

# University of Missouri School of Law Scholarship Repository

---

Faculty Publications

---

2012

## Before Wisconsin and Ohio: The Quiet Success of Card-Check Organizing in the Public Sector

Rafael Gely

*University of Missouri School of Law*, [gelyr@missouri.edu](mailto:gelyr@missouri.edu)

Timothy D. Chandler

*Louisiana State University*

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

 Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Timothy D. Chandler & Rafael Gely, "Before Wisconsin and Ohio": The Quiet Success of Card-Check Organizing in the Public Sector, 16 *Emp. Rts. & Emp. Pol'y J.* 629 (2012)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

# “BEFORE WISCONSIN AND OHIO”: THE QUIET SUCCESS OF CARD-CHECK ORGANIZING IN THE PUBLIC SECTOR

BY  
TIMOTHY D. CHANDLER\* & RAFAEL GELY\*\*

I. INTRODUCTION .....	629
II. CARD CHECK AUTHORIZATION AND UNION REPRESENTATION.....	631
Table 1: Summary of State’s Card-Check Laws (2000-2009) .....	634
III. THE ANTECEDENTS OF CARD-CHECK LEGISLATION .....	635
A. <i>Overview</i> .....	635
B. <i>Empirical Model</i> .....	638
Table 2: Comparing States with and without Card-Check Legislation, (2000-2009) .....	640
C. <i>Results</i> .....	642
Table 3: Logistic Regression Analyses Determinants of State Card-Check Laws, (2000-2009) .....	643
IV. THE EFFECTS OF CARD-CHECK LEGISLATION.....	645
A. <i>Card-Check Laws and Unionization Rates</i> .....	645
B. <i>Card-Check Laws and Union Membership Trends</i> .....	646
Figure 1: Public-Sector Union Membership Growth, (2000-2011).....	647
Table 4: Union Membership (Density) Under Various Labor Law Regimes, (2000-2011) .....	649
Figure 2: Average Annual Membership Growth.....	651
V. LESSONS LEARNED .....	651
APPENDIX A. VARIABLE DEFINITIONS.....	654

## I. INTRODUCTION

Before the recent, well-publicized controversies surrounding

---

\* Catherine M. Rucks Professor of Management, Louisiana State University.  
\*\* James E. Campbell Missouri Endowed Professor of Law, University of Missouri School of Law.

restrictive public-sector labor legislation in Wisconsin and Ohio,<sup>1</sup> unions in several other states achieved important legislative changes that facilitated public-sector union organizing. Without much fanfare or significant public controversy, between 2000 and 2009 a total of eight states enacted card-check legislation for public-sector employees.<sup>2</sup> Card-check laws, which have been unsuccessfully pursued by private-sector unions, mandate that employers recognize the union as the representative of employees on the basis of signed authorization cards without reliance on a representation election.<sup>3</sup> Card check authorization benefits unions because it short circuits the usual organizing process by eliminating the union's need to further prove majority support in a secret ballot election.<sup>4</sup> But by doing so, it imposes costs on employers by restricting their efforts to erode union support through aggressive campaign tactics.<sup>5</sup> Our paper seeks to better understand the development of these laws and their effects, and in that way, identify lessons for future public-sector labor law and unionization.

In particular, we examine two basic issues. First, we explore the conditions which may have facilitated the enactment of card-check legislation in the eight states that, since 2000, passed such laws. We propose that laws mandating card check authorization represent a natural progression in the legal regimes of states which have histories of more progressive labor relations practices. The introduction of card-check legislation in states with highly unionized public-sector workforces, and where unions win a high percentage of certification elections, should not evoke much controversy among labor relations participants because relatively little is at stake. If the public-sector

---

1. See, e.g., Michael Rose, *Labor Should Link NLRB Controversies to Economic Issues*, *AFL-CIO Speakers Say*, 230 Daily Lab. Rep. (BNA) A16 (Nov. 30, 2011).

2. As discussed below, *infra* note 22, the 2007 New Hampshire's card-check law was repealed in 2011. Oklahoma also repealed its law in 2011. *Infra* note 19.

3. At the federal level, the legislative effort is reflected in the Employee Free Choice Act (EFCA). For the most recent version of the EFCA, see H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). Similar bills had been introduced in three previous congressional sessions. H.R. 3619, 108th Cong. (2003); S. 1925, 108th Cong. (2003); H.R. 1696, 109th Cong. (2005); S. 842, 109th Cong. (2005); H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007).

4. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001); Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 330 (2008); Jennifer M. Dillard & Joel F. Dillard, *Fetishizing the Electoral Process: The NLRB's Problematic Embrace of Electoral Formalism* (Aug. 24, 2007) (unpublished manuscript), available at <<http://ssrn.com/abstract=1009636>>.

5. See Steven Greenhouse, *Employers Sharply Criticize Shift in Unionizing Method to Cards from Elections*, N.Y. TIMES, Mar. 11, 2006, at A9 (describing employers' opposition to the card check process).

labor relations environment mitigates against aggressive employer opposition to public-sector union organizing, which consequently eases union organizing efforts and leads to higher union win rates in certification elections, then public-sector employers may not object strongly to changes in the organizing process that “benefit” unions. Moreover, although such procedural changes may produce only limited benefits to unions in what is already a relatively favorable public-sector labor relations environment, they still benefit and, thus, can be expected to promote card-check legislation. Accordingly, we aver that the enactment of card-check laws depends on the presence of various factors, namely the presence of pro-labor constituents and characteristics of the political environment, which create favorable conditions for unions to pursue their legislative agendas.

Second, we briefly discuss the effects of card-check laws on the level of organizing activity for the eight states that passed the legislation.<sup>6</sup> Clearly, a card-check statute which mandates union recognition on the basis of authorization card signatures should affect unionization activity among public employees. One would expect unions to gravitate towards “organizing technologies” which facilitate the organizing process. Thus, the enactment of a card-check statute should prompt public-sector unions to shift their organizing strategies towards the use of card checks rather than elections. One would expect also there to be workplaces where employees might prefer union representation, but where such representation has not been achieved. If so, the adoption of a card-check statute should enable unions to not only organize new workplaces, but also new types of workplaces. Consequently, card-check statutes should facilitate union organizing and, thus, result in higher levels of union membership.

## II. CARD CHECK AUTHORIZATION AND UNION REPRESENTATION

For many, the use of card check authorization represents a departure from the normal method for achieving union recognition, namely the certification election process. The origins of this perspective date back to the passage of the National Labor Relations Act in 1935 (NLRA).<sup>7</sup> Interestingly, however, in the years

---

6. This section is based on the findings reported in Timothy Chandler & Rafael Gely, *Card-Check Laws and Public-Sector Union Membership in the States*, 36 LAB. STUD. J. 445 (2011).

7. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2008)).

immediately following the enactment of the NLRA, the National Labor Relations Board frequently certified unions on the basis of card-check agreements.<sup>8</sup> During these early years, Board supervised elections were typically used only when the employer questioned the status of the union as the majority bargaining representative, while the card-check process was the default recognition method.<sup>9</sup> In the mid-1940s, the Board began showing a preference for elections as the primary means of union certification.<sup>10</sup> This trend was further solidified when Congress amended the NLRA in 1947 and began requiring the Board to conduct a representation election whenever “a question of representation” existed.<sup>11</sup> Secret ballot elections became the dominant method used by the Board to certify a union as the exclusive bargaining representative of a group of employees.<sup>12</sup>

The NLRA’s approach to card-check organizing was largely incorporated by states’ legislatures when they began to enact collective bargaining laws for public employees.<sup>13</sup> The majority of state level collective bargaining laws provide union certification after an election conducted by the appropriate state agency, but either explicitly or implicitly allows public employers to voluntarily recognize the union.<sup>14</sup> For example, New Mexico’s statute allows a public employer and a labor organization “with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit” to establish “an alternative procedure for determining majority status.”<sup>15</sup>

A few states, however, deviate from the NLRA approach. Since 1958, New York’s public-sector bargaining law has mandated the corresponding administrative agency to “ascertain the public employees’ choice of employee organization as their representative . . . on the basis of dues deduction authorization or

8. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 857 (2005).

9. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 734-36 (John Higgins, Jr., ed., 5th ed. 2006).

10. Brudney, *supra* note 8, at 858.

11. Among the amendments to the NLRA Congress adopted in 1947 was section 9(c)(1)(b) providing that “[i]f the Board finds upon the records of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.” 29 U.S.C. § 159(c)(1)(b) (2008).

12. See Dillard & Dillard, *supra* note 4, at 16-18.

13. See Rafael Gely & Timothy Chandler, *Organizing Principles: The Significance of Card-Check Laws*, 30 ST. LOUIS U. PUB. L. REV. 475, 484 (2012).

14. See *id.*

15. N.M. STAT. ANN. § 10-7E-14C (2012).

other evidence, or if necessary, by conducting an election.”<sup>16</sup> More recently, various other states have enacted laws mandating card check recognition for employees covered under their public-sector collective bargaining laws. Unlike the traditional NLRA approach, covered employers are required to recognize a union as the collective bargaining representative of employees on the basis of a showing of majority support through authorization cards.

Between 2000 and 2009, eight states enacted public-sector labor legislation mandating union recognition based on union authorization card signatures. Table 1 reports the states with card-check legislation, the year it was passed, and the scope of coverage the law provides. Despite some differences in coverage and the slightly different legislative language, these card-check laws promote union organizing by allowing unions to achieve recognition without a certification election, and do so in ways that provide limited opportunities for employer interference.

---

16. N.Y. CIV. SERV. LAW § 207.2 (McKinney 2010). The New York Public Employee Relations Board’s rules implementing the statute provide that where only one labor organization is seeking to represent the employees,

[t]he employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director’s decision recommending certification without an election.

*Id.* § 201.9(g)(1). For a detailed account of the history and development of New York’s card-check legislation, see William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 ALBANY L. REV. 93, 133 (2010).

Table 1: Summary of State's Card-Check Laws, (2000-2009)

State	Year	Scope
North Dakota <sup>17</sup>	May 2001	Applicable only to teachers.
California <sup>18</sup>	January 2002	Applicable to employees of any public agency, including fire departments.
Illinois <sup>19</sup>	August 2003	The Illinois Public Labor Relations Act applies to employees of the state, political subdivisions of the state, and units of local government. The Illinois Educational Labor Relations Act applies to employees of school districts, public community colleges, state colleges and universities, and any state agency whose major function is providing educational services.
California	January 2004	Applicable to employees in K-12 education, secondary education, court interpreters, and other trial employees.
Oklahoma <sup>20</sup>	April 2004	Applicable to municipal employees.

Table continues on next page.

---

17. N.D. CENT. CODE §§ 15.1-16-07 to 15.1-16-13 (2003 & Supp. 2007).

18. The California law states:

A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit.

CAL. GOV'T CODE § 3507.1(c) (West 2010). Similar provisions are also applicable to the state's K-12 employees, *id.* §§ 3544.1, 3544, 3544.7; secondary educational employees, *id.* §§ 3574, 3577; court interpreters, *id.* § 71823(a)(5)(A); and other trial employees, *id.* § 71636.3.

19. "The Board shall designate an exclusive representative for purposes of collective bargaining when the representative demonstrates a showing of majority interest by employees in the unit." 5 ILL. COMP. STAT. 315/9(a-5) (2010). A similar provision covers educational employees. 115 ILL. COMP. STAT. 5/7(b) (2010).

20. OKLA. STAT. ANN. tit. 11, § 51-211(B) (West 2010) (repealed 2011).

New Jersey <sup>21</sup>	December 2004	Applicable to most public employees.
Massachusetts <sup>22</sup>	December 2007	Applicable to most public employees.
New Hampshire <sup>23</sup>	September 2007	Applicable to most public employees.
Oregon <sup>24</sup>	September 2007	Applicable to most public employees.

### III. THE ANTECEDENTS OF CARD-CHECK LEGISLATION

#### A. Overview

To the extent that card check authorization benefits unions and imposes costs on employers, one would expect that card check

---

21. The New Jersey law states:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes, by the majority of the employees voting in an election conducted by the commission as authorized by this act or, at the option of the representative in a case in which the commission finds that only one representative is seeking to be the majority representative, by a majority of the employees in the unit signing authorization cards indicating their preference for that representative, shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment . . . .

N.J. STAT. ANN. § 34:13A-5.3 (West 2012).

22. “Notwithstanding any other provision of this section, the commission shall certify and the public employer shall recognize as the exclusive representative for the purpose of collective bargaining of all the employees in the bargaining unit an employee organization which has received a written majority authorization . . . .” MASS. GEN. LAWS ch. 150E, § 4 (2012).

23. Notwithstanding any other provision of this section, the board shall certify and the public employer shall recognize as the exclusive representative an employee organization which has received a written majority authorization for the purpose of collective bargaining of all the employees in the bargaining unit.” N.H. REV. STAT. ANN. § 273-A:10, IX (Supp. 2007). (repealed 2011).

24. The Oregon law states:

Notwithstanding subsection (1) of this section, when an employee, group of employees or labor organization acting on behalf of the employees files a petition alleging that a majority of employees in a unit appropriate for the purpose of collective bargaining wish to be represented by a labor organization for that purpose, the board shall investigate the petition. If the board finds that a majority of the employees in a unit appropriate for bargaining have signed authorizations designating the labor organization specified in the petition as the employees’ bargaining representative and that no other labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the board may not conduct an election but shall certify the labor organization as the exclusive representative unless a petition for a representation election is filed as provided in subsection (3) of this section.

OR. REV. STAT. § 243.682(2)(a) (2011).



authorization would be most controversial in contexts where opposition to union organizing is stronger and union organizing outcomes are less certain. Such is the case in the U.S. private sector, where there is vehement employer opposition to unions, and union election win rates have often fluctuated around 50 percent.<sup>25</sup> This proposition may explain why unions have failed to achieve labor law reform at the federal level, where labor advocates have faced insurmountable resistance to a variety of legislative initiatives which would facilitate the process through which employees organize collectively. These include proposals seeking to expedite representation elections<sup>26</sup> and strengthen the rights of organizers,<sup>27</sup> and more recently mandating recognition via card checks.<sup>28</sup>

This proposition also helps explain why card-check legislation had gained more traction in the public sector. Recent events in Ohio and Wisconsin, notwithstanding, labor relations in the public sector have been less contentious than the experiences in the private sector. A key difference between public-sector employees and private-sector employees is that public-sector workers are simultaneously employees and “bosses,” because as citizens they can cast votes that help determine the makeup of local and state governments and thereby determine the officials who will be their supervisors. In short, public employees can influence who sits across the bargaining table.<sup>29</sup>

The political nature of public employment suggests that, relative to their private-sector counterparts, labor advocates in the public sector are likely to be more successful when seeking legislation that will facilitate their ability to circumvent the nonunion default rule

---

25. Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 330-31 (1998) (noting that the violations of section 8(a)(3) – the type of unfair labor practice charge most likely to be filed in the course of an organizing campaign – per election held, increased nearly four times between 1969 and 1997); see also JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, *DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS* (2007) (finding a steep rise in the 2000s relative to the last half of the 1990s in illegal firings of pro-union workers). Although the upward trend in employers' violations of the NLRA is well documented, the reasons behind the increase are less clear. Some commentators argue the increase could be attributed to the relatively weak penalties provided under the NLRA. See Morris, *supra*, at 318.

26. See Brudney, *supra* note 8.

27. See COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, *FACT FINDING REPORT 46-47* (1994), available at <[http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace)>.

28. See JON O. SHIMABUKURO, CONG. RESEARCH SERV., RS21887, *THE EMPLOYEE FREE CHOICE ACT 1 & n.1* (2011), available at <[http://assets.opencrs.com/rpts/RS21887\\_20110112.pdf](http://assets.opencrs.com/rpts/RS21887_20110112.pdf)>.

29. See Clyde Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1160 (1973).

that characterizes public-sector labor law. If the public-sector labor relations environment often mitigates against aggressive employer opposition to public-sector union organizing, which consequently eases union organizing efforts and leads to higher union win rates in certification elections, then public-sector employers may not object strongly, if at all, to changes in the organizing process that “benefit” unions.

This framework helps explain not only the difference one observes between the public and private sectors, but also the differences one observes in the favorableness of public-sector labor policies among states. In the context of card-check legislation, the model helps us explore factors likely to be associated with the enactment of such laws.

For our analyses, we view labor law as a political outcome that emerges from conflicts between labor and management that are “conducted within an ideological, partisan, and economic environment.”<sup>30</sup> Accordingly, a logical hypothesis for why card-check legislation is proposed and/or enacted in some states and not others is that such laws simply reflect the environmental reality surrounding public-sector labor relations in that state. Namely, unions are able to organize public-sector employee groups with little opposition from employers and with a high expectation of success. Without strong employer opposition to union organizing, and in an environment with a high percentage of union victories, card check authorization removes unnecessary steps in the organizing process. Both sides benefit from the reduced cost compared to the union certification election process. The passage of card-check legislation, rather than representing a significant victory for unions over unreceptive employers, simply reflects an incremental change in an already liberal labor relations environment.

A testable implication of this hypothesis is that card-check legislation is more likely to be proposed, and ultimately enacted, in states that already have more favorable public sector labor laws and a more highly unionized public-sector workforce. Because the policy process unfolds over time, prior policies affect present policy decisions. Accordingly, one would expect card-check legislation to occur in states which already have collective bargaining legislation.

---

30. See David Jacobs & Marc Dixon, *The Politics of Labor-Management Relations: Detecting the Conditions that Affect Changes in Right-to-Work Laws*, 53 SOC. PROBS. 118, 119 (2006).

The existence of a state law granting public-sector workers the right to unionize and engage in collective bargaining establishes legitimacy for card-check legislation and may eliminate barriers that public officials could otherwise confront. In short, incremental change from an existing collective bargaining law to card check authorization is much more likely than passing protective labor legislation where none exists.

### *B. Empirical Model*

Our focus is on factors that may affect the passage of a card-check law in a state legislature. If we can identify important differences between states that passed card-check laws and those that did not, it might be possible to better predict other future changes in public-sector labor law. For this purpose, we identify three sets of variables as likely to be associated with the passage of public-sector card-check legislation – the political environment; constituency disposition; and contextual demand variables that may increase the likelihood citizens will support pro-labor legislation for public employees.

*Political Environment:* Conservative political parties, namely Republicans, tend to support policies that benefit affluent constituents. Consequently, they are more inclined to oppose union favorable policies. In contrast, Democrats are more likely to support union favorable policies. We expect that card-check laws are more likely to be adopted in states where Democrats control the state's legislative and executive branches.

*Constituency Disposition:* Labor's organizational strength should affect its ability to organize politically and affect policy outcomes. The percent of the state's public-sector workforce that is unionized is used to represent the organizational strength of unions. Prior research has established a strong link between union strength and the presence of comprehensive public-sector labor legislation.<sup>31</sup> Consequently, the effect of public-sector unionization on card-check legislation reflects not only the political strength of unions, but also the favorableness of a state's public-sector labor legislation.

While higher levels of public-sector unionization should be associated with the passage of card-check legislation, its effect may

---

31. See Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. ECON. LIT. 41 (1986).

vary by the receptiveness of state legislators, which in turn may be tempered by the strength of opposition towards unions by other constituents who may oppose unions (e.g., employer organizations). To capture the presence of such opposition we identify those states that have enacted a right-to-work law (RTW). We use RTW to test whether the effects of public-sector union power on the passage of card-check legislation vary between right-to-work and non-right-to-work states. We expect the effects of union power on card check passage to be significantly diminished in right-to-work states due to the presence of ideological opposition to unions.

*Contextual Demand:* Enactment of card-check legislation is likely to be related to other characteristics of the state. For example, high unemployment reduces union collective bargaining power, but may lead unions to increase their political efforts, especially since public sympathy and support for workers increase during economic recessions.<sup>32</sup> The average unemployment rate, therefore, is expected to be positively associated with the passage of card-check legislation. Racial divisions are thought to interfere with labor's ability to wage successful concerted action,<sup>33</sup> because they undermine the solidarity required to establish support for policies that help the less affluent. Thus, states with high percentages of minority employment should be less likely to pass legislation that favors labor unions. Prior research also suggests that because "redistributive legislation is more likely when mean prosperity is most substantial... [a]ffluent states therefore should be more likely to enact provisions that help labor."<sup>34</sup> We use per capita income in the state as our measure of affluence. Finally, public-sector employees have a stake in legislation that affects them, even in the absence of union representation. To account for their political influence in state policy making, we include a variable measuring the percentage of total employment comprised of government employment. The variables used in the analyses are described in Appendix A.

In Table 2 we show the means and standard deviations for each variable separately for states which passed card-check legislation after 2000 and those which did not. All of the analyses use data from 2000 to 2009.

---

32. See Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS 3* (George Strauss et al. eds., 1991).

33. See WILLIAM H. FORM, *SEGMENTED LABOR, FRACTURED POLITICS* (1995).

34. See Jacobs & Dixon, *supra* note 29, at 124.

Table 2: Comparing States with and without Card-Check Legislation, (2000-2009)<sup>35</sup>

Variable Name	Passed Card-Check Legislation (N=80)	No Card-Check Legislation (N=420)	t-value
PERCENT PUBUNION	44.6	31.1	6.5***
RTW	.22	.48	-4.2***
DEMOCRATIC CONTROL	.34	.15	3.9***
PERCENT GOVERNMENT	14.2	15.4	-3.4***
PERCENT MINORITY	6.8	11.7	-3.3***
PCI	33286.2	29418	6.9***
STATE POPULATION	9074.4	5274.1	4.9***
UNEMPLOYMENT	5.2	5.2	.11

Table 2 reveals some interesting findings. States which passed card-check legislation for some group(s) of public employees during 2000-2009 differed significantly from states that did not for all variables, except average annual unemployment. They had significantly higher rates of public-sector union density, were significantly more likely to have democratic control of both the executive and legislative branches of government, were more affluent, and, not surprisingly, were significantly less likely to be right-to-work states. They were also significantly more populous states, but had significantly lower percentages of minority employment and government employment.

The results suggest that the level of constituent support for unions, (as represented by the presence of RTW legislation and by our measure of public-sector union density), and the ability of the

---

35. Significance: \* $<.10$  \*\* $<.05$  \*\*\* $<.01$  (all tests are two-tail). Data for RTW were obtained from *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND. (2012), <<http://www.nrtw.org/rtws.htm>>. UNEMPLOYMENT data for all years can be found at <[http://www.bls.gov/schedule/archives/all\\_nr.htm#SRGUNE](http://www.bls.gov/schedule/archives/all_nr.htm#SRGUNE)>. Data for DEMOCRATIC CONTROL, PCI, and PERCENT GOVERNMENT were obtained from the *Statistical Abstracts of the United States* issued by the U.S. Census Bureau. Data for total employment, and black employment (which were used to calculate PERCENT GOVERNMENT, and PERCENT MINORITY) were obtained from the Bureau of Labor Statistics; for Arizona, Hawaii, Idaho, Iowa, Montana, New Hampshire, New Mexico, Oregon, South Dakota, Utah, Vermont, and Wyoming, data on black employment were not reported, so the percent nonwhite is used instead. Union data were obtained from Barry T. Hirsch et al., *Estimates of Union Density by State*, MONTHLY LAB. REV., July 2001, at 51, and accompanying data from *Union Density Estimates by State, 1964-2011*, <<http://unionstats.gsu.edu/MonthlyLaborReviewArticle.htm>> (last viewed Nov. 5, 2012).

public to translate such preferences into legislation, (as represented by Democratic control of the state legislative and executive branches), appear to be related to the enactment of card-check laws.

To further test our hypotheses, we employ a pooled cross-sectional regression analysis using data from 2000 through 2009. Essentially, our basic research question is: What factors are significantly associated with a state's passage of card-check legislation during the time period 2000-2009 when controlling for various other factors that may affect passage of such laws? This empirical approach enables us to assess the effects on card check adoption of various state characteristics that vary over time, because annual longitudinal adoption is captured by the pooled cross-sections. Moreover, because we use pooled cross-sectional data, our data allow card check adoption to be affected by "independent variables with the right time property."<sup>36</sup> Of course, the major drawback with this type of study is that there is very little variance in the dependent variable, making it difficult to find significant effects using pooled cross-sectional time series data. In this study, only eight states adopted card-check legislation from 2000 to 2009 (1.6 percent of the state-year observations).

Because our dependent variable, CCLAW, is dichotomous, logistic regression is used to produce the results. To accurately reflect the policy making process, for states which adopt a card-check law we code the dependent variable, CCLAW, equal to one both the year the law was passed,  $t$ , and in year  $t-1$ . By specifying the dependent variable in this manner, we are accounting for the fact that the adoption of innovative legislation is the end product of an often lengthy process in which policy proposals arrive on a government's policy agenda, alternatives are identified, and an authoritative choice is made from among those alternatives by a legislative body.<sup>37</sup> In short, new policy does not emerge from thin air; rather it occurs through a process (sometimes quite lengthy) of development, debate,

---

36. Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395, 399 (1990).

37. JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 4 (1984). The manner in which we specified the dependent variable is consistent with the experiences of the various states which the card-check laws have been enacted. For example, in every state but one (North Dakota), the bills that eventually became laws were introduced very early in the calendar year (January or February) of the year before or the same year in which the laws became effective. One would expect that the type of discussions (formal and informal) that lead to a bill being introduced begin several months before the time the bill is brought before a committee.

and authoritative decision making.

### *C. Results*

Table 3 shows the results from the logistic regression analysis. All models include variables to control for time and state population. And all models include a variable, POST CC LAW, coded as 1 for states having card-check legislation, to account for states that had laws prior to 2000 and for a change in a state's legal regime after passing a card-check law. Although it is possible that a state could pass multiple card-check laws covering different public employee groups, we expect the presence of a card-check law to decrease the likelihood of passing later card-check legislation. We begin the analyses by entering the contextual demand, political elite, and constituency disposition variables into the equation separately to see how they relate to the passage of card-check legislation when not controlling for the other factors. These results, which are shown in models 1 through 4, provide support for some of our hypotheses. As predicted, per capita income (model 1), democratic control of state government (model 2) and the percent of public-sector workers who are unionized (models 3 and 4) are positively and significantly associated with the adoption of card-check legislation. Percent minority (model 1 and 4) and post card-check law (models 1, 3 and 4) are negatively and significantly associated with the adoption of card-check legislation. Likewise, though we did not hypothesize an effect, state population is positively and significantly associated with the adoption of card-check legislation (all models).

Table 3: Logistic Regression Analyses Determinants of State Card-Check Laws, (2000-2009)<sup>38</sup>

<b>Explanatory Variable</b>	<b>Model 1 Coeff. (S.E.)</b>	<b>Model 2 Coeff. (S.E.)</b>	<b>Model 3 Coeff. (S.E.)</b>	<b>Model 4 Coeff. (S.E.)</b>
<i>Constituency Disposition Variables</i>				
PERCENT PUBUNION			.05* (.03)	.07* (.04)
RTW			.39 (1.01)	.52 (1.52)
PERCENT PUBUNION * RTW				.18* (.10)
<i>Political Elite Variable</i>				
DEMOCRATIC CONTROL		1.50*** (.52)		2.44*** (.68)
<i>Contextual Demand Variables</i>				
UNEMPLOYMENT	.06 (.20)			-.18 (.24)
PCI	.02E-2*** (.006E-2)			.15E-3** (.06E-3)
PERCENT GOVERNMENT	-.05 (.10)			-.14 (.16)
PERCENT MINORITY	-.12* (.06)			.19** (.08)
POST CC LAW	-2.61** (1.21)	-1.25 (.87)	-2.14** (.99)	-2.63** (1.15)
STATE POPULATION	.10E-3** (.03E-3)	.10E-3*** (.03E-3)	.10E-3** (.03E-3)	.09E-3** (.04E-3)
YEAR	-.08 (.10)	-.07 (.09)	-.04 (.09)	-.11 (.12)
LIKELIHOOD RATIO	31.96***	21.43***	22.29***	48.53***

In general, the contextual demand variables had mixed performance at predicting the adoption of card-check legislation, and

38. Significance: \* $<.10$  \*\* $<.05$  \*\*\* $<.01$  (all tests are two-tail).



we failed to find much evidence that the presence of right-to-work legislation significantly reduces the likelihood that a state would adopt card-check legislation.<sup>39</sup>

When all the variables enter the analysis together, along with the interaction term between the percent public-sector unionized and right-to-work, no changes appear in the significant results found in the other models. However, interesting findings emerge with the effects of the constituency disposition variables on the passage of card-check legislation. To see whether the strong positive relationship between public sector unionization and the passage of card-check legislation is dampened by anti-union forces in a state, we included the interaction term between the percent of unionized public employees and the presence of a right-to-work law (PERCENT PUBUNION\*RTW) in model 4. For this analysis, PERCENT PUBUNION is centered to aid in the interpretation of the results.<sup>40</sup> The results show that public-sector unionization has significant, positive effects on the passage of card-check legislation in non-right-to-work states ( $b_{\text{Percent Pubunion}}$ ). The model 4 results also show that the effects of right-to-work legislation on the passage of card-check legislation are positive but not significant at the mean level of percent public unionized for the sample ( $b_{\text{RTW}}$ ). Moreover, the significant, negative coefficient for the interaction term PERCENT PUBUNION\*RTW suggests that public sector unionization does not significantly affect the passage of card-check legislation in right-to-work states. In fact, by reverse coding RTW so that RTW=1 for non-RTW states and then re-running the model 4 analyses, we find that public sector unionization does not significantly affect the passage of card-check legislation in right-to-work states ( $b_{\text{Percent Pubunion}} = -.11; p > .2$ ).<sup>41</sup> In short, a strong anti-labor environment in a state, as evidenced by a right-to-

---

39. The latter finding may be due in part to high multicollinearity between right-to-work legislation (our measure of anti-union ideology in the state) and the percent of public-sector workers who are unionized ( $r = -.73$ ); in fact, when the right-to-work variable is entered into the equation separately without the percentage of public-sector workers who are unionized, it has significant, negative effects on the passage of card-check legislation ( $p < .10$ ). These results are available upon request from the authors.

40. Centering is done by subtracting the mean value of a variable from each observation to obtain a mean of 0 for the centered variable. Doing so aids in the interpretation of regression coefficients and is thought to reduce multicollinearity among predictor variables. Kristopher Preacher, *A Primer on Interaction Effects in Multiple Linear Regression* (2003), <<http://www.quantpsy.org/interact/interactions.htm>>. After PERCENT PUBUNION is "centered" the coefficient for RTW shows the difference between right-to-work and non-right-to-work states at the mean percent public sector unionized for the sample.

41. These results are available upon request from the authors.

work law, appears to negate the otherwise positive effects of public-sector unionization on the passage of card-check legislation.

#### IV. THE EFFECTS OF CARD-CHECK LEGISLATION

Having explored the antecedents of public-sector card-check legislation, we now briefly describe the relationship between the presence of card-check laws and increases in union membership. We then re-examine data from an empirical study we recently conducted on this same issue.<sup>42</sup>

##### A. Card-Check Laws and Unionization Rates

According to Professor Benjamin Sachs, labor policy represents a legislative choice between having a union or a nonunion default rule.<sup>43</sup> The NLRA and public sector collective bargaining laws in the states establish the default status of workplaces as being nonunion.<sup>44</sup> To facilitate union organizing under this legal regime, labor advocates have focused on legislative changes that might make it easier for workers to circumvent the nonunion default rule.<sup>45</sup> Card-check legislation accomplishes this by minimizing managements' involvement in the union organizing process, making it easier for employees to depart from the nonunion default rule.

Because card check organizing should make organizing easier, a card-check law should lead public sector unions to organize using card checks rather than elections. Moreover, a card-check statute might enable unions to not only organize new workplaces, but also new types of workplaces. In short, card-check legislation should lead to more union organizing and, consequently, higher levels of union membership.

Indeed, prior research involving private-sector organizing outcomes in Canada and the United States confirm the facilitating effects of card check use on union organizing.<sup>46</sup> Although the contexts examined in these studies differ from the U.S. public sector, where

---

42. See Chandler & Gely, *supra* note 6.

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

44. *Id.* at 659, 664.

45. See *id.* at 673, 693-94 (explaining why these changes would help circumvent the default rule).

46. See E. Eaton & Kriesky, *supra* note 4; Chris Riddell, *Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1988*, 57 INDUS. & LAB. REL. REV. 493 (2004).

union success rates in representation elections tend to be quite high, recent research demonstrates the positive effects of card-check organizing on public-sector union membership.<sup>47</sup>

### *B. Card-Check Laws and Union Membership Trends*

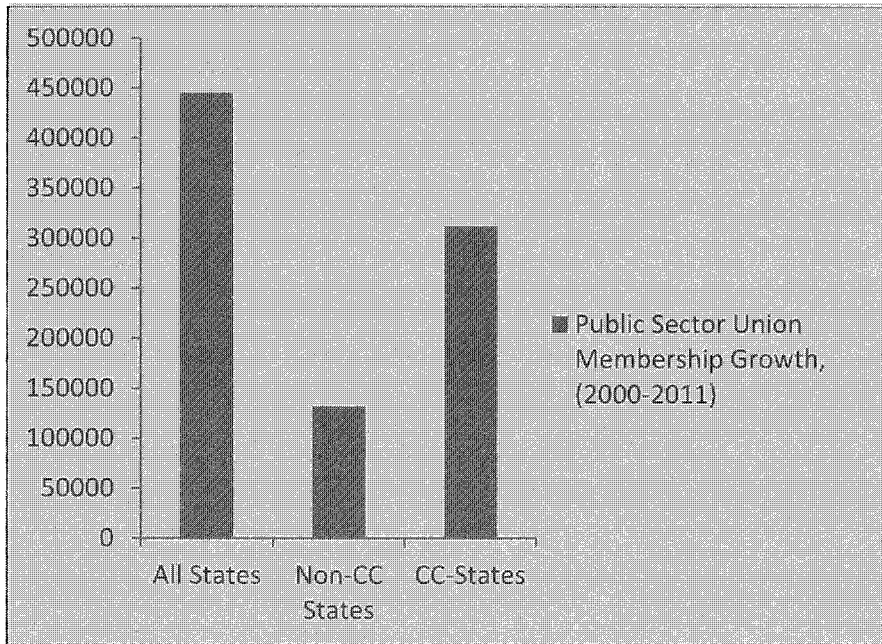
Public-sector union membership in the U.S. increased by nearly 445,000 members from 7.1 million in 2000 to over 7.5 million in 2011. As shown in Figure 1, most of this increase (70 percent) was concentrated in the eight states which passed card-check legislation (CC States). While it is true that these eight states had two times the average government employment than the other forty-two states,<sup>48</sup> the increase in union membership was also reflected in increases in union density. From 2000 to 2011, average union density for the eight states which passed card-check legislation increased from 42.4 percent in 2000 to 46.5 percent in 2011. In contrast, average union density for the other forty-two states was virtually unchanged, 31.9 percent in 2000 and 31.3 percent in 2011.

---

47. Union success rates in public sector representation elections are near 85 percent, or at least were in 1991 and 1992, see, for example, KATE BRONFENBRENNER & TOM JURAVICH, *UNION ORGANIZING IN THE PUBLIC SECTOR: AN ANALYSIS OF STATE AND LOCAL ELECTIONS* 11 (1995). For evidence of the positive effects of card-check legislation, see Chandler and Gely, *supra* note 6.

48. From 2000-2009 average government employment in the states that did not pass card-check legislation after 2000 was approximately 335,000 compared to nearly 703,000 for the eight states that passed a card-check law.

Figure 1: Public-Sector Union Membership Growth, (2000-2011)



To provide a more nuanced examination of the impact of passing card-check legislation on union membership and density, we compare the eight states that passed card-check laws after 2000 to the forty-two states that did not. Within these broad categories, all states were further sorted based on the overall favorableness of the state's public sector labor legislation. The bargaining laws are categorized as either comprehensive, indicating that bargaining rights are granted to nearly all occupations, or narrow, indicating that there are no bargaining rights for some occupations, or as no law, indicating that the state has no bargaining legislation providing unionization and collective bargaining rights to public-sector employees (this category also includes two states that explicitly prohibit collective bargaining).<sup>49</sup> Table 4 shows average union membership and density for groups of states having different legal regimes governing public-sector employees for years 2000 to 2011, as well as average annual union membership (density), average annual change in union membership (density) and the numbers of states included in each category.

A number of interesting comparisons are possible in Table 4. Examining within category changes over time, one finds generally positive trends in union membership under all labor law regimes, except for states

49. JOHN W. BUDD, *LABOR RELATIONS: STRIKING A BALANCE* 137-38 (3d ed. 2010). The occupational groups in question are police and fire, state employees, public school teachers, and municipal employees.

that did not pass card-check legislation and also had narrow bargaining laws (column 5). However, the increases in union membership translated to increases in union density only for those states that had comprehensive bargaining laws, regardless of whether the state passed card-check legislation. The six states with comprehensive bargaining laws which passed card-check legislation had an average annual increase in union density of .45 (4275.6 union members per year), compared to a more modest increase in union density of .05 (666.6 union members per year) for states with comprehensive bargaining legislation that did not pass card-check legislation. Likewise, despite declining union density for states with narrow labor laws, the two states that passed card-check legislation experienced an average annual decline of only -.004 compared to a decrease in average union density of -.23 for the thirteen states that did not pass card-check legislation. Indeed union membership actually increased by an average of 196.2 members per year for the two states with card-check laws and narrow bargaining legislation compared to an average decrease in union membership of -504.4 members per year for the narrow law states.

Table 4: Union Membership (Density) Under Various Labor Law Regimes, (2000-2011)

Year (New Card- Check Laws)	States Which Passed Card-Check Law		States Which Didn't Pass Card-Check Law		
	Comprehensive Bargaining Law	Narrow Labor Law	Comprehensive Bargaining Law	Narrow Labor Law	No Protection
2000	363524.8 (51.03)	27341 (16.6)	153866.1 (42.95)	104561.2 (26.35)	46536 (15.41)
2001 (ND)	370163.0 (50.9)	31580.5 (19.0)	150557.5 (41.8)	105767.62 (25.9)	50706 (16.1)
2002 (CA)	402288.5 (53.9)	39402 (22.4)	148874.6 (41.7)	105514.1 (25.4)	52083.3 (16.2)
2003 (IL)	392096.8 (52.1)	31667 (21.45)	155183.1 (41.4)	105024.3 (25.0)	46516.8 (14.8)
2004 (NJ, OK)	388237.2 (51.8)	29826.5 (18.8)	153864.8 (40.65)	102534.4 (24.48)	50176.9 (15.37)
2005	395063 (53.9)	28201 (18.1)	159763.4 (41.8)	104355.3 (23.7)	48520.1 (15.3)
2006	388362.7 (53.2)	31658 (18.0)	158574 (42.6)	103659.1 (23.8)	50244.7 (15.9)
2007 (MA, NH, OR)	400252.8 (52.2)	36282.5 (18.4)	163092.2 (43.2)	104462.4 (23.5)	49903.1 (14.8)
2008	438027.5 (56.4)	33270 (17.1)	167247.9 (42.54)	101584.8 (23.58)	50582.7 (15.15)
2009	4344020.33 (56.8)	30950 (17.1)	169475.4 (44.2)	103608.7 (24.0)	53140.6 (15.4)
2010	422387 (53.8)	24445 (15.3)	163597.4 (43.4)	100288.1 (23.8)	50067.6 (14.2)
2011	414832 (56.5)	29695 (16.5)	161865.6 (43.55)	98505.1 (23.58)	52208.1 (15.25)

Table continues on next page.

Average All Years	400771.3 (53.5)	31193.2 (18.2)	158830.2 (42.5)	103322.3 (24.4)	50057.2 (15.3)
Average Annual Change	4664.3 (.49)	214 (-.004)	727.2 (.05)	-550.3 (-25)	515.6 (-.01)
Number of States	6	2	20	13	9

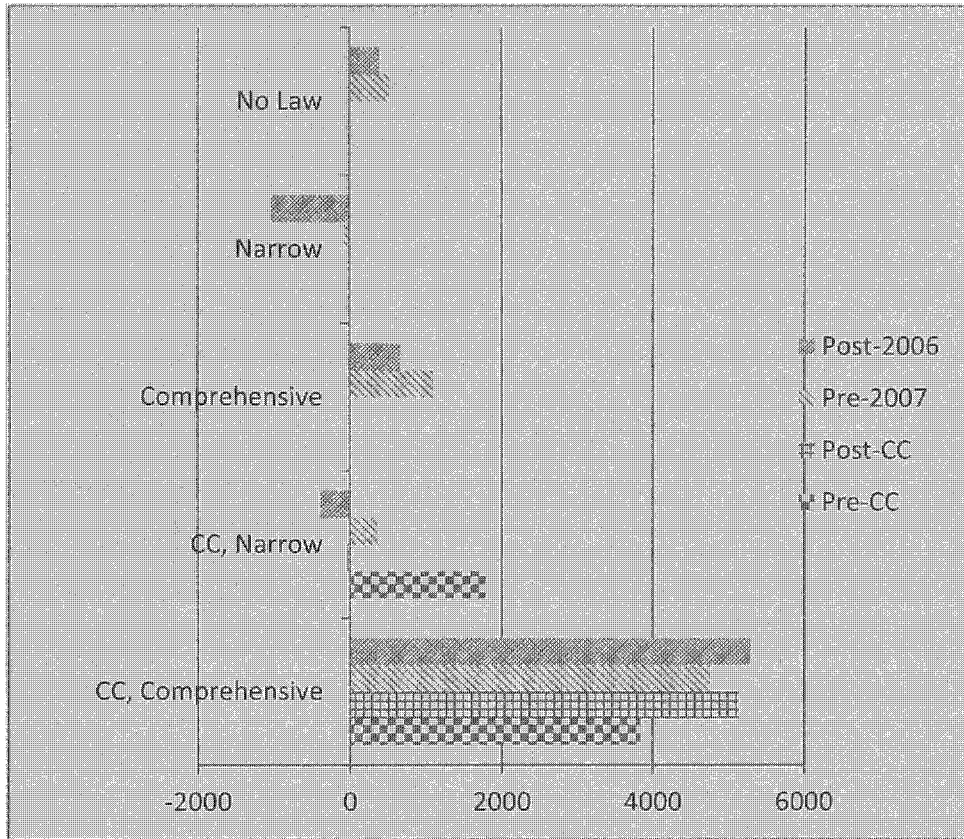
What is not reflected in Table 4 is whether changes in union membership (density) in card check states can be linked to the passage of card-check legislation. Figure 2 compares average annual membership growth in card check states with changes occurring under other labor law regimes. For states which passed card-check laws, we show average membership increases pre- and post-passage of card-check legislation. For all state groupings we also show average annual membership growth for years 2000-2006 and years 2007-2011. The latter time period is especially noteworthy because by 2007, all eight states had passed their card-check laws.

As seen in Figure 2, average annual union membership increased from approximately 3800 union members pre-card check passage to just over 5000 post-card check passage for states which had comprehensive bargaining laws. This represents an increase of 34 percent in average annual membership growth. In contrast, the two states with narrow laws which passed card-check legislation showed almost no change in average annual membership after passage of their card-check laws (-34 members annually).<sup>50</sup> Comparing trends in annual membership growth from 2000-2006 to 2007-2011 is perhaps more revealing. Average annual membership growth was observed under several of the legal regimes after 2006. But compared to membership growth for 2000-2006, post-2006 growth was larger only for comprehensive law states that passed card-check legislation. Likewise, although narrow law states which passed card-check legislation experienced average annual membership losses after 2006, the losses were much greater in narrow law states that did not pass card-check laws.

---

50. This comparison suffers from a very small sample size for the pre-card check category (n=3); moreover, all of the observations are from just one state, Oklahoma.

Figure 2: Average Annual Membership Growth



## V. LESSONS LEARNED

Perhaps appropriately so, the anti-union policies recently implemented in states like Ohio and Wisconsin has received much attention recently. The policies adopted in these states represent a serious threat to the ability of their public-sector employees to organize and, to the extent similar policies might be adopted in other states, a threat to the entire union movement among public employees. However, it is important to know that shortly before these most recent developments, a fairly progressive trend was developing across a non-trivial minority of states. By 2008 a total of twelve states had enacted card-check legislation covering at least some of their public sector employees with eight of those occurring just between 2001 and 2008. This article analyzes two specific aspects of such legislation: its antecedents and its effects.

Regarding the antecedents of card-check laws, along with other contextual factors, our results indicate that a strong public-sector union presence (as represented by our measure of public-sector union density), and



their ability to translate policy preferences into legislation, (as represented by the Democratic control of the state legislative and executive branches), are important factors in influencing whether card-check laws are enacted. Yet the positive effects of public-sector unionization on the passage of card-check legislation are limited to states not having right-to-work legislation, which we include as a proxy for opposition to organized labor in a state.

Our findings have implications for the long standing debate about the extent to which unions should pursue their objectives via political and electoral activities. For over a century, U.S. labor leaders have struggled with whether unions should seek to achieve their objectives at the workplace through collective bargaining, or more broadly, through political activities. Our results appear to support the importance of political action for public-sector unions. The enactment of favorable legislation seems to be dependent not only on electoral political activity, but also on having a broad base of support as reflected in higher union density rates and in more liberal ideological preferences across the relevant electorate that might translate into support for unions. While spending resources on union organizing in order to expand their base of support might be a necessary condition for the enactment of favorable legislation, unions may need to do more. A broad base of support as reflected in higher union density rates and an otherwise favorable political environment are both important to achieving legislative victories. As the recent events in Wisconsin and other states illustrate, elections matter, and having success in electing politicians who are likely to support worker-friendly policies, matter even more.

Our results also indicate that unions should consider expanding their outreach efforts beyond the purely electioneering type of activities. Operating in the context of an ideologically friendly electorate facilitates the enactment of legislation favorable to the interests of employees. While state ideology is difficult and perhaps impossible to change in the short run, on certain issues in which the public might be evenly divided, massive efforts to educate the public might prove beneficial to labor's long term interests.<sup>51</sup> Unions might be able to alter community perceptions by establishing operations in a community and engaging in community building activities even in the absence of immediate organizing activity.<sup>52</sup> Allocating resources to alter individuals' perceptions about unions and to allow communities to experience the benefits of collective action, might be necessary to pursue broader union goals.

Regarding the effects of card-check laws, our results confirm expectations regarding the potential impact of card-check legislation on union organizing. Concern about employer hostility as an impediment to

---

51. See David Reynolds, *Coalitions Politics: Insurgent Union Political Action Builds Ties Between Labor and the Community*, LAB. STUD. J., Sept. 1, 1999, at 54.

52. See Bruce Nissen, *Alternative Strategic Directions for the U.S. Labor Movement: Recent Scholarship*, 28 LAB. STUD. J., Mar. 1, 2003, at 133, 141-43, 144-48.

union organizing has been traditionally associated with private-sector employers. The widely held view has long been that public-sector employees face a much more favorable organizing environment. Public employers' budgets are not dependent on profits and public-sector unions have political clout that is especially meaningful to vote-maximizing politicians. Accordingly, public employers might avoid aggressive opposition to unions during union organizing and collective bargaining. Yet even in an environment where big gains to unions from card-check laws might not be expected, we find that such laws facilitate union membership growth.

Although our analyses predate recent attacks on public sector unions that occurred in states like Ohio and Wisconsin, these events highlight the significance of our findings. The aggressive manner which governors Scott Walker in Wisconsin and John Kasich in Ohio pursued anti-labor legislation may prove to be a defining moment for the public-sector labor movement, marking a new willingness by public officials to oppose organizing efforts by their employees. If so, card check organizing should become a more preferred method of organizing for public employee unions as they seek to avoid aggressively anti-union employers during organizing campaigns. However, if public employers and the public become more hostile toward public-sector unions, it also seems unlikely that other states will adopt card-check legislation, leaving public employees in a situation similar to that of their private-sector counterparts.

## APPENDIX A. VARIABLE DEFINITIONS

<b>Dependent Variable</b>	<i>Definition</i>
CCLAW	A dummy variable equal to one if state passed card-check legislation covering some portion of the public sector workforce in year $t$ or $t+1$ .
<b>Independent Variables</b>	
DEMOCRATIC CONTROL	A dummy variable equal to one if democrats control both houses of the state legislature and the state's governor is a Democrat.
PERCENT PUBUNION	Percent of state's public sector labor force that is unionized.
PCI	Per capita income (personal income/population, measured in 2000 dollars).
PERCENT MINORITY	Percent of labor force that is minority.
PERCENT GOVERNMENT	Percent of total employment in government.
POST CC LAW	A dummy variable equal to one if a state has a card-check law.
STATE POPULATION	State population in thousands.
RTW	A dummy variable equal to one if the state has a right-to-work law.
UNEMPLOYMENT	The average annual unemployment rate.
TIME	A variable equal to year <sub><math>t</math></sub> -1989.