# EMPLOYEE FREE CHOICE: AMPLIFYING EMPLOYEE VOICE WITHOUT SILENCING EMPLOYERS—A PROPOSAL FOR REFORMING THE NATIONAL LABOR RELATIONS ACT

Amy Livingston*

*This Note investigates the effectiveness of the National Labor Relations Act (NLRA) in balancing unions', employers', and employees' rights during the course of union organizing drives. After reviewing case law and commentary, it concludes that the NLRA's certification regime is ineffective and permits pressures that inhibit employees from expressing their real desires about whether or not to be represented by a union. This Note then examines proposed alternatives for certifying unions, and takes note of Canada's federal and ten provincial certification regimes. Finally, it concludes that the NLRA must be amended to protect worker free choice, and proposes reforms including limiting unions to a public sixty-day organizing campaign, designing a uniform authorization card to be submitted with a fee by employees desiring union representation, and establishing a verification process for these cards.*

## INTRODUCTION

Fueled by six decades of steadily declining American unionization rates,[1] scholars and union representatives alike have long debated whether the seventy-five year old National Labor Relations Act (the NLRA)[2] sufficiently protects employee free choice in determining whether to be represented by a union. Although different explanations have been offered for the decline in union density, most observers agree that it has resulted in part from changes in the structure of the American economy. Unionization levels peaked when the labor market was based on large manufacturing employers; the current economy is more diverse in

* J.D. Candidate, 2012, University of Michigan Law School; B.A. 2009, Grinnell College. Note Editor, *University of Michigan Journal of Law Reform* Volume 45. Special thanks to Professor Theodore J. St. Antoine for his support and feedback throughout the writing process. I would also like to thank Erin Eckles and Clara Park for their invaluable editorial contributions.

1. In the 1950s, thirty-five percent of the American private sector workforce was unionized. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 361 (2002). In 1975, only twenty-five percent of the workforce was unionized. *See* Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 1 (Princeton Univ., Working Paper No. 503, 2005). Today, less than seven percent of the private sector workforce is represented by unions. Bureau of Labor Statistics, U.S. Dept. of Labor, USDL-11-0063, *Economic News Release* (Jan. 21, 2011), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

2. 29 U.S.C. §§ 151–69 (2006).

employer size and more heavily service-based.[3] Most critics also agree that labor's decline has been exacerbated by technological advancements that allow machines to do tasks that once required human labor[4] and permit work to take place both outside the traditional workspace and beyond a traditional nine-to-five work schedule.[5] Additional theories for the decline include the US labor market's geographical shift to the Sunbelt;[6] the new global economy;[7] that other employment legislation has made the "protections" provided by a labor union less necessary;[8] or simply that more attractive working conditions are available in nonunion companies, leading fewer workers to seek union representation.[9] Interestingly, the decline in union density has remained constant across presidential administrations, continuing throughout both the Clinton years (featuring a *labor-friendly* NLRB) and Republican years (where the NLRB was less pro-union).[10]

These explanations cannot fully account for the decline of unions in America.[11] Other industrialized countries' economies have

3. *See, e.g.*, WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 2–3 (1993) [hereinafter GOULD, AGENDA]; Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 956 (1991) (giving the example of the decline in the steel and automobile industries).

4. Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What's Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1138 (2007). Hirsch also cites "an increasingly competitive domestic and international economy coupled with union wage premiums that have shown surprisingly modest declines" as explanations for unions' decline. *Id. See also* Befort, *supra* note 1, at 352.

5. *See* Befort, *supra* note 1, at 368–69.

6. *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 31 (1984); LaLonde & Meltzer, *supra* note 3, at 957 (explaining that the Sunbelt is less receptive to unionization). In addition, the Sunbelt is comprised of many right-to-work states. *Right to Work States Map*, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. (2001), http://www.nrtw.org/rtws.htm (last visited Sept. 28, 2011).

7. *See, e.g.*, GOULD, AGENDA, *supra* note 3, at 12; Befort, *supra* note 1, at 362. Befort also attributes the decline in unionization rates to the changing workforce composition (including more women and minority employees than ever before) and the increase in contingent workers (independent contractors, leased, and part-time employees). Befort, *supra* note 1, at 365–69.

8. *See* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 18 (2009). This protective legislation includes the Occupational Safety and Health Act, 29 U.S.C. §§ 651–78 (1970); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1967); and Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2006).

9. Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 533–34 (1994).

10. Hirsch & Hirsch, *supra* note 4, at 1139.

11. *But see* EPSTEIN, *supra* note 8, at 18 ("Some likely reasons [for the observed decline] include the expansion of free trade across national borders, more intensive global competition for employees, the reduced appeal of unions to younger workers, the entry of smaller decentralized firms, the rapid turnover of workers in a relatively open economy, the better wages and working conditions that nonunion employees can command in an open

changed, but their labor markets have experienced a less dramatic decline in unionization.[12] Moreover, domestic surveys consistently find high levels of union support among workers: a recent study found that nearly three out of five Americans "would join a union if they could."[13] This support for unions has been borne out in practice, as unions have increasingly won representation elections—in 1980, unions won just over forty-five percent of elections;[14] in 2000, unions won fifty percent of elections;[15] and in 2009 and 2010, unions won almost seventy percent of elections.[16] The incongruity between American workers' expressed desire for union representation and the continuous decline in unionization rates has caused union supporters to contend that the NLRA structurally hinders unions from organizing workplaces: it was "[d]esigned for a different era and type of workplace" and has "limited relevance today."[17]

The NLRA was originally enacted to foster unionization. The 1935 Wagner Act's stated national policy—which remains part of the NLRA today—is:

> [T]o eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by

economy, the rise in governmental regulation[] . . . ineffective union organizing, and the rigidity of the internal governance structure of unions themselves. Most important perhaps is the fundamental switch in the political economy of the United States.").

12. *Id.* at 13.

13. *See* David Madland & Karla Walter, *Unions are Good for the American Economy*, CENTER FOR AMERICAN PROGRESS ACTION FUND, at 1 (Feb. 18, 2009), http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html; *see also* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 17 (1999) (finding an implied desire rate of private sector unionization of forty percent, with approximately one-third of nonunion/nonmanagerial workers desiring unionization). *But see* Befort, *supra* note 1, at 376–77 (explaining that union decline is caused by union unpopularity: unions are seen as "bureaucratic and outdated" and do not fit with America's "rugged individualis[t]" mentality).

14. NLRB, FORTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30 1980, at 3 (1980).

15. NLRB, SIXTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30 2000, at 1 (2000).

16. *See* NLRB, SEVENTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30 2009, at 1 (2009) [hereinafter NLRB REPORT, 2009]; Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year, 2011 Daily Lab. Rep. (BNA) No. 85, at B-1 (May 3, 2011) (reporting that unions prevailed in 67.6% of elections held in calendar year 2010, and in 68.7% of elections held in calendar year 2009). This phenomenon may be explained by increased union selectivity in filing certification petitions or an overall change in union strategy regarding the withdrawal of petitions before an anticipated unfavorable vote.

17. *See* Hirsch & Hirsch, *supra* note 4, at 1134. *See also* FREEMAN & ROGERS, *supra* note 13, at 2.

> protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[18]

Detractors point out that the Act was expressly modified in 1947 to clarify that its purpose is not to promote unionization, but rather to further employee free choice. The Taft-Hartley amendments to the NLRA changed Section 7 to include the employees' rights to refrain from unionizing:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities* . . . .[19]

Thus, there is a tension between the NLRA's stated goals of fostering collective bargaining and preserving employee free choice.

A recurring complaint is that the Act unfairly prejudices unions. First, its sanctions arguably fail to deter employers from committing unfair labor practices that hinder unions' efforts to organize workplaces. More importantly, however, the NLRA as a whole allegedly manifests an inherent anti-union preference, allowing employers far too much legal latitude throughout the organizing process and even after a union is certified.[20] For example, after a union's certification, employers can bargain in "good faith" but nevertheless lawfully fail to reach a contract with a certified union.[21] After more than fifty years of labor's decline, the NLRA clearly requires reformation.

This Note proposes that employees' "free choice" regarding union representation would be safeguarded if Congress amended the National Labor Relations Act so that: (1) unions must file a notice with the NLRB prior to commencing a fixed sixty-day card signing campaign, with unions subject to harsh penalties for "jumping the gun" and commencing organizing prior to this time; (2) a uniform

18. 29 U.S.C. § 151 (2006).

19. 29 U.S.C. § 157 (2006) (emphasis added).

20. *See, e.g.*, Yungsuhn Park, Note, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN AM. L.J. 67, 90 (2005).

21. *See, e.g.*, Martin H. Malin, *Labor Law Reform: Waiting for Congress?*, 69 CHI.-KENT L. REV. 277, 283 (1993).

union authorization card is designed, effective for that limited sixty-day duration, and required to be submitted with one month's union dues from each employee as an indication of support for unionization in the certification process; and (3) the NLRB establishes a verification or revocation process for these cards.

Part I of this Note presents an overview of the current union organizing system. Part II explains why reform is necessary. Part III examines various proposed reforms, including the Employee Free Choice Act, as well as the deficiencies of these approaches. Part IV examines the Canadian labor organizing system for lessons to be applied in reforming the American system. Finally, Part V explains how the reforms described above will balance a union's right to organize, an employer's right to express its own views in its workplace, and most importantly, an employee's right to hear and express multiple views regarding the costs and benefits of union representation, and to exercise, in private, free choice to make an informed decision.

## I. THE NATIONAL LABOR RELATIONS ACT[22]

The union organizing process begins when a union undertakes to organize a particular workplace. Once a union is satisfied that it has substantial support, the union may file a petition with the NLRB seeking its certification.[23] The petition must be supported by a "showing of interest" from at least thirty percent of the workforce in the relevant bargaining unit designated in the petition.[24]

22. This Note's summary of the NLRA and its procedures is based on current law. The NLRB is currently undertaking an expedited rulemaking procedure, however, which would shorten the time between the filing of a certification petition and the election date and limit the opportunity for the Board to conduct a full evidentiary hearing or review contested issues before the election. *Proposed Amendments to NLRB Election Rules and Regulations Fact Sheet*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/node/525 (last visited Sept. 28, 2011).

23. 29 U.S.C. § 159(c)(1)(A) (2006). Although an employer may not normally petition for an election (because it could force a premature election, before the union has swayed a majority of the workers to vote pro-union), it may submit a petition for an NLRB election if a union claims to represent a majority of its employees and has attempted to bargain with the employer on behalf of the workers. § 159(c)(1)(B). See KENNETH C. MCGUINESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 49–50 (1976), for a more complete discussion of an employer's rights to petition the NLRB to determine a union's status as its employees' bargaining representative.

24. *See* MCGUINESS, *supra* note 23, at 63; *see also* Charles B. Craver, *Expanding Boundaries of the Law: Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1635 (1995) (explaining that in practice, however, union officials try to get sixty or seventy percent of the individuals in proposed units to sign cards before petitioning for an election). If other unions are concurrently attempting to organize that workforce, they need only demonstrate a ten percent showing of interest to intervene

Employees typically show their support through authorization cards (which are usually both signed and dated),[25] but their desires may also be established by other means, such as a signed petition or dues receipts.[26] The cards' presumed validity can be overturned based on strong proof that the signatures resulted from misrepresentation or coercion.[27] An employer is neither permitted to see the cards, nor to challenge any NLRB findings regarding its investigation or the cards' authenticity.[28]

At this point, the NLRB will determine whether it has jurisdiction over the employer and whether there are any bars to holding the election.[29] If an election is appropriate, the NLRB's Regional Director will attempt to facilitate an agreement between the union and the employer regarding the details for an election.[30] If no stipulated or consent election agreement is reached, the Regional Director will order a representation hearing, where disagreements can be litigated and decisions can be made about the appropriateness of the election, the determination of an appropriate bargaining unit (based on a commonality or "community of interest"), and potential determinations of who may vote in the election.[31] Once an election is directed, the Board also requires an employer to provide it with a list of the names and addresses of eli-

---

fully in the NLRB proceedings, and can achieve a spot on any NLRB ballot with an even smaller showing of interest. *See* NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL PART TWO: REPRESENTATION PROCEEDINGS §§ 11023.3, 11023.4 (2007) [hereinafter NLRB, CASEHANDLING MANUAL]; MCGUINESS, *supra* note 23, at 66.

25. *See* DOUGLAS L. LESLIE, LABOR LAW IN A NUTSHELL 14 (4th ed. 2000); NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE § 101.17 (2002); DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW 75 (1999).

26. *See* MCGUINESS, *supra* note 23, at 66–67; RAY, SHARPE & STRASSFELD, *supra* note 25, at 75–76.

27. *See* MCGUINESS, *supra* note 23, at 63, 68–69; NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 44 (2008) [hereinafter NLRB, OUTLINE]; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 861 (2005).

28. *See* S.H. Kress & Co., 137 N.L.R.B. 1244, 1248–49 (1962); *see also* LESLIE, *supra* note 25, at 14; MCGUINESS, *supra* note 23, at 63, 66.

29. *See* 29 U.S.C. § 159(c) (2006); RAY, SHARPE & STRASSFELD, *supra* note 25, at 76; ROBERT E. WILLIAMS, LABOR RELATIONS AND PUBLIC POLICY SERIES: NLRB REGULATION OF ELECTION CONDUCT 7–8 (1985) (clarifying that the Board will also look to whether the unit is appropriate for collective bargaining, whether a *bona fide* question of representation exists, whether the petition is timely, and whether there is sufficient employee interest to warrant holding the election).

30. MCGUINESS, *supra* note 23, at 97–101; RAY, SHARPE & STRASSFELD, *supra* note 25, at 79.

31. LESLIE, *supra* note 25, at 15; MCGUINESS, *supra* note 23, at 132–35. For instance, the union and the employer may contest whether individuals are supervisors under Section 2(11) of the Act, who are excluded from voting in union elections, thus leading to long decisional processes and greater delays.

gible voters (an "Excelsior list"), which is then given to the union to facilitate union-employee communication.[32]

Finally, a secret ballot election among eligible employees in the bargaining unit will be held (unless prolonged by a hearing or unfair labor practice charges that "block" the election), typically about thirty-eight days after the Board receives the petition and signed cards.[33] If more than fifty percent of the employees who cast ballots favor unionization, the union will be certified as the "exclusive bargaining agent" for all employees in that group,[34] including individuals who either did not vote or voted against union representation.[35] The employer may no longer bargain directly with members of the bargaining unit, even if the employee initiates the meeting.

Because secret ballot elections are not the exclusive means for certifying a union under the Act,[36] a number of early representation issues were decided without elections.[37] In 1939, however, the NLRB opined that "[a]lthough in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot."[38] As the Supreme Court explained thirty years later in *NLRB v. Gissel Packing Co.*,[39] it would be

> closing [its] eyes to obvious difficulties . . . if [it] did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent

32. MCGUINESS, *supra* note 23, at 82; RAY, SHARPE & STRASSFELD, *supra* note 25, at 83.

33. *See* Lafe E. Solomon, Acting General Counsel, General Counsel Memorandum 11-03, at "Introduction" (Jan. 10, 2011), *available at* http://www.nlrb.gov/publications/general-counsel-memos (explaining that 95.1% of all initial elections were conducted within fifty-six days of the filing of the petition, and initial elections were conducted in a median of thirty-eight days from the filing of the petition).

34. *See* 29 U.S.C. §§ 159(a), 159(c)(3) (2006); MCGUINESS, *supra* note 23, at 201, 204. If fifty percent or fewer of those casting ballots vote in favor of the union, there will be no union representation and no union can organize that bargaining unit for at least one year. § 159(c)(3).

35. *See* 29 U.S.C. § 159(a).

36. *See* § 159.

37. Cudahy Packing Co., 13 N.L.R.B. 526, 531 (1939).

38. *Id.* The Board came to the same conclusion in another decision handed down the same day (July 12) in Armour & Co., 13 N.L.R.B. 567, 572 (1939).

39. 395 U.S. 575 (1969).

> the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.[40]

The Court went on to say that elections are the "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[41] Thus, the secret ballot election has become the default method of union certification.

## II. CRITIQUES OF THE NLRA'S ORGANIZING PROCESS

For decades, critics have objected to this system, claiming that employees lack power and choice in determining whether they wish to be represented by a union. A number of articles have summarized unions' struggles to organize employees—even employees who support the unionization of their workplace.[42] Thus, commentators conclude that the NLRA's union organizing process itself is inherently anti-union and anti-choice. They contend that: employers are able to tip the scales in their favor by committing unfair labor practices, the inefficiency of the Board leads to long delays that hamper union chances of victory, and finally that the very procedures outlined in the Act disadvantage unions.

### *A. Employer Unfair Labor Practices*

Most critics hold employers primarily responsible for the unhealthy campaign environment.[43] They argue that employer unfair labor practices[44] committed during union organizing campaigns chill employee support for unions.[45] A wealth of anecdotal evi-

40. *Id.* at 604.

41. *Id.* at 602.

42. *See, e.g.*, T.A. Frank, *The Little Unions that Couldn't*, WASH. MONTHLY, Jan. 22, 2009.

43. *See, e.g.*, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises*].

44. Employer unfair labor practices are outlined in 29 U.S.C. § 158(a) (2006).

45. *See* Weiler, *Promises*, *supra* note 43, at 1778 (arguing that employers can easily convince unsophisticated employees of the negative features of unionization (dues, strikes, and potential job loss) while concurrently demonstrating the advantages of individual bargaining (without union interference) to employees); *see also* Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10 (2010) [hereinafter Estlund, *Choice*]. Note that unfair labor practices may be committed at any time during the employment relationship: in 2009, most allegations of employer unfair labor practices alleged employers violating the duty to bargain in good faith. *See* NLRB REPORT, 2009, *supra* note 16, at 5.

dence[46] and case law[47] supports this conclusion. Although studies have confirmed that employers commit unfair labor practices, the statistics in support of these findings vary wildly.[48] Kate Bronfenbrenner, a prominent labor activist, conducted a three-year study in the 1990s where she found that fifty percent of employers threatened to shut down or move their operations should their workplaces become unionized, regardless of the employer's actual financial situation.[49] Bronfenbrenner concluded that these employer threats were motivated by anti-union animus alone.[50] Another study found that employers illegally fired employees to reduce union support in twenty-five percent of union organizing drives.[51] More recently, a report found that in union organizing drives during 2002, fifty-nine percent of employers promised to improve employee wages,[52] fifty-one percent used bribery or favoritism to persuade workers to vote against the union,[53] forty-nine percent threatened to close or relocate a worksite if the union prevailed,[54] ninety-one percent required employees to attend anti-union meetings with supervisors,[55] and thirty percent fired workers allied with the union.[56]

---

46. *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing on H.R. 800 Before the H. Subcomm. on Health, Employment, Labor, and Pensions*, 100th Cong. (2007) [hereinafter *Strengthening America's Middle Class*].

47. Barker v. Regal Health Care & Rehab Ctr., 632 F. Supp. 2d 817 (N.D. Ill. 2009) (finding eleven of thirteen licensed employees signed union authorization cards, leading the employer to conduct an anti-union campaign consisting of fifteen unfair labor practices and terminating or threatening to terminate each of the eleven employees).

48. For a summary of twelve studies examining the effects of management opposition on union certification, see FREEMAN & MEDOFF, *supra* note 6, at 234–35 tbl.15-4.

49. Kate Bronfenbrenner, *Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers to Organize*, Report to the Labor Secretariat of the North American Commission for Labor Cooperation, 2, Sept. 30, 1996. Bronfenbrenner found that this rate is higher (62%) in more "mobile" industries, such as manufacturing, transportation, and warehouse/distribution, and lower in less mobile industries, such as healthcare, education, and retail. *Id.*

50. *Id.*

51. John Godard, Joseph B. Rose & Sara Slinn, *Should Congress Pass the Employee Free Choice Act? Some Neighborly Advice*, 15 JUST LABOUR: A CANADIAN J. OF WORK & SOC'Y 116, 117 (2009).

52. CHIRAG MEHTA & NIK THEODORE, AMERICAN RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 9 tbl.2 (2005).

53. *Id.*

54. *Id.*

55. *Id.* at 15 tbl.3.

56. *Id.* at 5. For an argument that employer unfair labor practice statistics are overstated, see EPSTEIN, *supra* note 8, at 52; LaLonde & Meltzer, *supra* note 3, at 996–98. LaLonde and Meltzer argue that the incidence is often overrated at one in twenty and (for 1980) was more accurately one in sixty. LaLonde & Meltzer, *supra* note 3, at 1006.

These studies confirm that employer threats are most effective where an NLRB election is required: one study found that employer unfair labor practices are twice as effective when a certification vote is required.[57] Moreover, the study found that four out of five American workers fear that they will lose their jobs if they vote for union representation,[58] indicating that these threats chill union support among workers. The success of these tactics has been attributed to the heightened vulnerability of employees during a union organizing campaign and the "aggressive and hierarchical" nature of any employer communication.[59] These threats succeed because of the message they send: where employees are terminated for supporting a union and later offered reinstatement via the NLRB, only about forty percent took their job back, mainly because they fear employer retaliation.[60] Moreover, the extensive delay between an unfair labor practice charge's filing, the issuance of an NLRB complaint, and the issuance of an ultimate and enforceable NLRB decision averaged 483 days in 2009,[61] meaning that the reinstatement lost all effect as an example to other workers. Lengthy Board delays in conducting elections or remedying unfair labor practices cause employees to lose interest and conclude that unions are ineffective and will be unable to address their employment concerns.[62]

Although these facts provide strong evidence of the NLRA election process's ineffectiveness, the actual prevalence of unfair labor practices during union organizing drives is disputed.[63] Many studies critical of the NLRB have been biased: they interviewed only union organizers, misstated the law, or used descriptions that considered acts to be "unfair labor practice[s]" even where the acts are not actually illegal.[64] Moreover, other studies have found that the statistical likelihood of an employer illegally firing an employee during a union organizing drive is less than three percent.[65]

---

57. *See* Godard, Rose & Slinn, *supra* note 51, at 118. Bronfenbrenner conducted her own analysis and concluded that unions won thirty-three percent of elections where these threats occurred, but won forty-seven percent where these threats did not occur. Bronfenbrenner, *supra* note 49, at 2.

58. Godard, Rose & Slinn, *supra* note 51, at 117.

59. Brudney, *supra* note 27, at 832.

60. *See* Weiler, *Promises*, *supra* note 43, at 1792.

61. NLRB REPORT, 2009, *supra* note 16, at 152.

62. *See* GOULD, AGENDA, *supra* note 3, at 158.

63. For an attack on Bronfenbrenner's bias and study, see EPSTEIN, *supra* note 8, at 40–42.

64. EPSTEIN, *supra* note 8, at 40–41.

65. *See* Thomas P. Gies, *Card Check: Changing the Rules for Collective Bargaining*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH 1 (Feb. 2009), http://www.aei.org/issue/100002.

Whatever the actual prevalence of unfair labor practices, the fact that employers commit them at all suggests that employees may be deterred from expressing their real desires regarding unionization, which indicates that the Act requires reform. For an employer, committing an unfair labor practice may be an acceptable risk. The penalty imposed by the NLRB (often back pay minus the wages that the employee earned elsewhere) is discounted by the enhanced probability that the union will lose the election and merely represents a cost of doing business.[66]

It is worth noting, however, that some studies have concluded that employer unfair labor practices do not influence employees, belying the Board's assumption that employees' tenuous pre-campaign support for a union is easily altered by an employer's anti-union campaign. One such study,[67] which interviewed the same employees right after the direction of an election and again immediately after the election,[68] found that eighty-seven percent of employees voted consistently with their stated pre-election intent to vote for or against the union.[69] With results consistent across a wide range of localities and situations,[70] the study found that employees largely ignore union and employer campaigns[71] and instead vote according to their feelings about unions that existed before the campaign began.[72] Even unfair labor practices had little effect on employees' votes.[73] Thus, the dismissal of union supporters during an organizing campaign did not adversely affect employees who originally intended to vote for unions.[74]

66. *See* LaLonde & Meltzer, *supra* note 3, at 964.

67. JULIUS G. GETMAN, STEPHEN B. GOLDBERG & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 33 (1976).

68. *Id.* The data came from thirty-one union elections occurring between February 1972 and September 1973, and included data from a number of different businesses, communities, and unit sizes. *Id.* at 34.

69. *Id.* at 69–70.

70. *Id.* at 65–66.

71. *Id.* at 109 (finding that the average employee remembers only ten percent of the issues raised in a company's campaign, and only seven percent of the issues raised in a union campaign).

72. *Id.* at 96–97 ("[N]either company nor union supporters pay particularly close attention to the campaign. Their voting decision is based on attitudes that antedate the campaign."). Indeed, employees' "predispositions tend to insulate them from the effect of [a] campaign." *Id.* at 97.

73. *Id.* at 128–29.

74. *Id.* at 130.

### *B. Delay*

A second main complaint about the NLRA procedure stems from the first: the process is plagued by delays. Union representation elections are held a median of thirty-eight days after the filing of the petition for certification, and 95.1% of elections are held within fifty-six days of filing the petition.[75] Rather than allowing workers additional time for reflection, these delays cause the union to lose momentum as workers become increasingly frightened that they, too, will be terminated should they support the union.[76] Studies have repeatedly found links between union election losses and long delays.[77] One study found that a union's chances of winning an election decreased by 0.29% for each day of delay,[78] leading researchers to conclude that delay weakens employee confidence in the Board's effectiveness and the union itself.[79] Delays cause employees to remain vulnerable for longer periods of time and provide a larger window for the employer to mount extended illegal campaigns designed to dissuade employees from voting in favor of unionization. The converse argument, however, is that an employer maintains the lawful "free speech" right to communicate its own views under Section 8(c) of the NLRA:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.[80]

---

75. *See* Lafe E. Solomon, Acting General Counsel, General Counsel Memorandum 11-03, at 2 (Jan. 10, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458043b761.

76. *See* Weiler, *Promises*, *supra* note 43, at 1794–95.

77. *Id.* at 1776–77 ("My thesis, however, is that the decline in union success in representation campaigns is in large part attributable to deficiencies in the law: evidence suggests that the current certification procedure does not effectively insulate employees from the kinds of coercive antiunion employer tactics that the NLRA was supposed to eliminate. It is the time lag between the filing of a representation petition and the vote, usually about two months, that gives the employer the opportunity to attempt to turn its employees against the union.").

78. Julie Martinez Ortega & Erin Johansson, *The Facts Behind the Employee Free Choice Act*, AMERICAN RIGHTS AT WORK 10 (2009), http://www.americanrightsatwork.org/dmdocuments/ARAWReports/araw_thefactsbehindefca.pdf.

79. Roomkin & Juris, *Unions in the Traditional Sectors: The Mid-Life Passage of the Labor Movement*, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH ASS'N. 212, 217–18 (1978).

80. 29 U.S.C. § 158(c) (2006).

Thus, even lawful anti-union campaigns will likely diminish support for a union. Moreover, delay can make it more likely that employees will leave due to normal turnover, increasing the difficulty for a union to maintain support in any workplace.[81]

### *C. Anti-Union Bias*

Critics have also repeatedly asserted that the overall union organization process is flawed, even where employers do not commit unfair labor practices. These detractors argue that the Act's anti-union bias can be seen in the definition of an employer unfair labor practice. For example, in *NLRB v. Gissel Packing Co.*, the Court drew a fine distinction between an employer's unlawful "threat" of closure and its lawful prediction "on the basis of objective fact" that the "demonstrably probable consequence[]" of unionization is closure.[82] Although a number of line-drawing problems are inherent in any definition,[83] critics argue that the current standards provide too much latitude for employers to make unfounded or tenuous predictions that influence employees' votes in union elections. Finally, captive audience meetings,[84] legal under the NLRA, are allegedly so successful at chilling union support that critics contend they should be considered unfair labor practices.[85] This is because these speeches are

> a display of employer power . . . a message about where power in the employment relationship rests, about the limits of a union's power (because unions are not likewise permitted to address workers at the workplace), and about the state's

81. *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.J. 65, 95 (1988).

82. 395 U.S. 575, 618 (1969).

83. *See* EPSTEIN, *supra* note 8, at 39.

84. Captive audience meetings are meetings held by an employer during work hours where the employer speaks to employees about unionization. As long as their contents are not otherwise coercive, these speeches are permitted under Section 8(c) of the NLRA. They may not take place within twenty-four hours of the election. MCGUINESS, *supra* note 23, at 166; RAY, SHARPE & STRASSFELD, *supra* note 25, at 102–04.

85. *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 560 (1993); David J. Doorey, *The Medium and the "Anti-Union" Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. L. & POL'Y J. 79 (2008).

> opinion of this imbalance of power and communicative access in the workplace.[86]

Moreover, critics point out that any employer speech will necessarily bias employees against unions. This is because employers "do not express their opinion in a vacuum," and behind an employer's speech "lies the full weight of [its] economic position" and influence over employees.[87] This theory is shown in studies finding positive correlations between employers' use of legal means of communicating with their employees and decreased union election success. Thus, employers can influence employee choice without breaking the law.

Likewise tilting the scale in the employer's favor, the NLRB usually conducts secret ballot elections at the employer's workplace. This factor is widely considered prejudicial, foremost because employer influence permeates the physical space of the workplace. Empirical research has confirmed this effect, arguing that if the "uncommitted" are brought to the polls in larger numbers (which is likely to occur if the election is held at their workplace), they will vote to preserve the status quo.[88] When a union objects to the election being held on the employer's premises, it must show good cause for the election to be held elsewhere.[89]

Finally, some critics have refused to address these individual elements and have instead pointed to the weaknesses of the current system as a whole. Current NLRB Member Craig Becker has argued previously that employers should have no role in the unionizing process.[90] Former Senator Arlen Specter expressed a somewhat less radical view, opining: "[u]nion representation elections are often conducted in an environment of intimidation and coercion,"[91] implying that the current system will fail to accurately measure employees' views on unionization. This has often been explained by the NLRA's majoritarian principles, which naturally invite and encourage opposition between unions and manage-

86. Doorey, *supra* note 85, at 80.

87. Becker, *supra* note 85, at 539.

88. *Id.* at 567.

89. *See* NLRB, CASEHANDLING MANUAL, *supra* note 24, at § 11302.2. Although presented with an opportunity to revisit this issue, the NLRB declined to do so recently in Mental Health Ass'n, Inc., 356 NLRB No. 151, 1 n.4 (2011), *available at* http://op.bna.com/dlrcases.nsf/id/ldue-8ghr3v/$File/mental%20health%20assn.pdf.

90. *See* Becker, *supra* note 85, at 500.

91. Senator Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 311 (2008).

ment.[92] One analysis concluded that the current union organizing system leads to an "underproduction" of worker voice, worker participation, and worker-management cooperation.[93] Surprisingly, it found that these problems exist whether or not a workplace is unionized.[94]

The current organizing process also discourages employees from attempting to unionize their workplaces:

> The fact that the benefits of representation come in the future, and often over a long time, exacerbates the problem: the workers who bear the substantial short-term costs of organizing in the face of employer resis-tance [sic] can capture only a fraction of the benefits of representation; and even those benefits tend to be overdiscounted [sic] because they occur in the future.[95]

These features of the current union organizing system—employers' frequent unfair labor practices, the delayed ratification of employees' signed union representation cards, and the NLRA's procedures—have all been found to unfairly prejudice unions in their organizing efforts. They are exacerbated by the toothless and delayed remedies provided by the NLRB,[96] as well as the Board's failure to inform employees of their rights under the NLRA.[97] Thus, in the view of organized labor, the National Labor Relations Act is structurally inadequate to ensure that employees' wishes are heard—indeed, the current system favors employers over unions,[98] and the employee is ultimately the loser in this battle. Most

92. *See* Morris, *supra* note 9, at 527.

93. Hirsch & Hirsch, *supra* note 4, at 1146.

94. *Id.*

95. Estlund, *Choice*, *supra* note 45, at 13.

96. Where the Board finds that an unfair labor practice has been committed during an organizational campaign, it usually orders one of two remedies: a second election (which may fail to cure the defect in the first election), or—in the most egregious cases where one-time majority union support has been eroded through employer unfair labor practices—requiring the employer to bargain with the union without requiring a second election (which even then only results in a "ten percent chance of obtaining an enduring collective bargaining relationship with the employer"). *See* NLRB v. Gissel Packaging Co., 395 U.S. 575, 610–14 (1969); Specter & Nguyen, *supra* note 91, at 318 (partially quoting Murphy, *supra* note 81, at 77). Specter & Nguyen argue that these remedies are so weak because the NLRA has been interpreted narrowly. *See* Spector & Nguyen, *supra* note 91, at 325; *see also* Weiler, *Promises*, *supra* note 43, at 1789–90 (discussing the inconsistencies in NLRB remedies, which are designed to deter certain employer conduct but often act more as a cost of doing business, taking on a reparative function).

97. *See* Morris, *supra* note 9, at 528.

98. For an argument that union campaign donations give unions a great deal of power over America and Americans, see EPSTEIN, *supra* note 8, at 23.

pessimistically put, "[o]nly when the employees' interests coincide with those of the union or the employer do their interests get championed, and then only secondarily and to the extent deemed financially prudent by the union or the employer."[99]

## III. PROPOSED ALTERNATIVES

Many critics argue that "the NLRB (election route) is a death trap,"[100] and a number of alternatives to the current system have been proposed: the Employee Free Choice Act (EFCA), card check, *rapid* or *quickie* elections, "Card Check 2.0," and various other substitutes. Although each of these proposals corrects some of the inequities under the current election regime, each presents new problems, and none level the playing field entirely or guarantee that employee free choice will be protected. At the same time, however, any attempt to rework the NLRA will be difficult due to the "ossification of labor law," as described by Professor Cynthia Estlund.[101] Indeed, in her February 11, 2011 comments regarding a House Subcommittee hearing, then-NLRB Chairman Wilma Liebman appeared to agree with this analysis, noting that the NLRB has fallen into "a long period of dormancy."[102] Ossification is institutionalized: "for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment that either group strongly opposes."[103] There is enough support to block amendments because opponents need only "a minority that is big enough, well organized enough, and committed enough to tie up a bill through the arcane supermajority requirements of the Senate . . . ."[104] As long as powerful groups in the Senate back both employers and unions, legislative reform will

99. Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. PA. J. LAB. & EMP. L. 101, 104 (2002).

100. George Raine, *A High-Stakes Labor Card Game: Organizing Strategy has Hotel Workers Avoid Secret Ballot*, S.F. CHRON., Mar. 28, 2006, at A1.

101. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) [hereinafter Estlund, *Ossification*].

102. Press Release, National Labor Relations Board, Chairman Liebman Issues Statement on Today's House Hearing (Feb. 11, 2011), https://www.nlrb.gov/news/chairman-liebman-issues-statement-todays-house-hearing.

103. Estlund, *Ossification*, *supra* note 101, at 1540. To avoid a filibuster or endless debate, Senate rules require sixty affirmative votes on a cloture motion. S. COMM. ON RULES AND ADMIN., 111TH CONG., STANDING RULES OF THE SENATE R. XX11, *available at* http://rules.senate.gov/public/index.cfm?.p=RuleXXII.

104. Estlund, *Ossification*, *supra* note 101, at 1540.

be difficult to enact.[105] Operating on the assumption that legislative reform is possible, however, this Note addresses and critiques the potential alternatives below.

### *A. Card Check*

The most prominent alternative to the NLRB election process is "card check," which would be codified under EFCA's provisions for certifying a union.[106] A union would be certified if a majority of workers in the relevant bargaining unit sign authorization cards indicating their support for that union. This system was designed to "allow workers to complete a unionization effort before management is aware that such an effort is underway."[107] The main advantage of card check over the current regime is secrecy: an employer whose workplace is being organized under the existing NLRA is necessarily made aware of the organizing effort when the signed cards in favor of unionization are submitted to the NLRB (almost six weeks before the actual election takes place). In contrast, a card check regime does not automatically inform an employer that a union is attempting to organize its workplace—a workforce may even be organized before the employer is aware that a campaign has taken place.

Consistent with its backing by unions, this method of certification is far more union-friendly than the current regime. One study found that secret ballot elections yield a 12.7% decrease in union support when compared to card signatures—thus, certifying unions based on cards alone would increase union support by the same percentage.[108] The AFL-CIO has consistently advocated for card check "because people can do it off premises, can do it in

105. *Id.* at 1611. Estlund ultimately concludes that the most realistic way of changing the American labor regime is to eschew the legislative process and instead to mobilize workers to publicly support workers rights.

106. In addition to card check in the organizing process, EFCA would create enhanced remedies for employer unfair labor practices during the organizing process and a system of binding interest arbitration to secure initial collective bargaining agreements. Employee Free Choice Act of 2009 § 3, H.R. 1409, S. 560, 111th Cong. (2009).

107. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 658 (2010).

108. Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87, 122 (1984).

their homes, can do it without the employer looking over their shoulder."[109]

Unions have long understood the relationship between workplace election success and secrecy vis-à-vis employers.[110] A number of union organizing pamphlets stress that union success is often based on employer ignorance of election campaigns, and thus encourage union organizers to be discreet and maintain a low profile.[111] For example, the International Brotherhood of Teamsters' Organizing Guide stresses secrecy by instructing that during all early stages of the campaign, "the organizer's work is totally underground" and should be conducted without the employer's knowledge.[112] Similarly, the American Federation of State, County and Municipal Employees' Organizing Model and Manual explains their union organizing procedure in a chapter titled "Keeping the Campaign Private."[113] Stressing the importance of secrecy, the manual explains that the organizer should not "tip off the employer [because] [t]his is 'undercover' work."[114] The manual also encourages organizers to "recruit potential leaders *as quietly and quickly* as [they] can" and "to constantly stress the need for secrecy and to make assessments discreetly."[115] By eliminating union elections and thus any guarantee that the employer will become aware of the organizing effort, a card check system aids unions in their attempts to organize workplaces, and ultimately leads to far greater union success.

While attempting to guarantee that employees are shielded from employer influence, card check conversely allows unions full access to employees' decisions. In short, "card check works both by *ensuring* a measure of secrecy [of the organizing process] vis-à-vis the employer and by *eliminating* secrecy [of the employees' decisions] vis-à-vis the union and its supporters."[116] Indeed, employees are

109. Anya Sostek, *Union: Yes or No? As State AFL-CIO Convention Comes to Pittsburgh, Unions, Employers Push for Changes to Voting Procedures*, PITTSBURGH POST-GAZETTE, Apr. 4, 2006, at A7 (quoting Stewart Acuff, organizing director of the AFL-CIO).

110. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 65 (4th ed. 2004).

111. *Id.* (explaining that "[u]nions recruiting workers will generally make contact with a small group of potential union adherents. At the early stages of a union effort this contact may be made secretly, to make it less likely that the employer will counter-attack with anti-union communications or unlawful reprisals."); *see also* Sachs, *supra* note 107, at 665.

112. Sachs, *supra* note 107, at 665 (citation omitted).

113. *Id.* (quoting Am. Fed'n of State, Cnty. & Mun. Employees, Organizing Model & Manual 1–6 (1999)).

114. *Id.* at 665 n.27 (quoting Am. Fed'n of State, Cnty. & Mun. Employees, Organizing Model & Manual 1–6 (1999)).

115. *Id.* (quoting Am. Fed'n of State, Cnty. & Mun. Employees, Organizing Model & Manual 1–11 (1999) (emphasis added)).

116. Estlund, *Choice*, *supra* note 45, at 15.

pressured to register their support (or lack thereof) for a union by signing (or refusing to sign) a card in front of an interested union official. Union coercion is not the only factor influencing employee votes, however: employees will also be forced to register their preference in front of their fellow employees, who may exert subtle (or not-so-subtle) group pressure on the individual to sign or refrain from signing a union authorization card.[117]

Thus, support for the card check system assumes that union officials and fellow employees are indifferent as to employee support and would not pressure or coerce employees. In reality, however, unions and their officials' jobs depend on collecting dues from new members.[118] The premise for card check fails to recognize that employees may sign cards "due to social pressure, misunderstanding, or outright coercion."[119] Accordingly, employees who prefer not to be represented by a union may nonetheless sign an authorization card merely to avoid retaliation should the union eventually be certified.[120] Under these circumstances, it is unclear whether voter-workers actually prefer union representation.

Even card check proponents have argued that secret ballot elections are a superior means of measuring employee preference—when it works in unions' favor. Congressman George Miller and fifteen of his colleagues sent a letter to the Mexican Labor Board stressing the necessity of elections in February 2001, explaining: "the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose."[121] Unions have made similar arguments in the context of decertifying (or voting to oust) a union. The AFL-CIO has argued to the NLRB that "other means of decision-making are 'not comparable to the privacy and independence of the voting booth,' and [the secret ballot] election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decision[s].'"[122] Former Democratic

117. *See, e.g.*, NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 566 (4th Cir. 1967); GOULD, AGENDA, *supra* note 3, at 163.

118. *See* Specter & Nguyen, *supra* note 91, at 319.

119. Sachs, *supra* note 107, at 669.

120. *See* EPSTEIN, *supra* note 8, at 47–48 (calling this "[s]trategic surrender").

121. Letter from U.S. Rep. George Miller et. al., to Junta Local de Conciliacion y Arbitrraje del Estado de Puebla (Aug. 29, 2001), *available at* http://www.boulettegolden.com/EFCA_Mexico_Letter.pdf.

122. ASSOC. OF SENIOR HUMAN RES. EXEC., MISTITLED "EMPLOYEE FREE CHOICE ACT" WOULD STRIP WORKERS OF SECRET BALLOT IN UNION REPRESENTATION DECISIONS 2 (2004) (quoting Joint Brief of the AFL-CIO *et al.* at 13, in Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc. (N.L.R.B. May 18, 1998) (Nos. 7-CA-36846, 7-CA-37016, 20-CA-326596), *available at* http://www.hrpolicy.org/memoranda/2004/04-10_Employee_Free_Choice_Act_PB.pdf.

Senator George McGovern pointedly acknowledged this inconsistency in an August 2008 *Wall Street Journal* op-ed:

> To my friends supporting EFCA I say this: We cannot be a party that strips working Americans of the right to a secret-ballot election. We are the party that has always defended the rights of the working class. To fail to ensure the right to vote free of intimidation and coercion from all sides would be a betrayal of what we have always championed.[123]

Indeed, experience demonstrates that employees cannot risk refusing to sign a card for a union that may later be certified, and thus union retribution and peer pressure can seriously undermine employee choice. In *Randell Warehouse of Arizona, Inc.*,[124] the NLRB found that union agents and supporters illegally threatened and coerced employees to influence their vote in a union election[125] by causing "[a] reasonable employee [to] anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support," and thus violated employee free choice.[126] Similarly, in *Alyeska Pipeline Service Co.*,[127] union officials threatened employees "that those possessing 'a Local 1547 membership card would be in an extremely favorable priority position' compared to nonmembers . . . ."[128] In *HCF, Inc.*,[129] a union member told an employee that "the Union would come and get her children and it would also slash her car tires" if she did not sign a union authorization card.[130]

Union organizers corroborated many of these claims at a recent hearing before the House Subcommittee on Health, Employment, Labor and Pensions. Jennifer Jason, a former union organizer for

123. George McGovern, *My Party Should Respect Secret Union Ballots*, WALL ST. J., Aug. 8, 2008, *available at* http://online.wsj.com/article/SB121815502467222555.html.

124. 347 N.L.R.B. 591 (2006).

125. *Id.* In Randell, union representatives took photos of employees either accepting or refusing to accept union campaign literature. *Id.* For a similar situation, see Mike Yurosek & Son, Inc., 292 N.L.R.B. 1074, 1074 (1989) (finding that unexplained videotaping combined with the statement, "We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here" led employees to reasonably fear reprisal); Pepsi-Cola Bottling Co., 289 N.L.R.B. 736, 736 (1988) (videotaping found objectionable as interfering with employee free choice).

126. *Randell*, 347 N.L.R.B. at 594.

127. 261 N.L.R.B. 125 (1982).

128. *Id.* at 125. For a similar union threat made during union decertification procedures, see Healthcare Employees Union, Local 399, 333 N.L.R.B. 1399, 1399 (2001) (union representatives were found to have threatened employees that they would be outsourced if the union were decertified).

129. 321 N.L.R.B. 1320 (1996).

130. *Id.* at 1320.

UNITE HERE, explained that she was trained to create a sense of agitation in workers and to capitalize on the "heat of the moment."[131] Yet the most striking testimony came from Ricardo Torres at the same hearing, who admitted that "[v]isits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union."[132]

This is not intended to suggest that unions coerce employees more than employers, or that their unfair labor practices are any more reprehensible. Rather, it illustrates a point often ignored in scholarly literature: that secrecy vis-à-vis employers, but not union officials, is not the answer to the NLRA's problems. Union officials, like employers, have been shown to deceive, coerce, and threaten employees. Secrecy may even prevent employees from expressing their preferences—union officials will steer clear of workers who are known to be anti-union or who support another union to avoid alerting them of the union's organizing efforts. Thus, not only will employers be silenced, but the persuasive voices of large numbers of employees may be silenced as well[133]:

> The defenders of EFCA say little or nothing to justify the possibility of a union preventing dissenting workers from having a voice in the democratic process that the representation elections afford to a union. It is a profound irony that a statute that purports to empower workers to exercise their "free choice" . . . disenfranchises a potentially large fraction of them.[134]

Thus, the card check regime designed to protect employee choice may not accurately reflect the employees' eventual consensus that would result from a robust exchange of views within the workplace.[135] This has long been understood. In *NLRB v. S.S. Logan Packing Co.*, the court recognized that "[t]he unreliability of the cards is . . . inherent, as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow

131. *See Strengthening America's Middle Class*, *supra* note 46, at 31–33 (prepared statement of Jennifer Jason).

132. *Id.* at 7.

133. *See* EPSTEIN, *supra* note 8, at 43.

134. *Id.* at 44.

135. The benefits of an informed "electorate" hearing opposing views is perhaps best exemplified in the 1954 CBS teleplay, *12 Angry Men*, where a lone man manages to change the minds of eleven other jurors during deliberations.

employees."[136] Empirical evidence confirms the cards' unreliability: where two unions have concurrently organized the same workforce, employees frequently sign cards indicating their support for both unions.[137] This inherent unreliability may be compounded, as card check proposals lack a contemporaneous oversight of the card solicitation process and unions maintain control over the cards until they are submitted to the NLRB. Moreover, employees who later change their minds may have no adequate means to withdraw or revoke their signed cards, so these cards may be submitted to the NLRB despite being contrary to employees' wishes.[138]

Even where signed union authorization cards initially represent the employees' desire for union representation (and not merely a request for an NLRB election), twenty-five percent of those who initially sign union authorization cards later vote against unionization, perhaps "represent[ing] a more considered, if not more informed, judgment."[139] For these reasons, card check alone is not a suitable alternative to the NLRA, as it replaces one extreme with another.[140]

### *B. Expedited Elections*

An expedited NLRB election process presents another alternative to the current system and retains the secret ballot election. Indeed, the NLRB is currently considering adopting this model.[141] Under this option, *rapid* or *quickie* elections would be conducted

136. NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 566 (4th Cir. 1967). Importantly, this was acknowledged and quoted by Chief Justice Earl Warren in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 n.20 (1969).

137. *See* GOULD, AGENDA, *supra* note 3, at 162–63.

138. For example, an employee who requests his card's return may be told that his card was destroyed. In this case, the employee will lack a means of ensuring that his revoked card is not later submitted as evidence of union support. For reasons explaining why this phenomenon is acceptable under the current system, see NLRB, OUTLINE, *supra* note 27, at 46–47 ("A showing of interest is not subject to attack on the ground that the cards on which it is based have been revoked or withdrawn. 'Such an attack,' said the Board, 'has no bearing on the validity of the original showing but merely raises the question as to whether particular employees have changed their minds about union representation. That question can best be resolved on the basis of an election by secret ballot.'" (internal quotations omitted)).

139. GETMAN, *supra* note 67, at 153.

140. For a discussion of how the EFCA fails to establish a "tight relationship between the supposed wrong [employer unfair labor practices] and the curative legislation [card check, increased employer unfair labor practice penalties, and mandatory first contract arbitration]," see EPSTEIN, *supra* note 8, at 18–20.

141. *See* National Labor Relations Board Representation—Case Procedures, 76 Fed. Reg. 36,812–47 (June 22, 2011).

soon after the pre-election hearing; according to dissenting Board member Brian E. Hayes, the election could be held as few as ten to twenty-one days after the filing of the election petition.[142] A secret ballot election arguably provides a number of benefits to a union:

> A secret ballot vote has a symbolic value that a card check can never have. It clears the air of any doubts about the unions' majority and also confers a measure of legitimacy on the union's bargaining authority, especially among minority pockets of employees who were never contacted in the initial organizational drive.[143]

In addition to this system's symbolic value, it provides practical value over card check by preventing employees from being bound by union authorization cards that they signed due to peer pressure, or whose meaning they misunderstood.

The main argument for *quickie* elections instead of the current system, however, is that it makes it "nearly impossible" for the employer to engage in unfair labor practices that cause unions to lose elections.[144] While rendering employer unfair labor practices "nearly impossible," this short window also makes any employer (and anti-union employees') statements "nearly impossible," meaning that employees may not be fully informed. As Weiler explains:

> It would be unthinkable to structure an electoral system in such a way that one political party, having carefully established its support among the electorate, could unilaterally trigger a snap election at a favorable moment and thereby rob the other party of any chance to compete in the race. For precisely the same reasons, the bill's detractors contended, 'instant elections' should be anathema in the union certification context.[145]

142. *Id.* at 36,831 ("What *is* certain is that the proposed rules will (1) substantially shorten the time between the filing of the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct. Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition."). As many critics have pointed out, however, *quickie* elections rely on increased Board efficiency that does not now exist. *See, e.g.*, Befort, *supra* note 1, at 352; Specter & Nguyen, *supra* note 91, at 324.

143. Weiler, *Promises*, *supra* note 43, at 1811–12.

144. *Id.* at 1812.

145. *Id.* at 1813.

Although the reform seeks to limit employer unfair labor practices, its effect will likely be "to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[146] This conflicts with the 1947 Taft-Hartley amendments to the NLRA, whose stated purpose in part was to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters."[147] As the Supreme Court recently recognized, Congress made "[a] policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate . . . .'"[148] Indeed, a number of speakers at the Board's open hearing on expedited elections argued that the Board's proposed rules "would prevent or impede a free and reasoned choice by the electorate," especially because a number of small employers cannot get in touch with attorneys, gather information, and prepare for the union campaign in this limited time period.[149] Thus, expedited elections inappropriately prioritize speed over the NLRA's other important purposes.

### *C. Card Check 2.0*

Although expedited elections and the Employee Free Choice Act remain the most widely debated statutory reforms being considered today, scholars have proposed other ways of amending the NLRA. Harvard Law School labor law professor Benjamin Sachs has proposed two alternatives, which he calls "Card Check 2.0." These proposals are "asymmetry-correcting altering rules," premised on the idea that workplaces (and thus workers) must be union or nonunion by default.[150] Borrowing from the preference-eliciting default theory of statutory interpretation[151] and the reversible de-

146. Dissenting View of Member Brian E. Hayes, NOTICE OF PROPOSED RULEMAKING, NATIONAL LABOR RELATIONS BOARD 77 (June 22, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/525/dissent.pdf.

147. S. Rep No. 105, at 23 (1947).

148. Chamber of Commerce v. Brown, 554 U.S. 60, 68 (2008) (citations omitted).

149. *NLRB Opens Hearing on Election Rules, Debate Centers on Need for Amendments*, 137 DAILY LAB. REP. (BNA), at AA-1 (July 18, 2011), *available at* http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=21329255&vname=dlrnotallissues&fn=21329255&jd=a0c8m2z5k2&split=0.

150. Sachs, *supra* note 107, at 659.

151. As defined by Sachs, the preference-eliciting default theory does not require the judiciary to adopt the statutory interpretation that it believes to have the greatest amount of public support; rather, it "requires courts to choose the interpretation that would be disfavored by the party to the interpretive debate with the greatest capacity to force the legislature to correct an erroneous interpretation." Sachs, *supra* note 107, at 674.

fault theory of corporate law,[152] Sachs explains that the default rule for unionization should be that from which it is easiest to depart (the nonunion default)[153] and should protect the party that would have more difficulty changing the status quo (workers).[154]

Under one of Sachs' proposed reforms, employees could cast their secret ballots over the phone or via the internet.[155] Under an alternative suggested reform, secret ballots could be submitted at regulated polling sites or through mail ballot voting at any time.[156] Unlike card check proposals, Sachs' models maintain secrecy of employee choice vis-à-vis both the employer and the union by providing for an election where votes can be cast in secrecy. This is arguably a superior option because it accounts for the persuasive abilities (the "epistemological authority")[157] of trained union organizers, and attempts to correct for the problem that employees might vote to please others rather than because of their own preferences.

Although these theories will be considered in Part V's reform, they have not gained the full approval of either the labor movement or management, and are subject to some of the weaknesses of card check. While praising the secrecy of Sachs' model, Estlund notes that "Sachs himself . . . offer[s] perhaps the strongest argument for openness" in arguing that asymmetry-correcting rules are necessary in the first place.[158]

In practice, telephonic and electronic voting may not be as "secret" as the voting conducted at a ballot box. Indeed, one can imagine a union election "party" where attendance is monitored and employees are encouraged (or coerced) to cast e-ballots or vote telephonically for union representation in the presence of union organizers. The converse is likewise possible. Under the

152. In the corporate context, the reversible default theory holds that:

> [W]henever there is uncertainty over the identity of the value-maximizing arrangement, a preference should generally be given to the alternative that is more restrictive of managers. This restrictive alternative would be reversed if it turns out to be value decreasing [and left in place if not], whereas the alternative favored by managers would remain in place if chosen as default even if it turned out to be value decreasing.

*Id.* at 678. Thus, Sachs argues that both the preference-eliciting default theory of statutory interpretation and the reversible default theory of corporate law are designed to facilitate change in unpopular laws.

153. *Id.* at 658–59.

154. *Id.* at 658–59, 676 ("favor the politically weak").

155. *Id.* at 663.

156. Sachs, *supra* note 107, at 663.

157. *Id.* at 662.

158. Estlund, *Choice*, *supra* note 45, at 18.

Railway Labor Act,[159] which governs representation elections in the railroad and airline industries, electronic voting already occurs. On December 8, 2010, the International Association of Machinists and Aerospace Workers filed a claim of election interference against Delta Airlines based in part on Delta's alleged ability to monitor employee voting from company computers.[160]

### *D. Other Alternatives*

Another reform, proposed by Jeffrey M. Hirsch & Barry T. Hirsch, professors at the University of Tennessee College of Law and Georgia State University, respectively, advocates eliminating the NLRA's "company union" prohibition, which limits the ability of employers to create work groups.[161] They argue that legalizing company unions would facilitate "welfare-enhancing employee voice and participation" and make employer-employee dialogue easier.[162] Admitting that their proposal could make union organizing more difficult, Hirsch and Hirsch contend that allowing company unions to compete with traditional unions could lead to innovation and more responsive representation, ultimately giving employees more choice and better representation.[163] Hirsch and Hirsch conclude with what has been forgotten in much of the recent literature: that the goal of labor law should be facilitating employee choice and increasing worker satisfaction, which should not be measured solely in terms of union density.[164]

Another alternative presented by Henry Drummonds proposes allowing the states themselves to determine the union organizing processes in their respective jurisdictions. Hirsch and Hirsch second this option, arguing that the states could act as laboratories for the nation by developing and testing new labor laws. The states that develop systems that enhance worker welfare will be copied,[165] and systems that are too costly to employers or provide too few benefits to workers will be displaced by more responsive systems.[166]

---

159. 45 U.S.C. §§ 151–88 (2006).

160. *IAM Charges Delta Air Lines with Election Interference*, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM) (Dec. 8, 2010), http://www.jointheiam.org/?p=810.

161. 29 U.S.C. § 158(a)(2) (2006).

162. Hirsch & Hirsch, *supra* note 4, at 1152. For another argument that this is a viable model to increase worker voice, see Befort, *supra* note 1, at 411–15.

163. *See* Hirsch & Hirsch, *supra* note 4, at 1165.

164. *Id.*

165. *Id.* at 1171.

166. *Id.*

### *E. Evaluation*

The main problem with many of these reforms is that in attempting to "even the playing field" between unions and employers, these proposals unfairly prejudice the employer. They fail to recognize that privileging unions' knowledge and access to employees may sometimes be at the expense of employee choice itself—the very choice that Section 7 of the NLRA and these alternatives are designed to protect. Reforms should not sacrifice employee choice to either union or employer pressure, but rather should protect employee privacy and the decision to "engage in" or "refrain from" union activity and support. For this reason, the reforms presented in Part V of this Note are a superior alternative for amending the NLRA.

## IV. THE CANADIAN EXPERIENCE

Canada's is perhaps the closest analog to the United States' labor relations system. The neighboring countries developed in parallel and now possess similar geographic and economic circumstances.[167] Moreover, their industrial relations systems are similar, and many of the same "international" trade unions operate in both countries.[168] Canadian unionization rates, however, have remained relatively constant while American unionization rates have decreased.[169]

Unlike the single federal system under the NLRA in the United States, Canada's federal and ten provincial systems each employ different procedures for certifying labor unions that can be divided into two different basic systems: a card-based majority certification regime and a secret ballot vote certification regime.[170] Four provinces (Manitoba, New Brunswick, Quebec, and Prince Edward Island) as well as the federal jurisdiction allow labor unions to be certified by virtue of a card majority that varies in each jurisdiction:

---

167. *See, e.g.*, GOULD, AGENDA, *supra* note 3, at 205; Weiler, *Promises*, *supra* note 43, at 1819.

168. GOULD, AGENDA, *supra* note 3, at 205; Weiler, *Promises*, *supra* note 43, at 1819.

169. *See* Marcel Boyer, *Union Certification: Developing a Level Playing Field for Labour Relations in Quebec*, MONTREAL ECON. INST. RES. PAPERS 9 (2009), *available at* http://www.iedm.org/files/september09_en_0.pdf (explaining that while the American union density rate has decreased from 22.3% in 1980 to 11.6% in 2007, the Canadian union density rate remained fairly constant, at 34.0% in 1980, and falling to 24.9% in 2007). For a year-by-year analysis of unionization rates in the two countries, see GOULD, AGENDA, *supra* note 3, at 210–11.

170. *See* Boyer, *supra* note 169, at 14; Doorey, *supra* note 85, at 81–83.

more than fifty percent in the federal jurisdiction, Quebec, and Prince Edward Island; more than sixty percent in New Brunswick; and sixty-five percent in Manitoba. Even when these thresholds are not met, however, unions may be certified through secret ballot elections, which establish lower thresholds for the percentage of employees who must submit cards, but require a majority of the employees who cast ballots in the secret ballot election to vote in favor of union representation.[171]

The Canadian card check system is designed to provide an extra level of protection to employees: employees are not only required to sign an authorization card, but must also apply for union membership and pay a nominal fee[172] to emphasize the consequences (financial and otherwise) of their signatures.[173] At the same time, Canadian law does not protect employee choice completely—union authorization cards are generally irrevocable, allowing some unions to become certified without the requisite employee support. Even where "a sizeable segment of current employees" have petitioned the Board that they have since changed their minds and no longer desire representation, this may be insufficient to prevent the union's certification.[174]

The six remaining provinces (Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, and Saskatchewan), which cover approximately seventy-five percent of the Canadian workforce,[175] all require that a union be elected by a majority of secret ballot votes to become certified. Each jurisdiction requires a different percentage of signed authorization cards in order to trigger the mandatory secret ballot election: forty percent in Newfoundland and Labrador, Nova Scotia, and Ontario; forty-five percent in British Columbia and Saskatchewan; and fifty percent in Alberta.[176]

171. *See* Canada Labour Code, R.S.C., c. L-2 §§ 29–31 (1985); Manitoba Labour Relations Act, C.C.S.M., c. L-10 § 40(1) (2004); New Brunswick Industrial Relations Act, R.S.N.B. c. I-4 § 14 (1973); Prince Edward Island Labour Act, R.S.P.E.I., c. L-1 § 13 (1988); Quebec Labour Code, R.S.Q., c. C-27 § 28 (1985).

172. Doorey, *supra* note 85, at 82. For example, in Alberta, the fee is C$2.00.

173. *See* PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 37 (1980) [hereinafter WEILER, RECONCILABLE].

174. Murphy, *supra* note 81, at 83 (citation omitted).

175. Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998*, 57 INDUS. & LAB. REL. REV. 493, 494 (2004).

176. *See* Boyer, *supra* note 169, at 14; Doorey, *supra* note 85, at 81–83.

### *A. British Columbia*

Although these two different basic systems can be analyzed separately, British Columbia's experience serves as a laboratory for the debate between the card check process and secret ballot elections. From its inception, British Columbia allowed unions to become certified through card check procedures. In 1984, the British Columbia legislature introduced a new election requirement,[177] mandating that it be conducted within ten days of the cards' submission.[178] In 1993,[179] the legislature repealed the election requirement and re-implemented the original card check procedure.[180]

Chris Riddell studied over 6,500 private sector union elections in British Columbia between 1978 and 1998 to analyze the effect of the two methods on union certification success.[181] When unions were required to be elected by a majority of the secret ballots cast between 1984 and 1992, union success declined by nineteen percent, which Riddell attributed entirely to the requirement for secret ballot elections.[182] Moreover, Riddell found that management opposition (as measured by unfair labor practice complaints) was twice as effective under the election regime, yet ultimately accounted for only a quarter of the decline in the unionization rate during this period.[183]

### *B. Quickie Elections*

Five Canadian provinces provide for *quickie* elections that must occur within five to ten days.[184] Legal scholars have praised these elections:

---

177. *See* British Columbia, Legislative Assembly, Hansard (May 16, 1984), at 4803 (recording the vote results for Bill 28, Labour Code Amendment Act).

178. *See* Riddell, *supra* note 175, at 495.

179. *See* British Columbia, Legislative Assembly, Hansard No. 6 (Nov. 12, 1992), at 4009 (recording the vote results for Bill 84, Labour Relations Code).

180. *See* Riddell, *supra* note 175, at 494–95.

181. *Id.* at 494. Thus, Riddell's study includes six years of data under a card check regime, followed by nine years of data under a mandatory secret ballot regime, followed by another six years of card check data.

182. *Id.* at 509.

183. *Id.*

184. In Newfoundland and Labrador and Nova Scotia, a secret ballot election must occur within five days of the submission of union authorization cards. Newfoundland and Labrador Labour Relations Act, R.S.N.L., c. L-1 § 47 (1990) ("Where a vote is taken it shall be taken no more than 5 days, excluding holidays and weekends after receipt by the board of the application for certification."); Nova Scotia Trade Union Act, R.S.N.S., c. 475 § 25 (1989) ("Normally the Board shall conduct the vote [. . .] no more than five working days

> If a union wins, not only does it get certification from the board, but it does so upon a footing which carries more credibility and legitimacy than automatic certification on the basis of cards . . . . If the union does lose an election conducted at a time of its own choosing, then its support among employees was sufficiently soft that it is far better off not getting involved in a fruitless, first-contract negotiation struggle.[185]

*Quickie* elections have been viewed as an effective compromise: "[i]n this highly compressed interval, it is nearly impossible for the employer to mount a sustained offensive aimed at turning employee sentiments around through intimidation and discrimination."[186] Although *quickie* elections do not entirely eliminate employer resistance to unionization, they have been effective in both reducing illegal conduct and its impact on union support to levels much lower than those existing during representation elections in the United States.[187]

### *C. Conclusions from the Canadian Experience*

Of the four largest provinces in Canada (Alberta, British Columbia, Ontario, and Quebec), Quebec has the most lenient labor organization rules: it alone allows for union certification without a secret ballot election, and its minimum threshold of signed union authorization cards to require an election is lower than those in other provinces (thirty-five percent in Quebec, forty percent in Ontario and Alberta, and forty-five percent in British Columbia).[188] Moreover, union authorization cards or petitions are valid for the longest period of time in Quebec (signatures are valid for twelve months in Quebec, six months in Ontario, and ninety days in Brit-

---

after receipt by the Board of the application and three working days after the Board's notices are received by the employer."). In Ontario, the election must be held within five to eight days. Ontario Labour Relations Act, R.S.O., c. 1 § 8 (1995) ("[W]ithin five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed with the Board."). In Manitoba, the election must be held within seven days. Manitoba Labour Relations Act, C.C.S.M., c. L-10 § 48(3) (2004) ("[W]ithin seven days after the day on which the application for certification is filed with the board."). In British Columbia, the election must be held within ten days. British Columbia Labour Relations Code, R.S.B.C., c. 244 § 24 (1996) ("[W]ithin 10 days from the date the board receives the application for certification.").

185. WEILER, RECONCILABLE, *supra* note 173, at 45.

186. WEILER, *Promises*, *supra* note 43, at 1812.

187. *See* Terry Thomason, *The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario*, 47 INDUS. & LAB. REL. REV. 207, 224 (1994).

188. Boyer, *supra* note 169, at 16.

ish Columbia and Alberta).[189] Despite Quebec's pro-labor legislation, however, in a 2006 opinion poll commissioned by the Conseil du patronat du Québec, seventy-nine percent of all Quebecers and eighty-three percent of unionized workers supported requiring a secret ballot election for unions to become certified.[190]

The most ringing endorsement of the secret ballot came during Ontario's legislative debates, concluding in Ontario's adoption of a mandatory secret ballot regime. During the hearings, a legislator read aloud from a Guelph worker's letter:

> I have been manipulated by unions and businesses alike during 20 working years . . . . If you truly want workers to exert control over their own destinies, give them the right to a secret ballot vote whenever possible. By making this a mandatory provision, you will force businesses and unions alike to ensure that the workers receive all of the information necessary to make an informed decision. This provision will . . . advance the interests of working people, . . . make the workplace more open, responsive and democratic and . . . eliminate threats to these worthy goals.[191]

The letter concluded by requesting that legislators defer to the ability of "working people to make rational decisions when provided with complete, factual information."[192]

## V. PROPOSED REFORM

Lessons emerge from experiences under both the Canadian and American models. First, the reliability of union authorization cards must be questioned, as evidenced by the prevalence with which employees join the same union multiple times and sign union authorization cards for rival unions.[193] Second, Section 7 of the NLRA provides a balanced approach toward employee choice: to join or not join a union. Just as union advocates argue that a secret ballot is necessary in the decertification context to ensure that

189. *Id.*

190. *Id.* at 7.

191. Ontario, Bill 76 Debate (An Act to Amend the Labour Relations Act) (Nov. 5, 1992), at 1050 (statement of Mrs. Elizabeth Whitmer), *available at* http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=1992-11-05&Parl=35&Sess=2&locale=fr.

192. *Id.*

193. *See* Boyer, *supra* note 169, at 17.

employee wishes are protected,[194] it is important to maintain the same attitude towards free choice for or against unionization in the certification process.

The prevalence of unfair labor practices committed by both unions and management, including coercion and distortions, requires that the NLRB become more involved in the union certification process. To ensure that both unions and employers are able to express their views and thus provide employees with the tools necessary to make an informed decision, Congress should amend the NLRA to replace the current organizing regime with a new process under which (1) unions must file a notice with the NLRB prior to commencing a fixed sixty-day card-signing campaign, with unions subject to harsh penalties if they commence organizing efforts prior to this time; (2) a standardized union authorization card, effective for that limited sixty-day duration, must be submitted with one month's union dues from each employee as an indication of support for unionization; and (3) the NLRB establishes a verification or revocation process for these cards.

### *A. First Prong: Sixty-Day Organizing Period*

The first prong of this reform—requiring unions to file with the NLRB prior to commencing a sixty-day card-signing campaign and subjecting unions to harsh penalties for "jumping the gun"—is designed to achieve a number of goals. First, mandatory disclosures ensure that unions cannot take advantage of an employer's ignorance to garner employee support through misstatements. Although it has been argued that "the employer does not need the same opportunity that the union needs in order to speak about representation of the workforce [because it] has had ample opportunity to demonstrate [its] ability to represent the employees' interests,"[195] it is important that an employer be made aware that its workplace is being unionized so that it may correct union misstatements. This open approach is also important to establish the union's legitimacy at the bargaining table and to start building a relationship between the union and employer. This disclosure

194. ASSOC. OF SENIOR HUMAN RES. EXEC., MISTITLED "EMPLOYEE FREE CHOICE ACT" WOULD STRIP WORKERS OF SECRET BALLOT IN UNION REPRESENTATION DECISIONS 2 (2004) (quoting Joint Brief of the AFL-CIO *et al.* at 13, in Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc. (N.L.R.B. May 18, 1998) (Nos. 7-CA-36846, 7-CA-37016, 20-CA-326596), *available at* http://www.hrpolicy.org/memoranda/2004/04-10_Employee_Free_Choice_Act_PB.pdf.

195. Murphy, *supra* note 81, at 92.

would similarly alert anti-union employees, so that they could communicate with their fellow employees and feel that their voice was heard during the unionizing process. These workers will be bound by the terms contained in any collective bargaining agreement if the union is successful and should have the opportunity to express their opinions during the union campaign.[196]

Limiting the duration of the union campaign to sixty days would also have positive economic and social effects. The period would begin after the Board sends an employer notice of the campaign and bargaining unit issues are settled. In order to ensure that technical or administrative issues are resolved quickly, the Board could establish a seven-day guideline: the main issue would be whether the union's proposed bargaining unit is an appropriate unit. Within this timeline, the employer would also be required to submit its Excelsior list of employees' names and addresses for Board and union use. When these two matters are settled, the sixty-day period would begin, and both the employer and the union could begin communicating their views to employees.

Likewise, this limited period would be beneficial because unions would not waste resources on workplaces where employees have little desire for unionization. Workers who are subjected to union pressure to sign authorization cards would know that the end is in sight. This reform is not a novel idea; labor advocate Paul Weiler previously suggested that the NLRB "mandat[e] a limited period in which the cards will be accepted as a demonstration of employee support for the union. Little cause would then exist for doubting the reliability of the cards as indicators of present employee desires."[197] Penalties against unions who violated either of these rules would help ensure that the rules are followed so that employers, unions, and employees could have confidence in NLRB oversight and the unionizing process itself.[198]

A possible critique of this approach is that unions would file scattershot petitions at multiple workplaces in a mad rush to organize, even where they do not intend to organize these workplaces and the workers have expressed no desire for union representation. This is unlikely to occur for three reasons: first, unions have limited resources, and it would be inefficient to expend the time and money to file a petition for a workforce that the union had no serious intent to organize. Second, the one-year bar imposed on

196. *See* EPSTEIN, *supra* note 8, at 43.

197. Murphy, *supra* note 81, at 90.

198. For example, penalties might include dismissal of the union's organizing demand and a bar on submitting any new demand at that workplace for six months.

unsuccessful attempts to organize (discussed in prong three) would deter this kind of conduct, as it could prevent any union from organizing a workforce that later desired union representation. Finally, unions would want to avoid a record of failure with the Board and the public.[199]

In conjunction with these reforms, however, union authorization cards should not be the final indicia of employee desire. The lack of transparency in ensuring that employees are allowed to withdraw or revoke their authorization cards[200] does little to assure employers or workers of the union's legitimacy. Requiring unions to return union authorization cards to employees upon request would enhance the union's legitimacy in the eyes of both employees and the employer. This reform is also not novel: Paul Weiler also argued for a "return date" for union cards, recognizing that employees may be "sweet talked by a smooth union organizer" or caught up in sudden peer-pressure and not have the time to reflect on the decision they are making.[201] Thus, "a case can be made for giving the employees some legal opportunity for second thoughts, so that they are satisfied and their true feelings about collective bargaining have been expressed."[202] The Board could explain these revocation rights in a letter or posting to employees when the sixty-day campaign commences.

### *B. Second Prong: Standard Union Authorization Card*

The second prong of this reform, establishing a standard union authorization card and requiring that employees sign this card and pay a set fee, would be an important step in ensuring that the card authorization process reflects employee preference. In the US Congressional Hearings concerning the Employee Free Choice Act, a number of employees revealed that they did not understand the significance of the card (or petition) that they signed, believing that they were only signing a card to receive more information

199. It might ultimately also strengthen unions by encouraging greater coordination so that they do not pursue competing target employers and industries. This might lead to both stronger individual unions (via possible mergers into a larger and stronger labor organization) and a particular union's individual focus on specific targeted industries. Thus, the United Auto Workers might be expected to direct their resources toward auto manufacturers and parts suppliers. The United Auto Workers' success in organizing would provide it greater density in that industry and the resulting leverage to obtain improved wages, benefits and working conditions. This would lead to further success in organizing and a far stronger overall labor movement.

200. *See* NLRB, OUTLINE, *supra* note 27, at 42.

201. WEILER, RECONCILABLE, *supra* note 173, at 43.

202. *Id.*

about the union.[203] This problem of ambiguous or misleading authorization cards could be remedied "quite simply by creating a uniform authorization card. A carefully-worded model card developed and issued by the Board would eliminate any questions concerning the possible misinterpretation of the cards."[204]

Moreover, the Canadian requirement that employees pay a fee in addition to signing an authorization card should be grafted onto the American model. The fee would impress upon employees the importance of their decision,[205] reinforce the idea that unionizing has costs as well as benefits, and discourage employees from signing multiple union authorization cards. Although Canadian jurisdictions only require that a nominal fee of between C$1.00 and C$5.00 be paid,[206] the fee under the US model should be sufficient to impress upon workers the importance of their decision, such as one month's union dues at the rate the union would charge for the duration of any first labor agreement. The NLRB's uniform authorization card could also be designed to explain any initiation fees, monthly dues, and other union fees to ensure that this information is accurately presented to employees in making their decisions. The Board's process and enforcement of dues as written on the card would thus ensure that the union accurately represents its cost structure and that all employees in a bargaining unit are given the same information.

The requirement that union authorization cards expire after the sixty-day organizing drive would similarly reflect employees' current desires. If authorization cards last indefinitely, employees may be unaware that their cards could serve as evidence of a workforce's desire for union representation despite having been signed months ago and forgotten. Moreover, expiration ensures that union authorization cards indicate current union support, a policy that underlies the National Labor Relations Act certification process. Finally, the automatic expiration of union authorization cards may be the best way of reflecting employee expectations—it is unlikely that workers expect these cards to remain effective after a union organizing drive fails.

---

203. *See, e.g.*, *Strengthening America's Middle Class*, *supra* note 46, at 5–6 (prepared statement of Karen M. Mayhew).

204. Murphy, *supra* note 81, at 94.

205. *See* WEILER, RECONCILABLE, *supra* note 173, at 42.

206. *Id.* Weiler argues that these amounts "should be raised to make it a more realistic device in securing the purpose for which the payment was designed." *Id.*

### *C. Third Prong: Card Revocation*

The final prong of the reform requires that the National Labor Relations Board validate these union authorization cards. If a majority of the workers in the appropriate bargaining unit submitted a union authorization card and paid one month's dues to the Board during the sixty-day organizing period, the union will be "conditionally certified." The Board would then send a letter to employees (using the Excelsior list previously provided by the Board by the employer excluding any terminations provided by the employer to the NLRB during the sixty-day period) to give them the opportunity to exercise in private their right to opt for no union representation. This not only encourages the employer to provide an accurate Excelsior list, but also forces the employer to notify the Board (which would then advise the union) of any terminations during the card signing period, and—with the threat of an unfair labor practice charge looming—thereby discourages an employer from discharging employees for their union activity. The NLRB's letter would inform employees that they have twenty days to vote against the union's pending certification via computer to the NLRB's secure website for that specific election, via telephone at an NLRB telephone number designated for that election, or by returning a signed, pre-posted card (included in the letter to the employee) to the NLRB stating that the employee does not wish to be represented by the union. To prevent fraud, an employee who chooses to vote against union representation online or by telephone will be required to enter a unique personal "pin number" or "code" contained in the NLRB's letter.

Employees will be given twenty days from the date the letter is mailed to register their preference to not be represented by the union; employees who desire union representation need not act. At the end of the twenty-day period (including time for postmarked ballots) the NLRB will assess how many "no" votes it received. If the no votes equal fifty percent or more of the bargaining unit (as measured by then-current employees from the Excelsior list), the conditional certification is revoked. If less than fifty percent of the bargaining unit votes against representation, the union is certified.

To ensure that these employee votes are private and not the result of undue union or employer influence, it must be an unfair labor practice for an employer or union to inquire about or review an employee's response to the revocation letter sent by the NLRB. Section 8(a)(1) of the NLRA currently would be interpreted to do

so regarding employers, but Section 8(b)(1)(A) of the NLRA should be amended to clarify that it is also an unfair labor practice for a union to inquire about or review an employee's actions regarding the revocation letter or card.[207]

Thus, it would be illegal for a union to host an event where it invited employees to show their support by turning in their sealed and unopened NLRB letters, preventing the participating employees from voting "no." Employees would be assured of secrecy vis-à-vis the union, despite the sixty-day open card check procedure, because an employee who signed his card due to union pressure would have the opportunity to, in effect, change his vote back to "no" in secret later. Similarly, an employer would not be allowed to ask employees whether they had voted against the union's conditional certification. This would prevent unfair labor practices that coerce employees and prevent them from exercising a true choice about "engaging in" or "refraining from" their rights protected under Section 7 of the NLRA.[208]

This reform is superior to that adopted in the NLRB's now-reversed decision in *Dana Corp.*,[209] which gave employees a forty-five-day period after notice of a successful card check drive to file a decertification petition. In *Dana Corp.*, the Board repeatedly stressed that the primary purpose of the NLRA is to ensure employee free choice, which is best protected by the privacy of secret ballot elections:

> [U]nlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice. The election is held under the watchful eye of a neutral Board agent and observers from the parties. A card signing has none of these protections.

207. See *President Riverboat Casinos of Missouri, Inc.*, 329 N.L.R.B. 77 (1999) for the proposition that it is currently an unfair labor practice for an employer to interrogate or inquire about an employee's vote. *See also* MCGUINESS, *supra* note 23, at 168 ("Interrogation or polling of employees about their union sentiments is often held to constitute coercion and election interference."). Because unions are permitted to ask employees to sign cards and how they will vote, Section 8(b)(1)(A) likely would not otherwise cover this behavior and would, therefore, need to be amended.

208. 29 U.S.C. § 157 (2006).

209. 351 N.L.R.B. 434 (2007). In this case, the Board held that no recognition bar would be imposed following a card check based recognition unless employees were notified of their right to file a decertification petition and filed such a petition within forty-five days. *Id.* at 434. This decision was reversed by the NLRB in *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (2011), which returned to the NLRB's previous standard that does not allow a union's representative status to be challenged for a reasonable time after an employer voluntarily recognizes a union based on a showing of interest. The reform proposed in this Note remains superior to the Board's traditional approach and that in its *Dana Corp.* decision, as it makes employee choice paramount.

> There is good reason to question whether card signings in such circumstances accurately reflect employees' true choice concerning union representation. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).[210]

Yet, the Board's own decision is subject to the very same criticism, as requiring employees to file a decertification petition does not ensure employee privacy. Rather, the petition process itself can involve pressure, coercion, and a lack of privacy vis-à-vis coworkers' decisions to the same extent as the card check process. The majority attempts to address this critique:

> The dissent faults our analysis here, observing that signing an "employee antiunion petition" is also a public action subject to group pressures. But there is an obvious difference. Such a petition, where it secures the necessary support, obtains a secret-ballot election. Union cards, on the other hand, obtain[ed] under Keller Plastics voluntary recognition shielded by an *immediate* election bar.[211]

But this argument fails to recognize that employee pressure is likely to discourage employees from initiating or signing a decertification petition in the first place, even if they knew that their ultimate vote for a union's decertification would be private. Thus, whether signing an authorization card at the outset or later signing a decertification petition, an employee would be required to participate in a public act and forced disclosure. In this regard, *Dana Corp.* neither ensures the privacy of the secret ballot nor employee free choice.

Notably, the Board's further condemnation of card check in *Dana Corp.* results from the fact that:

> [t]here are no guarantees of comparable safeguards in the voluntary recognition process. While the provision of an orderly process for determining whether a fair election has been conducted may result in substantial delay in a small minority

210. *Dana Corp.*, 351 N.L.R.B. at 438–39 (internal quotation marks omitted).

211. *Id.* at 439 n.19 (emphasis in original).

> of Board elections, it remains preferable to determine employee free choice by a method that can assure greater regularity, fairness, and certainty in the final outcome.[212]

The reforms to the card check process provided by *Dana Corp.* are not only addressed in the reform proposed in this Note, but they are improved upon. Like the Board's methodology in *Dana Corp.*, this Note's approach allows unions to be certified pending employees' later reflection on whether they prefer union representation. Unlike the process imposed by the Board, however, this Note ensures a prompt final determination and that employees have the ultimate protection of privacy in determining whether they wish to act and seek a union's decertification—after the initial card signing, no public action is required. And unlike the process to obtain a secret ballot vote in *Dana Corp.*, employees are guaranteed the right to register their opinion secretly in the privacy of their own homes, where they will not feel the pressure of coworkers, union organizers, or the employer.[213] As this consideration was paramount to the Republican-appointed labor board that decided *Dana Corp.*, the reforms proposed here should be a conceptually appealing compromise between the views of those who believe the NLRA must be modified and others who prefer the status quo.

A union will not be certified if it either fails to obtain a majority of signed cards during the sixty-day organizing period or if a majority of employees vote against its certification during the twenty-day revocation period.[214] To prevent the workplace from being disrupted repeatedly, an election bar would be added to Section 9(c)(3) of the NLRA to prevent that or any other union from attempting to organize the same workforce again during a one-year period.[215]

## CONCLUSION

This reform is superior to the current model for a number of reasons. First, it ensures that employees are informed. By filing with the Board prior to beginning a certification campaign, the

212. *Id.* at 439–40.

213. *See* Becker, *supra* note 85, at 566 (arguing that voting in the workplace environment unfairly prejudices a union).

214. In these cases, the dues that employees submitted with their signed initial union authorization cards would be refunded to those individuals.

215. Under current law, an election bar prevents the Board from conducting an election in any bargaining unit or subunit within which a valid election has been held in the preceding twelve months. *See* 29 U.S.C. § 159(c)(3) (2006); MCGUINESS, *supra* note 23, at 55.

amended Act would ensure that both the union and the employer have the opportunity to speak and be heard, allowing employees to make an informed decision. Employers would be guaranteed knowledge of the union's organization efforts, allowing them to consult attorneys earlier in the process to learn about their rights and obligations. This would provide several benefits. First, it might actually reduce the incidence of unfair labor practices, because employers would have time to ascertain the law before acting. Second, it would permit employers to present their views contemporaneously with the union. Third, employees who do not desire union representation would be able to express their opinions to their fellow workers, ensuring that these employee sentiments are allowed to develop and have a means of expression. Fourth, the limited period during which unions can attempt to organize a workplace ensures that employees are not subject to the pressures of a campaign for longer than the sixty-day period. Yet, all union advantages are not lost under this system: unions would still choose the time to launch their organizing efforts.[216]

Most important, however, is the establishment of conditional union certification. This two-stage approach corrects the "asymmetry" inherent in the unionization process, as the second stage establishes a union default. The onus is on employees who do not desire union representation to act. Whereas the current system increases the likelihood of an employer victory by bringing the uncommitted to the polls (who are more likely to vote to preserve the status quo), here the status quo would be unionization. Moreover, employees who signed cards due to pressure, coercion, or misrepresentation (or who refrained from signing cards due to fear of employer retaliation) would be able to register their vote in private, knowing that at the end of the day their voice was heard. The employee's ultimate private vote, not the initial card check, results in the union's certification. The process merely reverses the burden so that employees are required to vote against certification where a majority had previously indicated their support of unionization.

These reforms taken together would increase union legitimacy. Although "merely changing the selection mechanism would do nothing to make unions and employers more willing to deal with each other,"[217] a holistic reform to the union organizing process would ensure that unions, employees, and employers are fully informed at every stage of the relationship. Unions that have

216. *See* EPSTEIN, *supra* note 8, at 42.

217. Specter & Nguyen, *supra* note 91, at 331.

majority employee support will still be certified, and will have an advantage at the bargaining table with the employer—the employer will be assured of the union's legitimacy, and will be more inclined to bargain fairly with the union rather than stonewalling union demands. Finally, employees, whose Section 7 rights this proposal is designed to protect, will be assured that they are informed, and that their voices are heard.