803 for Japanese worker, 1693 for British and 1557 for German; key reason for differential is decline in American vacation time while vacation and holiday time has risen in other countries).

²⁹⁹ See FREEMAN & ROGERS, *supra* note 236, at 13 (reporting that top 10% of U.S. workers earn 5.6 times as much as bottom 10%, compared with differentials of 2.1 times in European Union and 2.4 times in Japan); DUNLOP COMMISSION REPORT, *supra* note 26, at 19 (reporting that male workers in top decile earn 2.14 times median earnings in U.S., compared to 1.4 to 1.7 times the median in most European countries, and that U.S. earnings distribution among workers has widened greatly in recent years).

³⁰⁰ See WEILER, *supra* note 248, at 6 (reporting that in 1973, total pay for the top 100 CEOs averaged 217 times the average worker salary; by 2000, earnings for the top 100 CEOs were 1,284 times the average worker salary).

³⁰¹ See *Upfront*, BUS. WEEK, Sep 16, 2002, at 6 (reporting that for first time in 20 years, more nonunion employees (50%) say they would vote to form a union than those saying they would not (40%)). See also David Moberg, *Do or Die*, IN THESE TIMES, March 19, 2001 at 12 (reporting that 41% of public views unions positively, while 24% hold negative views; this compares to 35% to 34% margin in 1993). This heightened interest in unions is not surprising, given the data indicating that unions have a substantial impact on compensation and working conditions for those they represent. See, e.g., Lawrence Mishel with Matthew Walters, *How Unions Help All Workers* (Ec. Policy Institute 2003) (available at www.epinet.org/briefingpapers/143/bp143.pdf) (reporting that unions raise wages of unionized workers by roughly 20%, and that unionized workers are much more likely than their counterparts to have paid vacation and holiday leave, employer-provided health insurance, and employer-provided pension plans).

³⁰² See HANDBOOK, *supra* note 34, at Table 10-2 (reporting that percentage of workforce represented by unions was between 15.4% and 14.6% from 1997 to 2002).

lack of sufficient energy or imagination within organized labor, and broader economic pressures and conditions. Over the past decade, however, organizing activity has become noticeably more intense, and the success of neutrality plus card check has begun to shift the tenor of the conversation. That shift may help to initiate a franker discussion of how to improve terms and conditions of employment for millions of workers in a society characterized by ever-increasing disparities in wealth.