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Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism

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INTRODUCTION

In the last few years, the labor movement has undertaken a behind-the-scenes revolution in organizing strategy. In an effort to stem the decay of union density and strength, labor has adopted a new and powerful method for organizing nonunion workplaces. In response, the opponents of labor have attempted to outlaw this new method. This article describes and critiques efforts by the National Labor Relations Board (NLRB or "the Board") and the U.S. Congress to address this issue and provides prescriptions for a more sensible approach to union organizing.

There are two primary methods by which employees can form a union: the first is the Board-supervised election and the second is the card-check, or voluntary recognition, method. The Board-supervised election was the overwhelmingly dominant method used by unions for decades, but a few years ago, some unions largely abandoned this method in favor of the card-check method. The success of these unions has led most unions to largely reject the slow, cumbersome, and ineffective Board processes for obtaining legal representation of the employees. This has proved an exceptionally controversial move, in no small part because it has been a very effective union strategy.

A card-check agreement is a contract between a union and an employer that provides that the employer will recognize the union as the employees' exclusive bargaining agent if a majority of employees sign cards—contracts between the union and the employee—authorizing the union to bargain for them.[2] This method, often coupled with a neutrality agreement in which the

employer agrees to refrain from campaigning against the union, has recently overtaken the Board's election method as the most widely used and successful organizing scheme.[3]

The success of the card-check method has not gone unnoticed by pro and antiunion factions within the federal government. The unusually politicized NLRB recently decided *Dana Corp*. (*Dana/Metaldyne*), a case which dramatically undermines the voluntary recognition mechanism.[4] In contrast, Congress is considering the Employee Free Choice Act (EFCA), which would not only overrule the Board's decision in *Dana/Metaldyne* but also *mandate* employer recognition of a union with a card-check showing of majority support.[5]

As we will show, both the pro and antiunion factions in the card-check debate focus their arguments on protecting employee free choice. However, underlying political motivations guide the ways in which the parties in this debate identify and seek to protect that free choice, and, as a result, they seldom acknowledge the full implications of their arguments. In this article, we describe those arguments and elucidate their implications for this vital area of labor law. Ultimately, we will show that many insights provided by the pro and antiunion arguments in the card-check debate are valid but that the problems identified by these insights cannot be solved by either an election-only or a mandatory card-check recognition scheme. Instead, those problems are deeply rooted in the employment system and must be addressed with a more thoughtful, probing analysis of the idea of employee free choice.

First, we will describe two broad categories of methods used to identify employee free choice: formalism and realism. Second, we will provide a brief history of the methods used to identify a union's majority support, describing the political tensions that shaped those methods. Third, we will discuss the current debate over representation recognition issues. In this discussion, we analyze the Board's historical and current methods for recognizing a union and critique the pro and antiunion arguments on the

voluntary recognition issue. We also use the pro and antiunion arguments to discuss the shortcomings of the current methods of union recognition. Finally, we demonstrate the systemic issues inherent in the current recognition methods and propose some potential reforms to begin to rectify these problems.

I. METHODS FOR EVALUATING FREE CHOICE

Both *Dana/Metaldyne* and the legislative attempts to alter the union election process raise similar fundamental issues regarding the nature of employee free choice. In *Dana/Metaldyne*, the Board considered whether an employer's voluntary recognition of a labor organization based upon union cards merits an immediate recognition bar, which would protect the unit from any challenge for "a reasonable period of time."[6] The Board decided that the recognition bar is not warranted; this decision undermines the card-check campaign as a method for union recognition.[7] The EFCA controversy in Congress focused on the question of whether cards or elections would better represent the will of the employees.[8]

While there are important distinctions between the questions considered by the Board and Congress,[9] they share two fundamental issues: first, how does one evaluate the effectiveness of a process in protecting free choice?[10] and second, how much protection of free choice is enough to consider the process "democratic"?[11] The second question is beyond the scope of this article, but we will refer to it occasionally to place the addressed issue in context. The first, more fundamental question is the focus of this paper. As we will show, there are a number of methods that could be used to evaluate the degree of free choice in each of the competing processes.[12] The method chosen in answer to this first question will very likely decide the outcome of the card-check controversy. However, none of the loudest participants in this controversy acknowledge the subversive and revolutionary ramifications of their arguments for the structure of labor law.[13]

The precise meaning of the secondary question—the extent of free choice required for a "democratic" process—depends upon the context. In the context of *Dana/Metaldyne*, the issue is how much free choice is required to merit a recognition bar. In the context of the congressional debate, the question is how much free choice is required to merit mandatory recognition. Because of this situational difference, a person could consistently apply the same method of evaluating free choice to both *Dana/Metaldyne* and the EFCA and arrive at a different result in each circumstance: a process could be democratic enough to merit an election bar but not democratic enough to merit mandatory recognition. Nonetheless, this secondary question cannot be addressed until there is an answer to the primary question regarding the method for identifying free choice. Sharp divisions in opinion about the secondary question, such as the one between the majority and dissent in the *Dana/Metaldyne* grant of review, are frequently a result of disagreement with regard to the primary question more than the secondary.[14] However, this primary question is seldom explicitly addressed by the Board, Congress, or any other player in this debate, and, as a result, this fundamental source of disagreement tends to be eclipsed by the rhetorical debate over the secondary question. Each side assumes that the answer to the primary question is straightforward and obvious and thus mistakenly believes that the source of disagreement is in the secondary question.[15]

Because the main conflict in the debate over union recognition methods is based on the primary question—how to identify and evaluate free choice in a process—we will now explore the various available methods of evaluating how much free choice a procedure provides. The methodologies for evaluating processes can be divided conceptually into two broad categories: formalism and realism.[16]

A. Possible Methodology: Formalism

Formalism mandates that the evaluator—in this case, the Board, the legislature, or reviewing courts—create a set of assumptions, rules, and principles by which to evaluate any given process and identify free choice. These principles are generally determined a priori; viewed as neutral, natural, or obvious; and are necessarily seen as separate from any political considerations.[17] This natural view is a necessary component of formalism because it gives the method its "legal" character.[18] These assumptions are often borrowed from a settled area of law, giving them the additional "virtue" of appearing to be neutral by way of reified analogy.[19] In addition, once this set of rules is established, the evaluator does not consider any contrary facts; indeed, the evaluator cannot acknowledge the existence of contrary facts or the neutral set of principles would become the product of the evaluator's political judgment of which facts to take into account when forming the principles. Formal methodologies often incorporate a binary logic with a strict pass/fail test and no acknowledgeable gray area.[20] Formalism also does not consider the results of the evaluated process. To the formalist, if the process is valid, then the results must be valid.[21] Any result is presumed to be "good" if it was created by a valid process.[22]

While formalism may seem, at first glance, to be a definite and objective method for determining the validity of a process, there are many different formalist methods that could be chosen, with no principled way to chose between them. These various formal methods—often drawn from other areas of law or from philosophy—can create very different results.

1. Contract Formalism

The classic formalist method for identifying free will is derived from the common law of contract. This method has origins predating the birth of modern representative democracy.[23] Under strict contract formalism, the evaluator asks only three questions to determine whether a person's choice was free: 1) did he[24] accept (sign) the contract?[25] 2) was he free from

physical duress when he signed the contract?[26] and 3) was he an adult legally capable of contracting (that is, not mentally incompetent by law)?[27] If each question is answered affirmatively then the person freely chose to enter into the agreement and is bound by all its terms, regardless of other circumstances or the content of the agreement.

Translated into the union recognition context, this contract-based formalism would provide that if an adult employee, without the threat of physical violence, signed a union card, the law would deem him or her to have chosen freely to sign the card. However, the legislature has explicitly rejected the use of contract formalism in a wide variety of other union contexts such as the statutory ban on "yellow dog" contracts.[28] The legislature has also declared in section 8 of the National Labor Relations Act (NLRA) that certain kinds of economic threats are unduly coercive of employee free choice, even when the competent employee has signed a contract.[29] Nonetheless, aspects of contract formalism are very much alive,[30] and the applicability of some variety of contract formalism in the context of union cards has been assumed by the courts for decades.[31]

2. Electoral Formalism

Another formalist method for determining the will of the employees is borrowed from the most recent incarnation of the American electoral processes.[32] Electoral formalists focus on the secret ballot aspect of American voting—one voter casts one anonymous vote.[33] Other aspects may include the existence of more than one candidate on the ballot, giving the voter a formal choice when casting a ballot (regardless of how the candidates were chosen), or the availability of some public information about each candidate for voters who may want to research their choice. Of course, the formalist will probably not evaluate the facts or opinions expressed in that information; the mere existence of information is sufficient. This formalist method assumes that the American electoral process provides an ideal representation of the will of the voters and that

those who employ it seek to create an analogous process when determining majority status.[34]

3. Formalism: Boundless Possibilities

It is important to note that these two familiar formal methods—contract formalism and electoral formalism—have no special logical or natural significance. The appearance that these methods have a special validity is historically contingent; an infinite variety of formal methods of equal logical validity is possible. For example, one can imagine a form of "anarchist" formalism, in which a number of far stricter tests could apply than those of contract and electoral formalism. One possible formulation would contain only one question: when a person makes a decision, will anyone punish that individual if he or she breaks the promise or changes his or her mind? If so, the individual is not free under anarchist formalism.[35] In a sense, this radically libertarian formulation of free will is the opposite of contract formalism, because contract formalism is designed to ensure predictability by restricting future actions based upon prior "choices," while anarchist formalism insists that the moment of free choice is the moment of action itself, and not a moment sooner. Under this formulation, any attempt to limit action by legally constructing a false prior choice destroys freedom. Both methods of analysis are types of formalism based on a set of "neutral" or apolitical assumptions.

Another potential type of formalism could be declaratory formalism—based on the electoral process as it existed for much of the history of this nation—in which the choice is declared orally and publicly.[36] This kind of formalism, like contract formalism, views public declarations as more reliable and less susceptible to fraud than secret balloting. It encourages voters to act in the public interest and prevents voters from acting only in their own narrow self interest. A free choice would be identified by the fact that it was orally declared openly and publicly, and records of the choice

would be open for inspection by any member of the public (unlike contracts, which are private).

It is not our intention to claim that contractual, electoral, anarchist, declaratory, or any other formalism is better or worse than other methodologies. The purpose is to understand the range of methods for addressing questions about free will and to recognize that none of these methods is, in fact, apolitical or prepolitical because political or policy-based considerations will necessarily factor into the decision of which method is most appropriate. Our society has not adopted a single method for resolving questions of free will; on the contrary, among the various areas of law, the notion of free will is an incoherent hodgepodge of methodologies. Obviously, contract law is dominated by contract formalism, while contract formalism has little or no relevance to electoral law.[37] In addition, there are numerous kinds of contracts that the courts have simply declared illegal, functionally limiting the role of contract formalism.[38]

As a result, it is apparent that there is nothing "natural" about any variety of formalism. If any particular kind of formalism was in fact a priori superior, there would be no reason to adopt that philosophy only partially, but instead it would be necessary to adopt that kind of formalism in all areas of law to utilize whenever a question of free will arises. Only by recognizing that the proper process for determining free will depends upon the circumstances (the fundamental realist premise) is it possible to rationalize our society's medley of approaches. This argument has tremendous intuitive weight; the practical impact of uniformity would be so disruptive as to deter any but the most dogmatic formalist.[39]

B. Possible Methodology: Realism

The simplest description of realism is the rejection of formalistic fictions.[40] Realism focuses on ascertaining, a posteriori, the success of factors in protecting free choice. Generally, realism is relational rather than

absolutist. Instead of determining whether a choice was free in an absolute sense, realism considers whether certain circumstances are more conducive or less conducive to free choice as compared to other circumstances.[41] Rather than reifying any particular process, realism posits that the suitability of a particular process for making free choices will be highly dependent upon the circumstances. While formalists frequently reason by analogy without knowing whether the circumstances are functionally similar, realists refuse to accept analogy unless it can be shown that the situations are actually analogous. Realism is focused on the result of its chosen process; a realist will alter the process to adapt to new evidence regarding the utility of the process. Realism seeks to determine the proper process inductively by constantly reevaluating the process and determining whether it is best adapted to effectuating free choice under the circumstances.

Realist methods for determining the free choice of employees do not attempt, as the formal methods do, to reason deductively from apolitical or neutral principles or law. Instead, a realist will attempt to reason inductively from observable phenomena to develop the process that is most likely to produce the desired outcome. However, because the realist rejects absolute definitions of free choice, the method is necessarily relational. As a result, the realist will frequently use one or another formal method as a convenient starting point for analysis. By comparing the results to a particular formal method, the realist is able to identify a reference point for discussing free choice.[42] For example, a realist who is concerned about an employer's ability to unduly influence an employee's opinion about union representation may start with the formal election-based method of determining an employee's will. The realist will then redesign the election method to reduce the employer's influence by limiting the employer's ability to communicate opinions to the employee; by providing the employee with additional, preapproved information on the benefits of a union; or by limiting the employer's ability to retaliate against an employee for his or her participation in the electoral process. The realist would not be

attached to any one of these alterations but would further alter the process if the results indicate that the employees are still being overly influenced by the employer.

As another example, a realist may start with contract formalism but seek to equalize the bargaining power of employees to ensure that the original choice of employment was made freely.[43] He or she could alter the contract method to ensure that every worker and nonworker in the country is assured a minimum (and respectable) standard of living regardless of work status, which would reduce the coercion inherent in the decision to work in the first place. A worker is less likely to formally consent by contract to an undesirable employment situation if he or she is certain that the failure to consent would not lead to starvation and ruin.[44] The realist is not interested in the contractual process itself as a "good" and would alter or discard this process if another method were more successful in reaching the desired ends.

Using the basic conceptual structure of formalism and realism, we will identify, explicate, and critique the methodologies of the Board, management advocates, and unions in the current controversy over card check. However, an overview of the development of representation elections and card-check procedures is first necessary to place this issue into the proper historical context.

II. HISTORY OF REPRESENTATION RESOLUTION

A. Before the Wagner Act

Before the federal government began regulating labor-management relations, unions achieved recognition primarily through actual and threatened strikes and boycotts. Companies fought these organizing tactics with coercion of their own, including threats, propaganda, company spies, goon squads, and blacklisting.[45]

Representation elections were a relatively late development in American labor law. The Railway Labor Act of 1926 did not include election proceedings,[46] but some railways used private elections to determine the status of the unions.[47] In 1934, the Railway Labor Act was amended to authorize the National Mediation Board to use secret-ballot elections to determine the representative of the employees.[48]

However, outside the limited context of rail and interstate transportation, elections were not used when the National Industrial Recovery Act of 1933 (NIRA) was passed.[49] Section 7(a) provided:

> [E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, . . . [and] no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.[50]

Similar language was used in the Norris-LaGuardia Act, which stated that

> though [the worker] should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion . . . .[51]

While both the Norris-LaGuardia Act and the NIRA provided for the right to organize, neither law discussed the creation of a government-managed electoral process.

As a result, the National Labor Board (NLB), chaired by Senator Robert Wagner and charged with mediating labor disputes under the NIRA, did not initially have a government-ordained process for enforcing section 7(a).[52] The NLB instead proposed to leave the organization process to the workers. As stated by Board Secretary William L. Leiserson: "As to what steps are

necessary to take, we can only say that is a matter for the employees to decide for themselves."[53]

However, the deferential approach of the NLB was cut short by employers' expanding use of company unions as a union-avoidance tactic.[54] Having decided that these company unions were illegal under section 7(a), the NLB attempted to design a representation process that would further the goals of the NIRA. During this process, "the drift was unmistakably toward state-mandated representation—ultimately, a privileged bargaining structure that granted the right of exclusive representation to unions demonstrating support by a majority of workers and requiring the employer to bargain with unions so certified, and them alone, for those workers."[55]

These elections were unlike current representation elections with two options: "yes-union" and "no-union." Instead, these NIRA elections were primarily held to determine whether the company union or the outside union was the legitimate representative of the employees.[56] Of the 546 elections held during the tenure of the NLB, 499 (83 percent) were between a company union and an independent union.[57] Thus, in what would become a pattern, a combination of employer resistance to collective bargaining and interunion conflict would push the NLB to create a formal electoral process for resolving disputes.

Elections were not necessary to validate a union as the legitimate representative. The NLB used the elections to "jump-start the bargaining process . . . [as] a plausible means of settling disputes in workplaces where the principal issue was union recognition."[58] In fact, the NLB's dispute-resolution "Reading Formula" was devised as a settlement agreement to the 1933 strike in the hosiery industry.[59] This agreement included a provision that the NLB "would hold elections in which the workers would vote by secret ballot for representatives and those so chosen would negotiate with the employers to the end of executing collective bargaining agreements covering wages, hours, and working conditions."[60]

The NLB continued to use this method of secret-ballot election to implement section 7(a), as a majority vote gave the prevailing union the legitimacy typically won by a successful strike.[61] Because the NLB's primary purpose was to mediate labor disputes, it was predisposed to use a method that would have the effect of avoiding strikes.

This developing ad hoc method was formally approved by Executive Order 6580, in which President Roosevelt indicated that "representatives who are selected by the vote of at least a majority of the employees voting . . . have been thereby designated to represent all of the employees eligible to participate . . . for the purpose of collective bargaining."[62]

The NLB instituted a policy of employer neutrality for these elections. Employers could not voice their opinions of the unions; nor could they offer employees rewards if the company union won or threaten retribution if the outside union won.[63] The election was seen as a matter solely of worker concern. As Francis Biddle of the NLB stated, "The employer has no place in elections."[64] In addition, the NLB attempted to ensure that employees themselves controlled the process by which the election occurred.[65] Senator Wagner himself compared the question of employer involvement to the employees' interest in the companies' combinations: just as employees did not interfere with company mergers and monopolies, the employers must not interfere with the workers' choices of association.[66] Thus, the workers exercised their freedom of self-organization, and, to protect that freedom, the employer was denied any role in determining the outcome.

B. The Wagner Act

After the Supreme Court invalidated the NIRA, Congress passed the Wagner Act of 1935 to protect the right to organize.[67] The Wagner Act rejected formalism.[68] Like the NIRA, under the Wagner Act, an election was necessary only when the employer had questioned the status of the representative.[69] The purpose of the election was investigatory; election results were merely evidence of majority support by the employees for a

particular representative.[70] The employer had no "free speech rights" during the election proceedings.[71] The election was viewed not as a campaign between union and management in which the employees would referee the outcome, but as an independent, entirely autonomous decision by the employees themselves, without interference by management.[72]

In passing the Wagner Act, Congress rejected any kind of electoral formalism for determining the will of the employees. The most important evidence of this rejection is the limitation of Board investigations to situations in which a serious dispute occurred regarding representation.[73] In effect, this meant that the Board would intervene only when an employer refused to recognize the union voluntarily. Board certification was not meant to be the exclusive method for becoming the exclusive representative;[74] in fact, Board certification was presumed to be needed only on those rare occasions when there was an interunion conflict concerning who was the chosen representative of the employees.[75] The traditional methods of voluntary recognition commonly practiced under the NIRA were entirely untouched by the Wagner Act. It only added the additional layer of Board investigation (by election or other method) and Board enforcement as a last resort.[76]

Another crucial feature of the Wagner Act evidencing the rejection of electoral formalism is section 9(c), described in an early committee report: "[I]n a dispute as to who are the representatives of the employees. . . . The Board is authorized to take a secret ballot *or to use other suitable methods*."[77] This provision was extraordinarily uncontroversial. Only twice in the legislative history did private citizens, during hearings opposing the bill, object to this provision.[78] This point of opposition was never echoed or mentioned by any congressperson.

In context, this near-total silence is understandable. Secret-ballot elections were a relatively recent innovation in the labor law context.[79] In the Railway Labor Act as well, elections were only mentioned as one of many ways in which the Mediation Board could investigate the majority

status of the Union.[80] Elections were merely evidence pertinent to the factual determination of majority support for the representative. The provision of the Railway Labor Act presents this mindset pointedly:

> In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, *or to utilize any other appropriate method* of ascertaining the names of their duly designated or authorized representatives in such a manner as shall ensure the choice of representative of the employees without interference, influence, or coercion exercised by the carrier.[81]

Elections are explicitly mentioned only because they were thought to be one way to ensure that the employer has as little influence in the outcome of the determination as possible.

The Wagner Act rejected formalism.[82] The Board intervened only when the employer refused to bargain with the majority representative. The Board was given flexibility to create methods for investigating employee choice. The touchstone for evaluating these methods was a realist creation: the success of the method in eliminating any employer coercion or influence.

C. Implementation of the Wagner Act Until 1947

In the first two years under the Wagner Act, the Board used its discretion to develop methods for determining the factual question of whether employees had a choice of representative. [83] In each case, the method was selected to best fit the facts of the situation.[84] Often, this meant that if the union could supply adequate evidence at the hearing to prove it had the support of the majority of employees, the union would be certified as the representative on the basis of this record alone.[85] In other circumstances, the evidence on the record was inadequate to establish the majority representative, in which case the Board would hold an election.[86]

This procedure comported with the realist policies and language of the Wagner Act, avoiding strict formalistic procedures that could be

manipulated to deny free choice. Importantly, this procedure followed the prescription of Congress that the Board should use whichever method was best suited to the circumstances and develop a realistic approach to determining the will of the employees.

However, in 1939 the Board began to change course. The three-member Board split 2–1 in *Cudahy Packing* and *Armour & Co.*, deciding that elections would be the only method for Board certification in some circumstances.[87]

Although this doctrinal shift was certainly a move toward electoral formalism, it was only a slight move. Even under the *Cudahy*/*Armour* doctrine, the Board still certified on the record when there had been an agreement with the employer for card check.[88] After the cards were counted, the regional director typically posted the results in the workplace for five days in order to give employees a right to object before the union was certified.[89] In addition, the vast majority of bargaining relationships continued to be formed without any formal Board action. Even in those cases in which representation petitions were filed with the Board, nearly half were resolved without formal action.[90] For example, in the final year before the Taft-Hartley Act was passed, 646 representation petitions were informally resolved through the card-check procedure.[91]

Why did the Board move toward formalism? Most likely, the Board chose the method best suited to serve its own institutional interests. This was an extremely turbulent period for the Board, in which the Board's impartiality and institutional validity were constantly under siege:[92] if the Board consistently and rigidly applied the same method for determining the validity of union selection, it could blunt any accusation of bias. As one former Board staffer and labor law scholar stated:

> It has been said truly that the Board never had a chance to function in a "normal" period . . . . Instead it had first the bitter opposition of most of industry and the fight on constitutionality; then the deluge of cases after the establishment of the

> constitutionality of the Act and the increase of union membership following the organization of the CIO; then, before it could get its work onto a current basis, the hampering congressional investigations; next the war; and, finally, the postwar avalanche and the renewed attacks upon the Act.[93]

Perhaps the most important of these factors was the pervasive claim of bias. Employers and the American Federation of Labor (AFL) both accused the Board of bias. In the case of employers, these charges were often a politically expedient substitute for attacking the concept of collective bargaining itself.[94] The AFL, on the other hand, felt extraordinarily threatened by the Congress of Industrial Organizations (CIO) and was constantly suspicious that Board staff might be secretly sympathetic toward CIO unions.[95] Continuing the pattern under the NIRA, interunion conflict combined with management hostility toward collective bargaining began to push the Board toward electoral formalism.[96] Indeed, interunion conflict is one of the situations in which elections are most helpful, so it should not be surprising that *Cudahy* was decided during a period of serious conflict within the labor movement.

The Board pragmatically looked to elections, one of the most respected modes of free-choice formalism in America, to assure stakeholders that its procedures were fair and entirely free from bias. The Board deliberately tied its own hands in order to demonstrate to employers and the AFL that Board staff would not have the discretion to implement any unfair bias. However, as we will show, electoral formalism subsequently took on a life of its own, ultimately swallowing any realistic assessment of the need for institutional validity.

D. The Taft-Hartley Amendments

Passed in 1947, the Taft-Hartley amendments further extended the role of electoral processes in representation cases and statutorily cemented the *Cudahy/Armour* doctrine.[97] More fundamentally, the Taft-Hartley

amendments indicated a shift from employee free choice as the sole objective for union selection to a balancing of employee free choice and employer free speech. This shift allowed the union selection process to become a more formalized electoral battle in which employers had a recognized stake in the outcome, instead of being uninvolved in the process. A no-union outcome was an explicit win for the management, rather than a choice by the employees not to be represented by a particular union.[98]

The Taft-Hartley amendments codified the Board election as the sole way a union could be certified by the Board as the representative of the employees.[99] While a non-Board certified union could still demand recognition from an employer, the Taft-Hartley amendments also included benefits for Board-certified unions, such as protection against organizational picketing by rival unions and the twelve-month election bar.[100]

As mentioned, Taft-Hartley also expanded protection for employers who wished to oppose the unionization of their workforces. Six years before Taft-Hartley, the Supreme Court ruled in *NLRB v. Virginia Electric & Power* that while employers could not be covered by a sweeping rule of employer neutrality, regulation of employer speech was valid.[101] Employers were seen as a nonparty—an entity with no interest in the proceedings worthy of legal protection, similar to the employees' nonparty status when the employer wished to join with another employer to create a combination. However, under Taft-Hartley, employee organization became an electoral battle in which employers had a recognized role as antiunion advocates. Rather than continuing to preclude employers from the organizing process as inherently coercive, Taft-Hartley required the Board to balance the interests of workers to organize freely and the interests of employers to voice their opinions of the unionizing effort.[102] In addition, Taft-Hartley forbade the use of employer statements as evidence of unfair labor practices (ULPs), invalidating the Supreme Court's opinion in

Virginia Electric & Power and the circuit court case *Trojan Powder*, cited with approval by the Supreme Court in 1945.[103]

By reconceptualizing the employer's role as a party in an election, rather than as a nonplayer in a selection process, Taft-Hartley ensured that employer interests would be encased by law in the election structure, allowing employers to engrain their inherent coercive powers in the union selection process.[104]

The likely consequences of this reordering of the representation paradigm did not go unnoticed by the amendments' opponents in Congress. In particular, the free speech provisions of Taft-Hartley were hotly debated in Congress. While the proponents of the bill claimed that Taft-Hartley would not result in increased coercion,[105] the bill's opponents were emphatic in characterizing the bill as a measure to decrease employees' independence while choosing a union:

> This bill ignores completely the undoubted fact which the [f]ederal circuit courts of appeals and the Supreme Court of the United States have repeatedly recognized, that employees who are dependent for their bread and butter on the job which it is within their employer's power to give or withhold are sensitive and responsible even to subtle suggestions of the employer's desires, and that employers need do no more than hint to assure that employees will obey them.[106]

After Taft-Hartley, the Board and the courts expanded the meaning of the amendments' assurance of employer free speech, validating the employer's ability to restrict union organizers from his or her property,[107] the employer's right to hold captive audience meetings[108] (and the union's nonright to parallel reply),[109] and the employer's right to "noncoercive" employee interrogations.[110] These developments ensured that the election process would not be free of coercion. Under the Wagner Act, these employer actions would have been considered coercive and infringing on employees' rights to free choice. Under the Taft-Hartley amendments,

these employer actions are the employer's prerogative to express an opinion in an election between a union and a nonunion workplace.

After Taft-Hartley, the Court's and the Board's attempts to ensure a noncoercive election process have failed. For example, the Board's 1948 attempt in *General Shoe* to maintain a legitimate electoral atmosphere by purporting to provide "laboratory conditions" in which to determine the will of employees has been unsuccessful in staving off the employer's coercive influence in the representation process.[111] *General Shoe*'s requirement of laboratory conditions to determine the will of the employees can be met while the employer makes dire predictions of ruin if a union enters the workplace, conducts captive-audience meetings, prohibits the union organizers from meeting with the employees in any functionally meaningful way, and interrogates employees "noncoercively."[112]

Thus, Taft-Hartley began the weakening of the worker's right to self-organization by replacing it with a worker's right to be involved in an election process, conducted by an outside party, where the employer's already inherent coercive influence is buttressed by legalized employer actions carefully designed to discourage the employee from voting for the union.

III. THE MODERN METHODOLOGICAL CONTROVERSY

A. Board Methods

From its realist origins under the Wagner Act,[113] the Board's methodology has, since Taft-Hartley, slowly ossified into electoral formalism. Indeed, the Board is on the brink of fetishizing its own electoral process at the expense of employee free choice. This change is evidenced most clearly around the borders of the Board electoral process where the Board has held that nonelectoral indicia of employee support may be adequate to demonstrate majority status. In this section, we will explore the ways in which these border areas have shrunk dramatically and, under the

current Board, are in danger of disappearing altogether. In addition, we will discuss how, even within the electoral process, assumptions about what "free choice" looks like have become increasingly formalistic.

1. *Gissel* Bargaining Orders and "Hallmark Violations"

In *Gissel*, the Supreme Court ruled that an employer can be ordered to bargain when a prior union majority—generally shown by cards—has been destroyed by management ULPs.[114] This was a very realist move; the Board and Court recognized that fair elections were not always possible, and they fashioned this remedy to allow themselves greater room to ensure employee free choice.[115] *Gissel* bargaining orders have since been used to address, for example, employer ULPs such as threatened plant closures and discriminatory discharges of union advocates.[116] By retaining the right to order bargaining when the union has lost an election but other evidence suggests that the union in fact enjoyed majority support prior to the commission of the ULPs, the Board indicates that it will, at times, bypass its formal mechanisms in favor of a fact-based, realist result.

However, *Gissel* was ultimately not the realist victory it initially appeared to be.[117] The Board has granted the *Gissel* remedy in only very limited situations, and its power to provide this remedy has been limited by the courts.[118]

In *Gissel*, the Court developed a number of extremely restrictive bright-line rules limiting the scope of the decision, probably to provide more legitimacy to the Board in the eyes of a suspicious federal court system. The Board subsequently began noting "hallmark violations" that, while not per se mandating a *Gissel* bargaining order, were indicative of the situations where the Board was most justified in providing the order.[119] These formal indicators of a probable *Gissel* situation have become bright-line restrictions on the Board's ability to issue bargaining orders when an employer's unlawful actions have hindered an employee's free choice.[120]

The term "hallmark" violations was first mentioned casually by the Second Circuit in an opinion denying enforcement of a bargaining order in which "there were no dismissals for prounion activities, no threats to close down or curtail the company's operations if the Union should prevail, and no actual use of force or physical violence, which usually are the hallmarks in cases where bargaining orders issue."[121] Then, in the following year, the term appeared for the first time in a Board decision, in which the Board stated that "direct threats to close operations is [sic] the hallmark of the type of case in which bargaining orders issue."[122] This casual use did not suggest a new bright-line rule; however, in the next case in which the phrase was used, the Board claimed that

> [i]t has long been established that the threat of loss of employment, discharge of union adherents, and the threat of plant closure, all of which occurred herein, are likely to have a lasting inhibitive effect on a substantial percentage of the work force, and therefore are considered "hallmark" violations which support the issuance of a bargaining order, unless some significant mitigating circumstances exist.[123]

At this point, the metamorphosis was complete; an isolated, passing use of a phrase had become a term of art and, ultimately, the current Board's bright-line rule for justifying its refusal to issue bargaining orders even when the employees' free choice has been severely impeded by other, nonhallmark, means.[124] Using this highly formalistic approach, the current Board has developed a pattern of reversing many administrative law judges' bargaining orders.[125] In some cases, even when the Board finds that a *Gissel* order would have been appropriate, it denies the order for other reasons such as the length of time between the initial showing of majority support and the Board's final decision.[126]

2. Recognition Bar to Elections

The recognition bar is a Board-created, judicially-approved method of ensuring that voluntary recognition is an effective means of forming a

bargaining relationship. The recognition bar prohibits any election or other challenge to the majority status of the union for "a reasonable period of time" following the employer's voluntary recognition of the union's majority status. In 1966, the Board instituted a recognition bar because "like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining."[127] The Board thus treated card-check recognition similar to the other methods of union recognition. Due to the recognition bar, the Board and the federal courts have long warned employers against refusing to bargain during that reasonable period based on a doubt of continued union majority status.[128]

The language used to describe the duration of the recognition bar, "a reasonable period," was the same language used to describe a certification bar under the NLRB rules as they evolved under the Wagner Act.[129] Thus, the recognition bar was one year in duration, equal to the certification and election bars.[130] The Board considered the card-check process sufficiently reliable as evidence of employee free choice to justify treatment comparable to an election, a position completely inconsistent with electoral formalism.[131] However, subsequent modifications have shrunk a "reasonable period" in the context of voluntary recognition, such that the term has come to mean two very different things with respect to elections and to card check.[132] A union that anticipates having more than six months of bargaining following recognition is taking a serious risk:[133] this shrinking voluntary recognition bar has created an incentive for unions to violate the Act by "prebargaining" contract terms informally with the employer before the union has obtained majority status.[134] If the recognition bar were long enough, providing the union sufficient time to negotiate *after* recognition, there would be less pressure for the union to agree to these terms before attaining majority status.

The voluntary recognition bar is an implicit rejection of strict electoral formalism because it supports and stabilizes relationships built on

nonelectoral showings of support for the union. Even into the early 2000s, the Board upheld the recognition bar for unions established by the card-check process, based on the understanding that the card-check process would elicit the free will of the workers, stating that "we believe that . . . we are both promoting voluntary recognition and effectuating the free choice of the majority of the unit employees."[135] Circuit courts have also been willing to uphold the Board's voluntary recognition determinations, based on the valid public policy reasons for the card-check process.[136]

However, in September 2007, a party-line, 3–2 majority of the Board radically overhauled the voluntary recognition bar along electoral formalist lines.[137] In this case, the employers Dana Corporation and Metaldyne Corporation voluntarily recognized a union that presented authorization cards signed by majorities of their respective employees. Shortly afterwards, employees opposing the union filed a petition with the NLRB seeking an election. The Board held:

> [N]o election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed.[138]

This ruling was not a complete victory for antiunion advocates, who argued that the voluntary recognition bar should be eliminated altogether.[139] However, the practical effect of the rule is to require a union to secure and maintain a supermajority of support of more than 70 percent of the employees for forty-five days in order to avoid a potentially coercive election campaign. Union selection is virtually always contentious, and 30 percent dissenting minorities are common, particularly before the first contract in newly organized workplaces.[140] As a result, the new rules effectively eliminate the voluntary recognition bar in most circumstances.

The general counsel argued for a thirty-day window before application of the election bar but would have required a showing that the cards were in fact no longer representative of the choice of the employees by an election petition signed by a majority of employees.[141] This option would have at least required that opponents of the union cast some doubt on the validity of the card majority; the rule adopted by the Board would require an election even where card majorities of up to 70 percent remain entirely undisputed.

This new rule is founded squarely on the claim that card check is of "lesser, and in some cases questionable, reliability."[142] The reasoning of the Board is deeply rooted in electoral formalism and, as admitted by the Board majority, is not based on any factual probability that cards are actually inferior indicators of the employee's true choice.[143] The Board claims the card-check process is inherently flawed because, unlike elections, cards are (1) signed in public and subject to social pressure; (2) subject to misinformation or lack of information before signing the card; (3) accumulated over time; and (4) protected only by the ULP standards of the NLRA, rather than the laboratory conditions standards of the Board election.[144] The Board also cites language from older cases to indicate that the election is a favored union selection method.[145] In short, the conditions under which the union authorization contract is signed are unfair, and employees who unquestionably did sign the contract should nonetheless get a chance to change their minds.

None of these reasons are coherent under contract formalism and reflect a clear commitment to an electoral formalist perspective. There is no abstract reason that decisions made in public are less reflective of the true choice of the individual than choices made in private. In fact, contract formalism relies on the public nature of the agreement to *support* the reliability of the decision. Similarly, lack of information is irrelevant under contract formalism; every person has a duty to read and understand what they sign. Misinformation is only of importance if it rises to the level of fraud (a ULP). Regarding accumulation over time, the Board argues that

authorization cards, unlike election results, are not a "snapshot" of employee opinion.[146] However, an employee can repudiate an authorization contract at any time prior to recognition. Thus, the cards signed at the time of recognition are also a snapshot of employee choice, though just a snapshot taken at a moment selected by the union. However, generally when a person signs a contract, he or she is irrevocably bound: this is the fundamental value of a contract and is no different than an election in that regard. Under contract formalism, laboratory conditions are not required before a contract becomes binding.

The Board cites notice procedures prior to Board elections to support requiring notice of the window period after voluntary recognition.[147] But the primary purpose of notice prior to election is to ensure that interested employees will be able to participate in the election so that the election accurately reflects employee opinion; in the card-check context, a majority of employees has already participated in selecting the union. Thus, the true purpose of notice in this context is to give antiunion employees and outside agitators an opportunity to delay effective union representation and a second chance to pressure others into changing their minds and defeating the union.

In justifying rejecting a thirty-day period in favor of a forty-five-day period, the Board reveals the utter arbitrariness of the new rule. The Board states, in effect, that thirty days is "too short" to effectuate free choice while forty-five days is just right, without any reason for supposing this to be true. Why not 365 days? Why not two days? Without something more than a vague stab in the dark, there is no reason to think that any particular "second-guessing" period is sufficiently protective of free choice.

While the current Board presents itself as a champion of employee rights, the Board is actually using a formalist principle to eviscerate employee free choice by ignoring evidence of clear majority support, thus denying the ability of management and unions to privately settle representation disputes.

3. Enforcing Agreements for Private Resolution of Representation Disputes

For decades, unions have made a practice of negotiating "after-acquired" clauses under existing contractual relationships that would prescribe a card-check process for voluntary recognition in new facilities acquired or formed by the employer.[148] The clause is a waiver of the employer's right to insist upon election, and it provides a binding alternative methodology for determining the free will of the majority of employees in the acquired unit.[149] This doctrine follows logically from the legality of voluntary recognition (i.e., waiver of election) and the enforceability of union/employer contracts under section 301(a) of the Taft-Hartley amendments.[150]

Under the Supreme Court's broad interpretation of section 301,[151] which provides for a private right of action in federal courts for "violations of contracts between an employer and a labor organization representing employees . . . or between any such labor organization,"[152] the lower courts applied section 301 to enforce voluntary recognition procedures even upon a contractual party who was not in an existing collective bargaining relationship.[153] The language of section 301 makes no distinction between collective bargaining agreements and other kinds of agreements between unions and employers.[154] As a result, the Board has enforced card-check neutrality agreements in which the employer agreed to voluntarily recognize the union upon a showing of majority cards, and it has also waived the right to an election or vocal opposition during the card campaign.[155]

In recent years, the Board has taken every opportunity to restrict the reading or effect of after-acquired clauses.[156] As support for ignoring what is often quite plain language indicating an employer's waiver of the election process, the Board has pointed to "public policy" favoring elections.[157] In contrast to appellate court opinions enforcing these agreements, the rhetoric of Board opinions has been starkly electoral formalist.[158]

In 2004, the Board accepted review of a waiver case, *Shaw's Supermarkets*.[159] The Board asked "whether public policy reasons outweigh the Employer's private agreement not to have an election."[160] This constitutes a direct attack on the legality of any contractual waiver of an employer's right to request an election. If the Board reaches this issue and decides in favor of the employer, the realm of voluntary recognition would shrink further still.

In August 2006, the Board accepted review of a related (and somewhat redundant) case, *Marriott Hartford Downtown Hotel*.[161] If decided in favor of the employer, this case would permit employers to demand an election at the moment a union requests a card-check agreement. The Board stated that "[t]his case presents many of the same issues that the Board is addressing in several pending cases currently under Board review."[162] The *Marriot Hartford* case could overrule *New Otani Hotel*, which held that a union request for a card-check neutrality agreement with the employer was not a "present demand for recognition" justifying a management election petition.[163]

The practical effect of a ruling for the employer in *Shaw's Supermarkets* and/or *Marriot Hartford* would be to further eviscerate voluntary recognition. The "public policy" concern recited by the Board proves too much and would just as easily justify eliminating voluntary recognition altogether.[164] This squarely contradicts the NLRA. As the Supreme Court stated in *Gissel*, "the 1947 amendments did not restrict an employer's duty to bargain under section 8(a)(5) solely to those unions whose representative status is certified after a Board election."[165]

4. Formalist Assumptions Within Electoral Doctrine

In addition to severely limiting the ways in which a bargaining relationship can form outside the electoral process, the Board has also embraced an increasingly formalistic vision of the electoral process itself. If the Board electoral process was relatively realist in its methods, one could

perhaps understand the assault on voluntary recognition as standard fare efforts by an agency to aggrandize its own power. However, the assault upon voluntary recognition has been coupled with an assault upon realism within the Board electoral process itself.

a) The Unfortunate Language of "Laboratory Conditions"

The Board has established "laboratory conditions" as the prerequisite for a fair voting environment.[166] This language implies an absolutist, rather than relational, vision of free choice.[167] Laboratory conditions create a vision of sterilized perfection, of an ideal control circumstance in which absolutely pure free choice is isolated from the surrounding dross.[168] This perspective necessarily implies electoral formalism by reifying a particular process and circumstance as the ideal, perfectly free, election proceeding.

The language of laboratory conditions also suggests that the Board believes its electoral method to be neutral and prepolitical, eliminating the policy-driven bias that other methods might create.[169] The Board does not have any proof that its chosen electoral method does, in fact, create those laboratory conditions.[170] However, as electoral formalists, the Board does not feel the need to show that its process "works" in any outcome- or fact-based way. Recently, the Board has used the language of laboratory conditions as a justification for its moves against voluntary recognition.[171]

Ironically, the standard of laboratory conditions was originally created to protect, rather than hinder, employee free choice.[172] The language was, in no small part, an effort by the Board to assert its legitimacy in the aftermath of Taft-Hartley.[173] However, despite the Board's best intentions, the rules developed under the laboratory conditions standard became increasingly formalistic and decreasingly protective of employee free choice under intense judicial scrutiny. As a result, what remains of the once potentially powerful standard of laboratory conditions is the electoral formalist rhetoric.

b) The Decay of the Laboratory Conditions Standard

The modern laboratory conditions standard has been criticized as too permissive of coercive employer activities.[174] For example, free speech rights allow employers to intimidate and misinform the employees to vote against the union.[175] Employers are able to have captive audience meetings in which they express their antiunion opinions.[176] Studies have shown that these legal tactics have a significant effect on the employee's ultimate choice.[177]

In addition to the specific acts available to the employers within laboratory conditions, employers also benefit from their social and economic advantage over employees. The Supreme Court in *Gissel* recognized this problem, but subsequent efforts to solve the problem have proven ineffectual.[178] For example, in the simple act of picking up a paycheck, the employee is reminded that the employee is beholden to the employer, and the employer will always have the power to take away the employee's livelihood if the employer chooses.[179] Indeed, the law states that while an employer's *threats* to shut down the business are coercive, the *act* of shutting down the plant in retaliation for union activity is perfectly legal.[180] Though employees may not know the intricacies of the law, the employer's total control of the workplace is a felt experience.[181]

c) The Ineffectiveness of Remedies

The Board's penalties for employer violations of the NLRA are functionally irrelevant to those employers. The small fines and rare bargaining orders, issued far into the future, pale in comparison to the employer's desire to prevent the establishment of a union in the workplace.[182] The only remedy for a violation of laboratory conditions (short of a ULP) is a rerun of the election procedure.[183] Even if ULPs have been committed, bargaining orders are rare and the usual remedy is a rerun election.[184] ULP remedies are also very weak. For example, the usual remedy for discriminatory discharge is reinstatement and back pay (minus

mitigation), often many years after the discrimination occurred.[185] Unlike discrimination under Title VII, no punitive remedies are available for union discrimination.[186] This feature of the Board policy is, unfortunately, severely limited by the language of the NLRA itself.[187] Extensive academic criticism of NLRA remedies renders further discussion of this issue superfluous.[188]

d) Formalism in Action

As an electoral formalist body, the Board declines to analyze facts indicating that the electoral method is not the optimal process for enacting the free choice of the employees. When comparing elections to the card-check process, the Board does not consider which method more often results in the precampaign choice of the employees.[189] In addition, the Board does not evaluate whether the actual situational outcome of a unionized versus a nonunionized workplace would indicate whether an employee would be more likely to vote for a union. One might expect that the worker's free choice would, in most instances, be to vote for the situation that will best benefit that worker,[190] but the Board never analyzes whether the initial showing of cards or the election results actually indicate the free will of the employees.

Most surprisingly, the Board does not analyze the differences between their model of electoral process—the American system of voting—and their own method of electoral process.[191] The American system ensures that both parties have a high degree of access to the voters. But in Board elections, unions are not allowed access to company property, while the employers are allowed to have mandatory meetings regarding their opinions on the union.[192] In American elections, the ruling party is not able to take away a voter's livelihood if he or she expresses support for the opposition. But under the Board system, workers are often fired illegally for their union support, and reinstatement is often long delayed and ineffectual in preventing coercive impact on other workers.[193] By designing its electoral

process to be formally similar, but not too similar, to the American system of voting, the Board and courts are able to appear neutral and democratic while imposing their own policy-driven desires on the process.

B. Management Method

Management interests have adopted strict electoral formalism in analyzing the card-check system. Management advocates express the belief that the Board election is the only way to ensure that employees' free will can be protected, and they argue that card-check contracts are inherently coercive and thus inadequate as a method for determining a union's majority status.[194] The electoral formalist method has support in the NLRA and Board precedent. Under the current law, cards are only due voluntary recognition while successful elections require mandatory recognition, indicating that the NLRA has, at least, a preference for elections.[195] Furthermore, the legislative history of the Taft-Hartley amendments is also supportive of this electoral formalist position.[196]

Management advocates have adopted several inherently contradictory arguments to justify their adherence to electoral formalism. When criticizing card-check agreements, management advocates undertake a factual analysis of the potential hazards to employee free choice under this contractual system. Rather than recognize the card-check agreements as valid contracts signed by competent adults—the same type of contract that businesses use every day—the management advocates focus on the potential for coercion in the signing of the cards[197] and express their belief that this coercion is sufficient to invalidate the cards as an expression of the employees' free choice.[198] Indeed, some of the main card-check detractors have used this potential for coercion to argue that "*all* [card-check agreements] are fraught with coercion" and should be invalidated as a method of organization without any factual analysis of the circumstances surrounding each card-check agreement.[199]

When extolling the virtues of the Board elections, the management advocates use strong electoral formalism, relying on statements of the inherent worth of elections rather than using any factual analysis of the actual circumstances surrounding those elections. In a striking and unintentionally ironic mixed metaphor, many anti-card-check advocates have even referred to the Board's elections as the "crown jewel" of industrial democracy.[200] These advocates focus on two main aspects of the Board elections as central to their superiority: the privacy of secret-ballot elections[201] and, to a much lesser degree, the information provided to the employees by the two competing parties.[202] Thus, this form of electoral formalism requires only two things—secrecy in the voting booth and two parties on the ballot—to validate the process of the election. It does not undertake even a cursory analysis of the many other factors that will also influence the voter's expression of choice. In addition, these management advocates play on their audiences' emotional connection between the formal electoral process and patriotism, decrying the card-check advocates as "Orwellian."[203]

Management advocates also cite the Board's repeated use of phrases such as "laboratory conditions"[204] to support electoral formalism.[205] The management advocates do not undertake any analysis of whether the laboratory conditions are actually present in any given election; instead, they rhetorically assume that because the Board says the laboratory conditions exist and are effective, they are sufficient for effectuating employee free choice. However, as we have already discussed, the protections of these laboratory conditions have eroded throughout the Board's history, and the current standard for laboratory conditions is sadly insufficient to protect employees from coercion.[206] Indeed, much of the language that management advocates use to support their position was originally written decades ago to ensure freedom *from* coercive management influence in the electoral process rather than freedom *of* management to participate in the electoral process.[207] Management

advocates are using the Board's rhetoric of laboratory conditions while taking advantage of the Board's lax enforcement to perpetuate management's coercion of employees during the electoral process.[208]

In their eagerness to disparage the card-check method of union recognition, management advocates are willing to cast doubt on the employers' ability to voluntarily enter into card-check neutrality agreements with unions.[209] These advocates argue that, like the employees, companies are unable to enter into noncoercive contractual agreements with unions. Instead, they argue that card-check agreements are entered into under duress and should be voided.[210] They do not recognize these agreements as regular contracts with sophisticated participants; instead, they advocate for a factual analysis of all the circumstances surrounding the signing of the agreement.[211]

Skepticism of the validity of contractual agreements is reflective of management advocates' general electoral formalism in the union context. However, the business community's concern for the contractual method's lack of protection for free will is belied by regular business practices. Many businesses rely on the validity of adhesion contracts formed under conditions very similar to those under which employees signed union cards.[212] Adhesion contracts are not signed secretly; the contracts are often not explained in detail to the customer; and the customer is bound by their decision regardless of a later change of heart. In the card-check context, the employee signs the card publicly, may not be fully aware of all the implications of signing the card, and will be bound to the representation of the union if the union gains the requisite number of cards. However, businesses argue that the adhesion contract can be a permissible and suitable method for making an agreement while they decry the similar use of union cards as coercive and invalid.[213]

In addition, a contract made between an employee and a company will also be tainted with coercion—the company has the power, the money, and the job, and the employee can only bargain with his or her (easily

replaceable) manpower[214]—but the business community will certainly not contest the employee's ability to make a binding agreement in that circumstance. Indeed, while management advocates actually argue that the employee/employer agreement is less coercive than the employee/union agreement,[215] current employment law provides few safeguards to protect the employee's interests in the at-will employment context.[216] While the employer community's anti-card-check arguments are mainly from the perspective of protecting worker freedom, the alternative to unionism—at-will employment—is hardly a proworker scheme.

Furthermore, an employee is often not aware of all the rights the employee is relinquishing when he or she signs an employment agreement with an employer, such as a binding arbitration commitment.[217] Although management advocates argue that employees are not aware of what they are committing to when they sign a union card, they are more than willing to hold an employee to an arbitration agreement that was not explained to the employee when he or she signed it.[218]

These inconsistencies highlight the management advocates' instrumental use of the electoral formalism argument—while management's arguments may sound sincere, they do not practice what they preach. The business community insists on a functional and factual (and ultimately impossible) analysis for proof that the contractual method of union recognition is not coercive, yet the community relies on a formalist contractual method in its everyday business practices. By rejecting contract formalism in the union context, the business community actually casts doubt on its reliance on contract formalism in nearly every other area of business law.[219]

C. Union Methods

Unions are also inconsistent in their evaluation of free choice in the union selection processes. Union advocates use a type of contract formalism to evaluate employee free choice under card check.[220] However, when evaluating and critiquing the Board election process, unions have adopted a

realist approach. Despite this inconsistency, the union's mixed method for evaluating the will of the employees has significant support in court and Board decisions.

1. Contract Formalism in the Card-Check Context

Though union supporters rarely use the language of freedom of contract, the validity of signed cards as an indicator of employee intent necessarily assumes a baseline contractual perspective. In *Dana/Metaldyne*, card-check supporters were in a defensive position—primarily rebutting the anti-card-check advocates' electoral formalism—and positive statements of the unions' underlying rationale supporting card check as an indicator of intent were rare. However, some card-check advocates do suggest that the card-check method is a per se indication of the employees' free choice.[221] In the legislative debates, card-check supporters are in the offensive position and are expected to more clearly articulate affirmative reasons why signed cards accurately represent employee free will. For example, in her testimony to the Senate on the EFCA, law professor Cynthia Estlund indicated that cards should be presumptively valid absent any showing of explicit union coercion.[222]

Arguments by management that point to the possibility that union organizers may obtain signatures from uninformed, naïve, or socially pressured employees are unrecognizable to a contract formalist because the contract formalist presumes that people read and understand agreements that they sign.[223] Under contract formalism, a failure to read or understand an agreement before signing is the signer's fault, and any detriment that occurs from that omission is fair and lawful.[224] In addition, the inability of management under a neutrality agreement (a common addition to the card-check agreement) to explain its side of the union/management debate is irrelevant to whether the employees are making a free choice. No baseline amount of information is required for contractually recognizable consent because employees who are legally capable of entering an agreement are

presumed to be able to obtain all the information they need to make a free choice.[225]

Substantial support for the union's contract formalism method can be found in the NLRA. The NLRA permits union certification by voluntary recognition, and the Board and the courts have a long history of interpreting it to allow, and even encourage, voluntary recognition via card check.[226] In addition, the NLRA does not mandate that the electoral process is the only means by which majority support may be determined. Instead, it implicitly permits any of the traditional contractual methods of demonstrating the will of the employees.[227] By indicating that these other "suitable" methods for determining majority support exist, the NLRA tacitly validates the voluntary recognition method, which is founded on basic freedom-of-contract methods of determining the employee's will and the absence of unacceptable coercion.

Contract formalism can also be found in the NLRA in its evaluation of acceptable and unacceptable coercion by establishing the ways in which both employers and unions can violate the NLRA through coercive activities.[228] In the card-check context, the most important of these provisions is section 7, which, among other things, protects the right of employees to refrain from participating in collective activities such as joining a union.[229] If the union "restrain[s] or coerce[s]" employees in the exercise of section 7 rights by applying overly powerful pressure on employees to sign a card, the union has committed a ULP, and the card would not be valid under section 8(b)(1).[230] This vague standard appears, at least by its language, to invoke contract formalism and its definitions of duress. The NLRA's banning of certain types of coercion is similar to contract law's invalidation of contracts that are signed under certain situations, such as duress or incapacity, while not invalidating contracts signed in other types of potentially coercive situations, such as extreme poverty or lack of education. In this way, the NLRA merely redefines

duress but otherwise embraces the general structure of contract formalism.[231]

Thus, the union's methodology for examining the worker's free choice in card-check agreements is a modified contract formalism, with unacceptable coercion defined in part by the NLRA. The union process does not go into a realist analysis of the card-check procedure.[232] This lack of a realist analysis may be the result of the union's interest in the card-check procedure, as card-check recognition more often results in a showing of majority support.[233] The unions may also rely on the formalist analysis here because formalism can be explained in absolutist terms, in a way that seems neutral and fair to the average citizen. Thus, the formalist evaluation of card check provides the unions with the best of both worlds: they reach the desired outcome without appearing self-serving and arousing political suspicion.

Unions have also taken advantage of this modified contract formalism to criticize the election process.[234] By expanding the definition of duress to include the NLRA's language under sections 7–8, unions are able to characterize elections that occur after employer ULPs as less free than a card-check (contractual) situation.[235] Unions are thus able to invert the typical hierarchy of protectivity within formal methods.

2. Realism in the Election Context

In evaluating elections, unions often take the critique of elections further than is consistent with contract formalism even as modified by the NLRA.[236] In attempting to demonstrate the necessity of permitting card check, unions have adopted a realist critique of elections that goes far deeper than is consistent with the contract formalism used to evaluate card check. In this sense, the unions are using a double standard of applying contract formalism to card check while using functional criticisms of the electoral process.[237] While statistics demonstrating that massive ULPs are a characteristic aspect of most elections could be interpreted as consistent

with modified contract formalism, arguments that these ULPs are more likely to influence workers because of their functionally subservient position in the employer/employee relationship indicate the introduction of realist analytical methods.[238]

Thus, the unions' mixed method for deciding which processes are democratic illustrates their ad hoc reasoning. Because unions currently are more successful with card check, they adopt the methodology most supportive of card check in the card-check arguments. When discussing the problems of Board elections, however, they switch their tactics to the functional critique of on-the-ground problems with the electoral process.

Despite this inconsistency, the unions' mixed method for evaluating the will of the employees has significant support in court and Board decisions. The Board and the courts have been willing to employ a realist analysis of the electoral process to set aside the results.[239] When an employer has committed massive ULPs in its attempts to discourage employees from voting for the union, the Board ignores the formal showing of no majority support and will either order a new election or, occasionally, order the employer to bargain with the union.[240] Conversely, the Board will sometimes rely on a formalist trust in the results of card-check recognition to actually order an employer to bargain on the basis of a preelection contractual showing of majority support.[241] Thus, while it is intellectually inconsistent, the unions' mixed use of the functional and formal methods of evaluation has been traditionally utilized by the Board and by courts to determine the will of the employees.

IV. THE REALIST CRITIQUE OF FREE CHOICE IN THE WORKPLACE

Union and management advocates both identify serious problems with the Board process. Any sincere effort to ensure free employee choice must account for these problems. Rather than attempting to deal with these issues, the current Board has obscured them with formalism, abandoning the mandate of the NLRA to protect worker free choice.

Management advocates have argued persuasively that the card-check process inadequately protects the free choice of employees.[242] This argument is particularly persuasive in the case of employees with little education, lacking a sophisticated understanding of the legal and practical implications of the prounion or antiunion choice. These employees are likely unable to make a decision based on anything more reliable than rumor, ideology, or the baldly partisan assertions of union and management advocates. The Board does not carefully police the truthfulness of the unions' assertions during the representation campaigns, and employees often have a difficult time finding neutral information about the pros and cons of union representation.[243] The management criticisms recognize this inequity and are substantiated by a well-developed body of research and case law suggesting that, in the traditional contractual situation, adhesion contracts between parties with disparate bargaining power are rarely freely and fairly chosen.[244]

The unions have persuasively criticized the electoral process because it permits employers to wage a coercive campaign against union organization.[245] The unions' most convincing arguments focus on the employer's complete control of employees' well-being. Under an at-will employment system, when the Board is protecting core entrepreneurial prerogatives—for example, the right to go completely out of business even for retaliatory reasons—employees are well aware that employers entirely control their livelihoods.[246] Paychecks, health insurance, and business connections are all within the control of the employer.[247] Under these circumstances, even calmly stated expressions of preference against the union carry the suggestion of a fist inside the velvet glove.

In addition, though it is rarely mentioned by unions, the employer also plays a role in crafting the ideology and, thus, the self-perception of the worker.[248] In modern society, employers are among the most powerful of the institutions responsible for creating and perpetuating social ideology. A worker's supervisors subject him or her to the ideology by their very

existence, informing the worker that he or she is subordinate to the employer and less qualified than the employer to direct his or her own labor. Indeed, the micromanaging, condescension, arbitrary decisions, and pervasive control of the employer wield great power upon the self-perception of the worker.[249] Employers treat employees as subjects, driving an ideological wedge between the worker and her labor, which is controlled by, and thus a part of, the employer. Employees then believe that their labor is not their own but that it has been validly purchased by the employers and is thus completely subject to the employers' control.[250] In this situation, an employee will not feel entitled to claim his or her right to join a union and thus exercise some power over his or her own labor. In addition, other social structures, such as the tiered educational system, function to reinforce the worker's belief that he or she is unqualified to make decisions regarding the nature of and compensation for his or her own work.[251] Against this ideological backdrop, the worker is, without any basis in fact, predisposed to think that the union could not be effective because the employer requires, and has a right to, total and arbitrary control to manage effectively. The ideology of the employer interpellates the employees' identity, saying that workers should not collaborate to take more control of directing their work because they are just workers—it's not their job; it's none of their business.[252]

In these criticisms, both explicit and implicit, the Board has clearly abandoned its mandate to protect worker free choice.[253] As summarized above, Board doctrine relies increasingly on unadulterated electoral formalism, looking only to the reified, politically contingent concept of laboratory conditions.[254] The text and purpose of the Wagner Act clearly demand a thoroughgoing realist approach to ensuring worker free choice.[255] The Wagner Act is adamant that employees should be free to choose the representative whom they desire.[256] The Taft-Hartley amendments inserted protections for individual employee rights to decline to participate in

collective action;[257] however, the Taft-Hartley amendments did not remove the important language of the Wagner Act's purpose.

The Wagner Act and its authors suggest that "true freedom of contract" is only possible within a unionized workplace.[258] If true freedom of contract is an objective of the statute, and true freedom is only possible with collective representation, then protection of rights not to bargain collectively makes little sense. The bizarre result is that the modern NLRA does not protect freedom, but the "freedom to choose" whether to be free or not. In addition, the Taft-Hartley amendments did not alter the Wagner Act's protection of voluntary recognition.[259] Instead of replacing voluntary recognition with electoral formalism, the Taft-Hartley amendments simply distorted the purpose of the Wagner Act—to ensure that workers can choose freely to bargain collectively—without replacing it with a coherent purpose. In light of this legislative confusion, it is perhaps understandable that the current Board has lost sight of the importance of ensuring that employee choices in the workplace are, in fact, free.

Rather than pursue a realist goal of ensuring that all employees can make their pro or antiunion choice in a free context, the Board relies on an electoral formalist concept of laboratory conditions. This concept has no ontological significance and is politically contingent. The circumstances in which a choice is made always have a substantially significant impact on the outcome; even the process of being observed in making one's choice will impact the choice itself.[260] At the same time, it is impossible to conceive of choice in a total vacuum; at least some circumstances and surrounding context are necessary to give a meaning to the choice.[261]

Any definition of laboratory conditions must include some aspects of the circumstances to give the choice meaning.[262] However, the precedent reveals no principled basis to distinguish between improper influences that disturb laboratory conditions and other circumstances that are acceptable to consider and which give the choice meaning.[263] This is not caused by a failure to discover and apply the correct principles; laboratory conditions do

not isolate the *true* desires of the employees because the concept has no prepolitical significance. Studies that try to isolate aspects of electoral circumstances and their influence on worker choice fail to answer the question of whether the circumstances are coercive or not because it is impossible to know what a choice made in a vacuum would look like.[264]

Therefore, there is no principled way to determine what kinds of circumstantial influences on the employees' choices are acceptable or required and what kinds are not. Because of this lack of principled methodology, the way laboratory conditions are described—what is within laboratory conditions and what is not within laboratory conditions—is a political choice. Without a principled grounding, the Board's laboratory conditions electoral formalism falls apart and becomes a baldly political or policy-driven choice.[265]

Both union and management critiques suggest that circumstances in society guarantee that neither card-check nor electoral methods of determining the free choice of the employees will be adequate. These critiques prove too much against the Board process; a more radical overhaul is necessary to ensure employee free choice. If, as employer advocates assert, lack of education and inability to understand the impact of labor/management choices leave employees susceptible to coercion by union advocates in the card-check context, these factors do not disappear or lose importance simply because the choice is made on a ballot. Speech during an electoral campaign by union and management is hardly educational or nonmisleading.[266]

If, as union advocates have argued, the immense power of the employer to dictate the conditions of employment makes the electoral process inherently coercive, then card check can also not be expected to completely counterbalance this power. Card check still permits employers to exercise their coercive power over employees before the decision can be made, providing an analytical framework to employees that protects the

employers' interests. If both of these criticisms are true, neither system is adequate to protect employees.

These critiques point out problems within general society that make the current system not conducive to free choice. Any choice made within an at-will employment system, including those made via the card-check method, will have the problems identified by the union. Employees are subject to the employer's ideology prior to choosing whether to sign a card. Employees are also always subject to the ultimate employer retaliation: going out of business. No amount of tweaking the process to shield employees from potentially coercive speech can change the role that employers play in interpellating employees as subjects, constantly reaffirming the basic fact that the employer and his or her capital control the employees' well-being.[267]

An appropriate analogy is to political elections in totalitarian nations.[268] Within a totalitarian nation, a vote for the ruling party can hardly be considered a free choice. When a single party has extreme control over all aspects of citizens' lives, a person runs a terrible risk by voting against that party. Even assuming a particular voter has the extraordinary strength of will to withstand the propaganda and ideology formation created by the totalitarian state, it is incredibly risky and most likely irrational to vote against the ruling party. The at-will employer exercises an even greater degree of control over the economic livelihood of the employee than the totalitarian exercises over the life of the voter.[269] Thus, the issue cannot be addressed adequately by simply tinkering with the system if the underlying system stands undisturbed. By definition, there is no free choice within an unfree society. An unfree person cannot freely choose whether to be free. Only a process that effectively accounts for these underlying inequities will allow free choice. This accounting is what the authors of the Wagner Act were trying to do when they discussed "actual liberty of contract."[270]

While labor law cannot fix these underlying social problems, it can account for them in the creation of unionized workplaces. This requires

changing the position of employees in the workplace to ensure that true democratic choice will be possible. Labor law should permit employees to make choices about how to exercise the collective power of the workers, rather than merely permitting employees to choose whether to join together to realize their power.

V. CONCLUSION

Labor law cannot completely fix the problems of social ideology and background oppression. However, labor law can alleviate, or at least refrain from exacerbating, the more damaging forms of coercion. Ultimately, no labor law process will be able to isolate free choice, but there are many steps that can be taken that would improve the situation and limit the effect of the most coercive factors.

As a first step, the NLRB should overturn *Dana/Metaldyne* and other recent cases that restrict the unions' ability to utilize card-check agreements. These decisions further entrench electoral formalism, obscuring rather than illuminating and alleviating coercion. While the card-check process does not eliminate the coercive effect of employer ideology, card-check agreements signal to employees that, because the union is powerful enough to obtain a card-check agreement from the employer, the union may be strong enough to protect them from the most terrifying forms of retaliation, freeing them to consider whether to exercise their collective power to take some control of their own labor.

Second, the Board should monitor union actions during card-check campaigns to ensure that the union is not providing false information to the employees. In the election context, the Board should return to its policy of realistically assessing the coercive impact of employers' and unions' statements. These minor adjustments would partially rectify the information gap faced by many employees when they are deciding whether to vote for the union.

Third, Congress would further the ability of the employees to make a free choice if it passed legislation such as the EFCA. Although management advocates have articulated problems with the process proposed by the EFCA, it is still superior to the current Board electoral system in protecting free choice. The threat of employer retaliation remains a most potent form of coercion, and legislation could limit the ability of employers to make these threats by eliminating the campaign. In some ways, the mandatory recognition card-check process proposed by legislation is weaker than the card-check agreements obtained under the current method because card check under the EFCA would not signal to employees that the employer would not retaliate against them. However, the card-check process as proposed by the EFCA would require fewer resources and would proceed much more quickly than card-check agreements (which often require an extended corporate campaign to prove the union's strength), thereby permitting a greater number of employees to express their preference. In addition to ensuring that employees have more opportunities to express their choice for a union beyond the watchful eye of the employer, the EFCA would also provide an interest arbitration clause, which will ensure that the employees' choice to be represented by a union will ultimately be effectuated by a collective bargaining agreement, at least for the first few years.

Alternatively, as a more modest reform, Congress could revert section 9(c) back to its original form under the Wagner Act, emphasizing that Board certification can be based on any kind of proof of majority support. Certification should issue the moment a majority representative is proven by a preponderance of the evidence, regardless of the form of the evidence. This reform is more elegant than the parallel portions of the EFCA because it more effectively eliminates formalist fictions. Majority support would again be a simple matter of fact, for which any probative evidence would be admissible. The historical circumstances that plagued the Board in its first twelve years have since passed, and the Board is currently in a far better

position to make these determinations without invoking suspicions of communist or anti-AFL sentiment.

However, these relatively modest steps are only the beginning of the effort to fully effectuate employee free choice. They do not adequately address the underlying issues of employer domination by ideology and total control of livelihood. While a full explication of the reforms needed is beyond the scope of this article, the following basic outline will guide future efforts and provoke reformers to ask the right questions.[271]

In order to address the coercive impact of the employer's total control of the work, the system of at-will termination and "core managerial prerogatives" must be replaced by another legal regime that permits employees to recognize the validity of their collective power. Currently, total employer control is a baseline interest that the employer may contractually waive. A less coercive system would provide employees a baseline interest in their jobs that they could contractually waive. The employer would then have to negotiate with the employee for the right to fire them for just cause. At-will adhesion agreements between dramatically unequal parties would be considered unconscionable as a matter of law. This alteration would eliminate a significant source of employer power over the employees, freeing them from the fear of arbitrary firing and providing the minimal level of job security necessary to confidently assert collective rights against the employer. The increased success of second (as compared to first) contract negotiations in the union context is at least partly attributable to the protection provided by just cause provisions in the first contract.

Instead of a baseline of no union, with employees required to take a number of onerous steps to be democratically represented, the baseline should be a democratic decision-making scheme in every workplace, with the option of affiliating with an international union if the employees so choose.[272] Imperfect international comparators abound, particularly in Germany and Japan.[273] In some industries, where employees are in high

demand, employees may generally favor individual bargaining for issues such as salary. If a majority of employees wish to bargain individually on particular terms, they would simply specify that proviso in the unit contract, which occurs currently in the professional sports unions. This baseline shift, in addition to lessening the employer's power over the employees, would provide support for a different ideology in which workers have the right to manage and organize their own labor.

While none of these proposals will fully rectify the issues we have identified in the union certification scheme, they would provide a starting point for ensuring that employee free choice is effectuated by American labor law.

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

[3] The AFL-CIO reported that less than one-fifth of its newly organized members from 1998 to 2003 were organized through the NLRB election method. *Id.* at 828.

[4] Dana Corp., 351 N.L.R.B. No. 28 (Sept. 29, 2007). In *Dana/Metaldyne*, the Board decided that voluntary recognition must be subject to two critical preliminary requirements: notice of recognition to the employees, and a forty-five-day period immediately after such notice in which no election or contract bar will apply. *Id.* at 1. This would require an election if 30 percent of employees sign a petition for decertification. *See infra* Part III.A.2.

[5] Employee Free Choice Act, H.R. 800, S. 1041, 110th Cong. (2007). While this legislation failed a cloture vote in the current Congress and was unable to move to debate, Democratic congresspersons have promised that this legislation will resurface in upcoming sessions. *See, e.g.*, Press Release, Office of Senator Edward M. Kennedy, A Majority of Senators Stand Up for Working Families (June 26, 2007), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=e20ab81b-4fc7-4a7e-9441-ef9efb69f82f.

[6] Dana Corp., 351 N.L.R.B. No. 28, at 1.

[7] *See infra* Part III.A.2. In accepting review of another recognition case, the Board went even further, explicitly asking (in the context of a card-check neutrality agreement applying to "after-acquired" facilities) "whether public policy reasons outweigh the

Employer's private agreement not to have an election." Shaw's Supermarkets, 343 N.L.R.B. 963, 963 (2004).

[8] *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families: Hearings Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. (2007) [hereinafter *Hearings*] (statement of Professor Cynthia Estlund, Professor of Law, New York University Law School), *available at* http://help.senate.gov/Hearings/2007_03_27_a/2007_03_27_a.html (stating that NLRB elections are but a "trapping of democracy" and "a parody of democracy"); *see also Hearings*, *supra* (statement of Peter Hurtgen, former chair of the NLRB) ("It seems to me, frankly, self-evident that full freedom can only be achieved . . . by a secret ballot in choosing a representative.").

[9] Although the NLRB is, in many senses, functioning as an expert agency with wide discretion for policymaking delegated to it by Congress in the NLRA, it is constrained to some extent by the existing statutory language and history, and the prospect of appellate court review. Congress, on the other hand, is free to remake policy choices as it sees fit. Nonetheless, in the current context, these differences are unimportant because the legislature has chosen to focus upon "employee free choice" as the primary value to be served by representation proceedings while the Board has similarly interpreted employee free choice as a primary objective of the current law. In theory, the Board is also constrained by the weight of its own precedent to maintain a certain level of stability in industrial relations. In recent years, this constraint has proved more and more illusory. *See infra* Part III.A.2–3.

[10] This primary question—how to evaluate the role of free choice in a process—is closely related to a number of other issues. For example, what does "free choice" or "free will" look like? If the purpose of a procedure is to determine the will of the majority of employees, how can the process ensure that the choices made by the employees are free?

[11] The rhetoric of both sides, particularly in the Congressional debate over the EFCA, is often couched in terms of workplace democracy. *See infra* Part III.B, C.

[12] *See infra* Part I.

[13] *See infra* Part IV.

[14] *Compare* Dana Corp., 341 N.L.R.B. 1283, 1283 (2004) ("The issue raised herein is the extent to which, if any, a voluntary recognition should be given an election 'bar quality.'") *with id*. at 1287 (Liebman & Walsh, Members, dissenting) ("The Petitioners also argue that employees may be 'coerced' into signing authorization cards. . . . [T]he Act provides recourse for employees who believe their employer recognized a union that lacked uncoerced majority support.").

[15] The majority in *Dana/Metaldyne* most likely believes, like former NLRB Chair Hurtgen, that it is "self evident" that elections better protect freedom of choice. *See supra* note 8. However, if freedom of choice is assessed realistically, secret ballots in laboratory conditions may not be adequate to protect free choice. *See infra* Part III.A.4.

[16] Formalism and realism, as discussed in this article, should not be confused with the historical movements for which they are named. These historical movements provide a greater context for understanding the terms but are not identical to the ways in which we use them in this article.

[17] Formalism is akin to the "grid aesthetic" described by Pierre Schlagg in *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1061 (2002) ("Both the appellate judge and the academic can become entranced with maintaining or perfecting the grid at the expense of attending to its worldly implications. This is the allure of law cast as geometry. This is the formalist orientation par excellence: the dominance of concern with maintaining the proper form and order of law in terms of its own criteria." (citations omitted)).

[18] This seemingly simple statement skims lightly over a massive area of controversy in jurisprudence. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); RONALD DWORKIN, LAW'S EMPIRE (1986). Suffice it to say that many thinkers identify the application of bright-line rules as an essential feature distinguishing law from other forms of social control.

[19] *See, e.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (discussing the use of reified metaphors in creating the appearance of neutrality in contract law).

[20] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976).

[21] *See* HENRY A. M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[22] This very brief working description of formalism combines two distinct, and in some ways contradictory, ways of thinking about law: classical legal thought and process theory. The confusion is deliberate; both ways of thinking share an emphasis on categorization. Both share the faith that if only a factual situation can be squeezed into the right category, the issue will resolve itself in an apolitical fashion. This belief is the basic characteristic that binds this broad grouping of methodology together. While modern process theory is a response to the historical realist movement that is, in many ways, sensitive to the concerns of historical realism, it is the categorization approach favored by process theory that justifies its treatment under the broad category of formalism. To reiterate, these broad categories are not coextensive with any particular historical movements, but they are merely a device for classifying efforts to evaluate "free choice."

[23] The origins of the common law of contracts, at least the pertinent aspects of that tradition, have been traced to England's covenants under seal in the twelfth century and the doctrine of assumpsit in the fourteenth century. *See* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 2–3 (1990).

[24] The use of the male pronoun in these circumstances is intended to be (ironically) historically accurate, as early common law identified women as legally incompetent to contract.

[25] The method for demonstrating "acceptance" often varies according to the kind of agreement: from seal, to notary, to signature, to verbal declaration. However, what these modes of acceptance have in common is that they are public, unique to the individual (unforgeable), and often permanent. These aspects functioned to impress upon the parties the seriousness, irrevocability, and permanence of the obligations created by the contract and to ensure easy proof and enforcement of the contract.

[26] Under common law contract, duress was limited to physical violence or imprisonment. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 28.2 (Joseph M. Perillo ed., Matthew Bender 2002) (1951) ("Few areas of the law of contracts have undergone such radical changes in the nineteenth and twentieth centuries as has the law governing duress. In Blackstone's time (c. 1776), relief from an agreement on grounds of duress was a possibility only if the agreement was coerced by actual (not threatened) imprisonment or fear of loss of life or limb. . . . Today the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress. This simple statement of the law, however, conceals a number of questions, particularly as to the meaning of 'free will' and 'wrongful.'" (footnotes omitted)). The definition of "duress" is at the heart of our inquiry into employee free choice.

[27] *See id.* § 27.

[28] National Labor Relations (Wagner) Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006). *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

[29] 29 U.S.C. § 158(b).

[30] JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 171, 178–80 (1983) ("Although decisions in labor law are not usually written in status or contractual terms, many of the decisions involve the construing or constructing of status or contractual relationships. . . . Indeed, the statute is often used to enforce those aspects of the contractual relationship that courts create.").

[31] From its infancy, the card-check process presumed consent from signature. *See infra* Part II.C.

[32] The American electoral process is not a stable process; instead, it has been molded to fit the social circumstances and is a controversial system. For example, the electoral college has inspired much debate, and the continuing lack of federal representation for citizens living in the District of Columbia indicates the political nature of the system's tailoring. *See, e.g.*, Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429 (1999) (arguing that the electoral college system was designed to enhance the power of the white leaders in the slave-holding states); Symposium, *Is There a Constitutional Right To Vote and Be Represented?: The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 617 (1999) (remarks by Professor Gary Peller) ("What we have in the District of Columbia is a more or less classic case of colonialism, of an old style eighteenth and nineteenth-century colonialism. The biggest mark of that colonialism, the most obvious from our twentieth-century liberal eyes, is the denial of formal self-determination, denial of the formal right to vote.").

[33] See *infra* Parts III.A.4, III.B for a description of a current electoral formalist point of view.

[34] *See, e.g.*, 153 CONG. REC. H1980 (daily ed. Feb. 28, 2007) (statement of Rep. Wilson) ("The so-called card check provision of the bill would force union membership by the signing of a form and thus denying employees having secret ballot elections. As citizens of a democratic Nation, Americans have the right to elect their public officials in secrecy and without coercion."); 153 CONG. REC. H2102 (daily ed. Mar. 1, 2007) (statement of Rep. Foxx) ("I want to talk a little bit and give another side of the story of this bill that

passed here today called the Employee Free Choice Act. We have been calling it the Employee Intimidation Act. And what I find most astonishing is that our colleagues on the other side are so willing to knock down one of the cornerstones of our democracy, and that is the right to a private ballot. For centuries, Americans, regardless of race, creed or gender, have fought for the right to vote and the right to keep that vote to themselves. Now, just months after a new House majority was elected in 435 separate elections, it has just voted to strip men and women of this country of their right to a private ballot in the workplace. I don't know what could be more undemocratic than that. Again, it just seems to me that hypocrisy is running rampant among the House majority.").

[35] While this question seems incredibly vague, even to the point of meaninglessness, it is important to remember that formal methods are only given content by the historical context. One can imagine a relatively formal, concrete definition of "punish" that gives meaning to this test; thus, the actual impact of the test will depend greatly on the definition given to this word. In this sense, our imagined anarchist formalism is neither more nor less natural, concrete, administrable, a priori, or definite than contract or electoral formalism.

[36] The secret ballot was not added to the American electoral process until the late nineteenth century and was fiercely opposed by classical liberals such as John Stuart Mill, who argued that, as a "public duty, [voting] should be performed under the eye and criticism of the public" rather than in secret. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 487–90 (quoting JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 232–33 (1946)). Mill argued that public voting ensured that voters would act in the public interest, rather than in merely private or selfish interest. *Id.*

[37] Many votes are still taken by declaration, such as Constitutionally-prescribed roll-call voting on legislation in Congress. *See, e.g.*, U.S. CONST. art. I § 7.

[38] For example, politicians are not permitted to create contracts to purchase a vote from a voter, and contract law has no explanation of this policy choice.

[39] Some proponents of the law and economics approach advocate an expansion of that methodology into most, if not all areas of life. For example, some well-respected law and economics scholars have defended a proposal for a "baby market." *See, e.g.*, Richard A. Posner, *Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 70 (1987) (arguing that the lawful selling of babies should be less regulated to decrease the number of babies being sold illegally or through the black market). The nonbinding character of adoption contracts signed before birth is not only a rejection of contract formalism, but is in itself a kind of "anarchist formalism" in which no choice is considered free unless it can be revoked at any time before actual performance.

[40] For a classic work of realism, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV 809 (1935).

[41] One important feature of realism is its humility. Realism does not pretend to discover fundamental truths; instead, it tries to find ways to compare options rather than achieve ideals.

[42] For a more expansive explanation of the implementation of realism, see *infra* Part IV.

[43] In fact, this basic effort is the foundation of the Wagner Act itself. *See To Create a National Labor Board: Hearing Before the Sen. Comm. on Education and Labor*, 73d Cong. 17 (1934) [hereinafter *To Create a National Labor Board*] (statement of Sen. Wagner) ("I think it has been recognized that, due to our industrial growth, it is simply absured [sic] to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for wages. The worker, if he does not submit to the employers terms, faces ruin for his family. The so-called freedom of contract does not exist under such circumstances. The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining. When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power."), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 31, 47 (1949) [hereinafter 1 LEG. HIST. WAGNER ACT].

[44] *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472–73 (1923) ("The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner—consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided. Such obedience may take the . . . form of working for the owner at disagreeable toil for a slight wage. . . . [W]hat would be the consequence of refusal to comply with the owner's terms? It would be either absence of wages, or obedience to the terms of some other employer. . . . Suppose, now, the worker were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone owns. He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property. . . . Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer.").

[45] CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 21 (2005). During the first half of the eighteen hundreds, state governments fought labor organization through criminal conspiracy law, often convicting defendants for their participation in labor "combinations." *See generally* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 128–79 (1993) (analyzing law and politics in the United States between 1790 and 1850, focusing on the interaction between law and labor and examining the social and political reasons for the dominant role of legal discourse during this time period); IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941 (1970) (examining the rising power of unions, the influential role of labor in politics under the New Deal, and the reorienting of public policy from employers to workers).

[46] Railway Labor Act of 1926, 45 U.S.C. §§ 151–188 (2006).

[47] MORRIS, *supra* note 45, at 21–22. When introducing an amendment to the NIRA, Senator Wagner indicated that the NIRA was defective because, unlike the RLA, it did not guarantee employees the right to recognition. This deficiency led to "over 70 percent of the disputes coming before the [NLB, which had] been caused by the refusal of employers to deal with representatives chosen by their workers." Instead, the amendment was "modeled upon the successful experience of the Railway Labor Act, which provides that employers shall actually recognize duly chosen representatives and make a reasonable effort to deal with them and to reach satisfactory collective agreements." 78 CONG. REC. 3443, 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 15, 16–17.

[48] Railway Labor Act, 45 U.S.C. § 152; *see also* the discussion of section 2(9) of RLA *infra* Part II.B. Interestingly, the National Mediation Board, which supervises elections under the RLA, currently uses mail-in ballots or telephone voting with an anonymous identification number rather than in-person voting as the NLRB does. *See* Nat'l Mediation Bd., Representation Manual (Sept. 14, 2007), *available at* http://www.nmb.gov/representation/representation-manual.pdf.

[49] *See* MORRIS, *supra* note 45, at 22; BERNSTEIN, *supra* note 45, at 174.

[50] National Industrial Recovery Act, Ch. 90, § 7(a)(1)–(2), 48 Stat. 195 (1933) (invalidated in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[51] Norris-LaGuardia Act § 2, 19 U.S.C. § 102 (2006). *See* DAVID BRODY, LABOR EMBATTLED: HISTORY, POWER, RIGHTS 49 (2005). The Norris-LaGuardia Act's full declaration of the United States' public policy is even more striking: "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Norris-LaGuardia Act § 2.

[52] BRODY, *supra* note 51, at 101.

[53] *Id.*

[54] *See id.* at 49–50; MORRIS, *supra* note 45, at 31. *See also Hearings on S. 1958 Before the Sen. Comm. on Education and Labor*, 74th Cong. 40 (1935) (statement of Sen. Wagner) (stating that over 69 percent of the company unions existing in 1935 began after the NIRA was passed), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1377, 1416.

[55] BRODY, *supra* note 51, at 102.

[56] *See id*. at 101–02. For a discussion of parallel development of formal electoral methods to resolve interunion disputes in the 1940s, see discussion *infra* Part II.C.

[57] MORRIS, *supra* note 45, at 34.

[58] *Id.* at 31–32.

[59] *Id.* at 32.
[60] *Id.*
[61] *See id.*
[62] *Id.* at 34 (citation omitted). The Executive Order 6580 was signed in February 1934. President Roosevelt had already signed Executive Order 6511 in December 1933, which approved the Board's prior actions and authorized the Board to "settle by mediation, conciliation or arbitration all controversies between employers and employees which tend to impede the purpose of the National Industrial Recovery Act." *Id*. at 34 (citation omitted).
[63] *See* BRODY, *supra* note 51, at 103.
[64] *Id.*
[65] In a statement by the Board of its principles, Milton Handler, general counsel of the Board, described the role and procedure of representation elections: "The Board has employed the device of an election by secret ballot under government supervision, when the employer has questioned the authority of any agency to act as representative of employees. The Board has held that the manner of conducting the election is entirely within the discretion of the employees, and that the employer in no way can interfere with the conduct of the election." 78 CONG. REC. 12016, 12029–30 (1934), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1177, 1210.
[66] *See* BRODY, *supra* note 51, at 103.
[67] National Labor Relations Act § 8(a)(3), 29 U.S.C. §§ 151–169 (2006); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[68] The Wagner Act is also a thoroughgoing realist document with respect to contract. The original findings and statement of purpose, first introduced by Senator Wagner, stated that "[t]he tendency of modern economic life toward integration and centralized control has long since destroyed the balanced bargaining power between individual employer and the individual employee, and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract . . . ." S. 2926, 73d Cong. § 2 (2d Sess. 1934), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1, 1. Senator Wagner's statements about the bill repeat this refrain, "Genuine collective bargaining is the only way to attain equality of bargaining power." 78 CONG. REC. 3443, 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 15. "Simple, common sense tells us that a man does not possess this freedom [to act freely in his interest, and bargain candidly] when he bargains with those who control his source of livelihood." *Id.* at 16.

> The principle of collective bargaining has been attacked as a violation of the constitutional guarantee of freedom of contract, since it does not preserve for each employer the right to make contracts with each of his employees as individuals. Nothing can be more fallacious. The fathers of our Nation did not regard freedom of contract as an abstract end. They valued it as a means of insuring equal opportunities, which cannot be attained where contracts are dictated by the stronger party.
>
> The law has long refused to recognize contracts secured by physical compulsion or duress. The actualities of present-day life impel us to recognize

> economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7 (a) of the Recovery Act, is a veritable charter freedom of contract; without it there would be slavery by contract.

78 CONG. REC. 3678, 3679 (1934), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 18, 20.

> Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate common man from destitution, from insecurity, and from human exploitation. In this modern aspect of the timeworn problem the isolated worker is a plaything of fate. Caught in a labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group.

79 CONG. REC. 7565 (1935) (statement of Sen. Wagner), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2321, 2321 (1949) [hereinafter 2 LEG. HIST. WAGNER ACT].

[69] National Labor Relations Act, ch. 372 § 9(c), 49 Stat. 449 (1935) (current version at 29 U.S.C. § 159(c)) ("Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties . . . the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.").

[70] In discussions of whether election determinations should be directly reviewable in court, the Act's legislative history references the fact that "[a]n election is the mere determination of a preliminary fact, and in itself has no substantial effect on the rights of other employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing." S. REP. NO. 74-573, at 14 (1935), *reprinted in* 2 LEG. HIST. WAGNER ACT, *supra* note 68, at 2300, 2314.

[71] *See infra* Part II.D.

[72] See BRODY, *supra* note 51, at 102 ("[A]s a Brookings Institution study summed it up, 'The election was nothing with which the employer need be concerned. It was a matter in which his employees alone had a stake.'").

[73] National Labor Relations Act § 8(a)(3), 29 U.S.C. § 159(c) (2006).

[74] *See infra* note 165 and accompanying text.

[75] *See* 78 CONG. REC. 10351, 10353 (1934) (article by Sen. Walsh) ("When a dispute arises, as is now so frequent, as to who are the representatives of the employees with whom the employer is required to deal for the purposes of collective bargaining, the Board may undertake to determine this question and to certify to the employer the names

of individuals or labor organizations that have been designated and authorized to represent employees by not less than a majority."), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1117, 1121; 78 CONG. REC. 10559, 10560 (1934) (article by Sen. Walsh) ("One other important provision is that where a dispute takes place among employees as to who are the representatives to negotiate collective bargaining with their employer the board is authorized to take a secret ballot or use other suitable methods of determining what kind of an organization the majority of the employees desire and just who the majority of the employees desire to choose as their representatives."), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1122, 1126. Note that Senator Walsh, the chair of the committee that reported the bill, hinted that interunion conflicts were in fact a form of employer opposition, presumably, because company unions were generally one party to the conflict. Senator Walsh did not imagine elections playing a role outside of interunion conflicts.

[76] 29 U.S.C. § 159(c).

[77] S. REP. NO. 73-1184, at 8 (1934) (emphasis added), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1099, 1107.

[78] *To Create a National Labor Board*, *supra* note 43, at 566 (statement of Ralph Foster) ("Section 207 [predecessor of 9(c)] is another one to which we object, because it speaks of the secret ballot, but permits the Board to utilize any other appropriate method. We think that the secret ballot is the only fair method and is the only method which is free from coercion; that the Board should be limited to the use of the secret ballot in the conduct of elections."); *Hearings on S. 1958 Before the Sen. Comm. on Education and Labor*, 74th Cong. 40 (1935), *reprinted in* 2 LEG. HIST. WAGNER ACT, *supra* note 68, at 2038, 2044–45 (statement of Clifford Cartwright) ("I think . . . the words 'or utilize any other suitable method' should be stricken. What other method is more suitable than by secret ballot that is nothing but fair? 'Any other method' could mean anything.").

[79] *See supra* Part II.A.

[80] Railway Labor Act of 1926, 45 U.S.C. § 152(9) (2006).

[81] *Id.* (emphasis added); *see also* 74TH CONG., COMPARISON OF S. 2926 AND S. 1958 31 (Comm. Print 1935), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 1319, 1357.

[82] *See supra* note 68 and accompanying text.

[83] HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 133 (1950).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *In re* The Cudahy Packing Co., 13 N.L.R.B. 526, 531–32 (1939) ("We are thus faced with conflicting claims as to which of two labor organizations, each designated by a substantial number of the employees involved, is entitled, under the Act, to represent all of them. Our determination of representatives looks to the initiation of collective bargaining between the Company and its employees. We believe that since each of two contesting labor organizations has proved substantial adherence among the employees the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as

possible, eliminated. Although 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. We shall, accordingly, direct that such an election be held."); *In re* Armour & Co., 13 N.L.R.B. 567, 572 (1939) ("At the hearing, the Union offered evidence in support of its claim that the majority of the employees had designated it as their collective bargaining agent. It requests certification upon the proof offered. The Company, however, contests the Union's claims. It contends that an election is necessary to determine the wishes of the employees. Although in the past we have certified representatives without an election upon a showing of the sort made by this record, we are persuaded by our experience that, under the circumstances of this case, any negotiations entered into pursuant to a determination of representatives by the Board will be more satisfactory if all disagreement between the parties regarding the wishes of the employees has been, as far as possible, eliminated. We shall therefore direct that an election by secret ballot be held.").

[88] *See, e.g.*, Carnegie-Illinois Steel Corp., 40 N.L.R.B. 532 (1942).

[89] MILLIS & BROWN, *supra* note 83, at 133–34.

[90] *See id.* at 87.

[91] *Id.*

[92] James A. Gross, *The NLRB: An Historical Perspective*, *in* A GUIDE TO SOURCES OF INFORMATION ON THE NATIONAL LABOR RELATIONS BOARD 3, 11–12 (Gordon T. Law, Jr., ed., Routledge Research & Information Guides in Business, Industry and Economic Institutions Series 2002). The Board underwent intense scrutiny upon allegations of Communist influence. The Smith Committee, a Special House Committee led by conservative congressman Howard Smith, "was a classic illustration of how a congressional investigation can be used to promote pre-conceived labor policies through skillful manipulation of its public hearings and careful management of the communications media as political instruments to influence public opinion and to achieve its predetermined political objectives." *Id.* at 12.

[93] MILLIS & BROWN, *supra* note 83, at 34.

[94] *See* Gross, *supra* note 92, at 11.

[95] Organized in 1937, the Congress of Industrial Organizations (CIO) was more radical than the American Federation of Labor (AFL). *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1778 (2001) ("The rise of industrialism and the poor fit between the AFL's craft unionism and the increasing numbers of workers employed in manufacturing processes led to the formation of a splinter group within the AFL, the Congress of Industrial Organizations. Formally organized in 1937 as a distinct entity from the AFL, the CIO promoted a class-conscious unionism that contemplated worker solidarity across craft lines, indeed across the entire working class. Working through the left wing of the Democratic Party, the CIO sought to advance the economic interests of the working class through lobbying for legislation that advanced the standard of living for all workers.").

Employers tended to prefer the AFL to the CIO; therefore, the AFL proposed an amendment to the Wagner Act in 1939 that would have limited the Board's discretion and authority in decision-making and would have encouraged employer support for a

preferred labor organization when different unions were fighting for one bargaining unit. Gross, *supra* note 92, at 11.

[96] See *supra* Part II.A for a discussion of the development of electoral processes under the NIRA.

[97] Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. §§ 141–197 (2006).

[98] *See* BRODY, *supra* note 51, at 107–08.

[99] National Labor Relations Act § 8(a)(3), 29 U.S.C. § 159(c)(1)(B) (2006) ("If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.").

[100] *See* H.R. REP. NO. 80-245, at 30 (1947) ("Under [Section 8(a)(5)], if an employer is satisfied that a union represents the majority and wishes to recognize it without its being certified under section 9, he is free to do so as long as he wishes, but as long as he recognizes it, or when it has been certified, he must bargain with it. If he wishes not to recognize an uncertified union, or, having recognized it, stops doing so, the union may ask the Board to certify it under section 9."), *reprinted in* NLRB, 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 321 (1985) [hereinafter 1 LEG. HIST. LMRA]; *see also* National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (2006) (restricting organizational picketing of employer with certified union); 29 U.S.C. § 159(e)(2) (establishing a twelve-month election bar).

[101] NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 478 (1941) ("In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done.").

[102] *See* BRODY, *supra* note 51, at 146–47.

[103] National Labor Relations Act, 29 U.S.C. § 158(c); *Va. Elec. & Power*, 314 U.S. 469; NLRB v. Trojan Powder Co., 135 F.2d 337, 338–39 (3d Cir. 1943) (enforcing Board decision finding employer ULPs when "employer wrote to its employees a series of letters which the Board found had coerced 'the employees into abandoning their organizational efforts.'"), *cited in* Thomas v. Collins, 323 U.S. 516, 537–38 (1945) ("When to [the employer's lawful] persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.").

[104] By codifying the employer's "free speech," Congress limited the Board's ability to use a realist analysis of the effects of the employers' speech on the employees, which varied on the basis of the specific facts of the organization situation. A management speech made to one set of employees may have an entirely different effect on a different set of employees.

> The Board's regional offices were in a good position to observe the effects of pre-election statements by employers. They reported great variation early in 1947 in the extent to which such statements were used, depending on industry and area and influence of particular attorneys. They were widely used in the South. Many of the regions noted some elections lost when there were such pre-election campaigns by employers, although some thought the importance of these letters overestimated. In general, the statements had little effect in the better-organized cities or long-organized areas, but in the "hinterlands" the story was quite different. They were especially effective in isolated, rural

> areas where employees were unsophisticated, sometimes illiterate, and newly organized, and the unions were weak. They were sometimes effective also where there had been a history of good labor relations. Sometimes, however, the effect was opposite to that which had been intended. It was clear that greater freedom of employers to enter into the campaign as employees tried to organize was a real handicap to unions in some of the industries and areas where organization was still in an early stage and where freedom to organize was not yet thoroughly established.
>
> This experience gave some indications as to the needs of sound policy. If the purposes of the Act were still to be accomplished, it was important for the Board be willing and able to make a realistic appraisal of all the factors in particular situations and not hesitate to enjoin statements when they were clearly coercive in the entire context, including consideration of the social milieu. The fact of employers' dominance in one-industry towns and backwoods areas could not be ignored in deciding whether statements were coercive. . . . Moreover, the experience in 1947 showed how important it was to continue to use statements as evidence of motive in connection with other evidence of discrimination or other unfair labor practices, if employees were still to be protected from interference by some employers with their rights under the Act.

MILLIS & BROWN, *supra* note 83, at 187–88.

[105] *See* 93 CONG. REC. 4479, 4558 (1947) (statement of Sen. Ball) ("I should like to emphasize also that the pending amendment and all the proposed amendments to the National Labor Relations Act make absolutely no change in the duties and obligations of employers. The unfair labor practices of employers defined in section 8(a) of the pending measure are identical with the unfair practices defined in the present law. Not one is changed. In fact, we have added one definition. We make it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement. If in spite of our care in trying to avoid it, lawyers discover loopholes in this bill by which employers can engage in a union-busting campaign, I shall be the first to try to plug those loopholes and to correct the situation by adding new definitions of unfair labor practices on the part of employers, if they are needed."), *reprinted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1161, 1199 (1985) [hereinafter 2 LEG. HIST. LMRA].

[106] 93 CONG. REC. 3572, 3579 (1947) (statement of Rep. Price), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 100, at 669, 681. *See also* 93 CONG. REC. A895, A895 (1947) (statement of, extension of remarks of Rep. Murray; reprint of Sen. Wagner, *The Wagner Act—A Reappraisal*) ("Moreover, all the propaganda to the contrary notwithstanding, the phenomenal growth of labor organization has taken place without any diminution of the employers' constitutional right to free speech in labor relations. The talk of restoring free speech to the employer is a polite way of reintroducing employer interference, economic retaliation, and other insidious means of discouraging union membership and union activity, thereby greatly diminishing and restricting the exercise of free speech and free choice by the working men and women of America. No constitutional principle can

support this, nor would a just labor-relations policy result from it."), *reprinted in* 2 LEG. HIST. LMRA, *supra* note 105, at 935, 935; 93 CONG. REC. 1884, 1911 (statement of Sen. Morse) ("[T]he question of employers' freedom of speech has generated a great deal of heat in the hearings before the Senate committee. It is, of course, self-evident that neither the Board nor the courts can impair the right of free speech guaranteed in the Constitution. It is my impression that those who propose legislation designed to enlarge the employer's right to express his views to his employees are not so much interested in vindicating their constitutional rights as they are in obtaining statutory immunity for acts and conduct which in fact interfere with and coerce employees."), *reprinted in* 2 LEG. HIST. LMRA, *supra* note 105, at 939, 984.

[107] Lechmere, Inc. v. NLRB, 502 U.S. 527, 540–41 (1992) (overturning Board determination that the union should have access to company property because the union had some possible methods of communicating with them off-site); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) ("No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." (citations omitted)). "*Access* to employees, not *success* in winning them over, is the critical issue." *Lechmere*, 502 U.S. at 540–41. (emphasis in original).

[108] *In re* Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948) ("With respect to the 'compulsory audience' aspect of the speeches, the Trial Examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings removed the element of choice from the employees and, in effect, compelled them to attend in violation of the Act. In reaching this conclusion, the Trial Examiner relied upon the 'compulsory audience' doctrine enunciated in [a previous Board case]. However, the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the [earlier] case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses. Even assuming, therefore, without deciding, that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act.").

[109] Livingston Shirt Corp., 107 N.L.R.B. 400, 406–07 (1953) ("We reject the idea that the union has a statutory right to assemble and make campaign speeches to employees on the employer's premises and at the employer's expense. We see no real distinction in principle between this and admitting an employer to the union hall for the purpose of making an antiunion speech, a suggestion which our dissenting colleague would doubtless view with abhorrence. We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to

be realistically achieved by attempting . . . to make the facilities of the one available to the other.").

[110] Blue Flash Express, Inc., 109 N.L.R.B. 591, 593–94 (1954) ("[W]e are not holding in this decision that interrogation must be accompanied by other unfair labor practices before it can violate the Act. We are merely holding that interrogation of employees by an employer as to such matters as their union membership or union activities, which, when viewed in the context in which the interrogation occurred, falls short of interference or coercion, is not unlawful. . . . In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that the employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent."). *See also* BRODY, *supra* note 51, at 106 ("[N]o amount of fine distinctions about time, place, and so on can alter the fact that, in the heat of a representation campaign, an interview in the supervisor's office about how an employee feels about the company is coercive to that employee.").

[111] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again."); *see infra* Part III.A.4.a–b.

[112] BRODY, *supra* note 51, at 147.

[113] *See supra* Part II.B.

[114] NLRB v. Gissel Packing Co., 395 U.S. 575, 579 (1969).

[115] *Id.* at 602–03.

[116] *See, e.g.*, Cal. Gas Transport, Inc., 347 N.L.R.B. No. 118 (Aug. 31, 2006) (discriminatory discharge); Nat'l Steel Supply, Inc., 344 N.L.R.B. No. 121, 177 L.R.R.RM. (BNA) 1323 (June 30, 2005) (discriminatory discharge); Taylor Machine Products, Inc., 317 N.L.R.B. 1187, 1216–17 (1995) (threatened plant closure and discriminatory discharge); Somerset Welding & Steel, Inc., 304 N.L.R.B. 32 (1991) (threatened plant closure).

[117] Scholars have questioned the effectiveness of the *Gissel* bargaining order. *See, e.g.*, Terry A. Bethel & Catherine Melfi, *The Failure of Gissel Bargaining Orders*, 14 HOFSTRA LAB. & EMP. L.J. 423 (1997). Not only are *Gissel* bargaining orders not issued as often as they might be, but, when they are issued, they often fail to fix the problem of employer coercion and refusal to bargain. *Id.* The problems presented by a formal approach to "good-faith bargaining" enforcement are very serious, but far beyond the scope of this paper.

[118] The Second Circuit, in particular, has given little to no deference to the expert determinations of the Board that a bargaining order is justified by the circumstances. *See* NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212 (2d Cir. 1980); *see also* Rebecca Hanner White, *Time for a New Approach*, 69 N.C. L. REV. 639, 658 (1991) ("The Second Circuit, for example, has consistently refused to enforce the Board's 'Gissel' bargaining . . . when the Board has failed to consider subsequent events or when 'hallmark' violations are not present. Moreover, the Second Circuit has chastised the Board when it fails to adopt the court-constructed 'Gissel' standards.").

[119] *See Taylor Machine Products*, 317 N.L.R.B. 1187; *Somerset Welding & Steel*, 304 N.L.R.B. 32; Indiana Cal-Pro, Inc., v. NLRB, 863 F.2d 1292, 1301–02 (6th Cir. 1988); *Jamaica Towing*, 632 F.2d at 212.

[120] *See* Bethel & Melfi, *supra* note 117.

[121] NLRB v. Jamaica Towing, Inc., 602 F.2d 1100, 1104 (2d Cir. 1979).

[122] Patsy Bee, Inc., 249 N.L.R.B. 976, 977 (1980), *enforcement denied*, 654 F.2d 515 (8th Cir. 1981). Interestingly, the Board in *Patsy Bee* did not cite the *Jamaica Towing* decision.

[123] Highland Plastics, Inc., 256 N.L.R.B. 146, 147 (1981). Of course, the Board was only able to cite *Jamaica Towing* and *Patsy Bee* as authority to support this statement! In this context, the use of the signal "*see, e.g.*" to indicate that *Patsy Bee* was but one of many such examples was particularly disingenuous. *Id.* at 147 n.8.

[124] *See* Concrete Form Walls, Inc., 346 N.L.R.B. No. 80, 179 L.R.R.M. (BNA) 1193 (Apr. 13, 2006); Nat'l Steel Supply, Inc., 344 N.L.R.B. No. 121, 177 L.R.R.M. (BNA) 1323 (June 30, 2005); Cal. Gas Transport Co., 347 N.L.R.B. No. 118; Evergreen Am. Corp., 348 N.L.R.B. No. 12 (2006); *see also* Memorandum from Fred Feinstein, NLRB General Counsel, to All NLRB Regional Directors, Officers-in-Charge, and Resident Officers (Nov. 10, 1999), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/1999/gc99-8.html).

[125] *See, e.g.*, The Register Guard, 344 N.L.R.B. No. 150, 177 L.R.R.M. 1382 (July 28, 2005); Allied Mechanical, Inc., 343 N.L.R.B. 631 (2004); Hialeah Hospital, 343 N.L.R.B. 391 (2004); United Scrap Metal, Inc., 344 N.L.R.B. No. 55, 2004-2005 NLRB Dec. (CCH) ¶ 16,881 (Mar. 31, 2005); S. Nuclear Operating Co., 348 N.L.R.B. No. 95 (Dec. 29, 2006); Desert Toyota, 346 N.L.R.B. No. 4, 178 L.R.R.M. (BNA) 1369 (Dec. 23, 2005); Desert Toyota, 346 N.L.R.B. No. 1, 178 L.R.R.M. (BNA) 1384 (Dec. 23, 2005); Desert Toyota, 346 N.L.R.B. No. 2, 178 L.R.R.M. (BNA) 1413 (Dec. 23, 2005); *see also* Erin Johansson, American Rights at Work, Is Another NLRB Election Really a Solution for These Workers? (Dec. 15, 2004), http://www.americanrightsatwork.org/eye-on-the-nlrb/editions/is-another-nlrb-election-really-a-solution-for-these-workers.html (discussing the Board's overturning of the ALJ's bargaining order in *Hialeah Hospital*).

[126] Smithfield Foods, Inc., 347 N.L.R.B. No. 109, at 8 (Aug. 31, 2006) ("The judge concluded that, regardless of the results of the election, the Respondent engaged in repeated and pervasive unfair labor practices that warranted issuance of a remedial bargaining order based on proof that the Union had obtained valid authorization cards from a majority of unit employees. Under the particular circumstances of this case, we disagree. We are concerned that due to the Board's 'long and unjustified delay in processing the case,' a *Gissel* bargaining order would likely be unenforceable.

Accordingly, rather than possibly engender further litigation and delay over the propriety of a bargaining order, we decline to reach the question of whether a remedial bargaining order is appropriate here. Instead, we find that employee rights would be better served by proceeding directly to a second election." (citations omitted)). The Board was right to think that the bargaining order would be difficult to enforce. *See* Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1171–73 (D.C. Cir. 1998) (criticizing the Board for not considering the passage of time). The irony (and the danger) of this logic is that an employer's own misdeeds in delaying the litigation could exonerate the employer from a duty to bargain under *Gissel*.

[127] Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966).

[128] *See, e.g.*, NLRB v. Universal Gear Service Corp., 394 F.2d 396, 398 (6th Cir. 1968) (upholding NLRB decision) ("While the Union in the present case was not certified by the Board, there is no question but that it was lawfully designated the exclusive bargaining representative of the Company's employees by means of the authorization cards, and was recognized as such by the Company." (citations omitted)); NLRB v. Montgomery Ward & Co., Inc., 399 F.2d 409 (7th Cir. 1968) (upholding Board's cease and desist order to enforce bargaining); NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1384 (2d Cir. 1973) (upholding Board remedy) ("Having voluntarily determined that the Union had a majority status which entitled them to recognition as the representatives of its employees and having foregone the right to request an election, we cannot accede to the proposition that the employer can now unilaterally determine that the Unions no longer represent a majority of the employees and refuse to bargain with them.").

[129] *Keller Plastics*, 157 N.L.R.B. at 586 ("[C]ertification must be honored for a reasonable period, ordinarily 1 year in the absence of unusual circumstances."). For a discussion of the original NLRB rule and the effect and purpose of the Taft-Hartley amendments in codifying the rule, see Brooks v. NLRB, 348 U.S. 96, 98–99 (1954) ("'Unusual circumstances' were found in at least three situations: (1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members of officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." (citations omitted)). Although the Court in *Brooks* mentioned that the bar had not been applied by the Board in the card-check context (*id*. at 101 n.9), the *Brooks* decision predated *Keller Plastics*, in which the Board invoked pre-Taft-Hartley board precedent creating the certification bar to justify a recognition bar. *See supra* note 127 and accompanying text. The parallel language used by the Board in *Keller Plastics* strongly suggests that the recognition bar was meant to be a relatively simple application of an identical bar to that originally developed for certification prior to Taft-Hartley. *See id.*

[130] For decades, many appellate court opinions have announced the rule that the recognition bar would operate for one year, absent unusual circumstances. *See* Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243, 1247 (D.C. Cir. 1994) ("[B]y voluntarily recognizing a union an employer waives its prerogative to insist upon an election. The company thereby agrees in effect to treat the union as if it had won an election and to afford the union all the benefits that accompany full representational status. Chief among those benefits is a conclusive presumption of continuing majority support for one year

after voluntary recognition. Thus, by unlawfully refusing to negotiate with the Union absent an election only eight months after recognition, Exxel violated its promise to respect the desires of a majority of its employees and to allow the Union a reasonable time to negotiate." (citation omitted)). *Accord* NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1300–02 (D.C. Cir. 1988); Hotel, Motel, & Restaurant Employees & Bartenders Union Local No. 19 v. NLRB, 785 F.2d 796, 798–99 (9th Cir. 1986); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978); Sahara-Tahoe Corp. v. NLRB, 581 F.2d 767, 769–70 (9th Cir. 1978).

Board precedent on this issue has been extremely complicated. *See* Brennan's Cadillac, Inc., 231 N.L.R.B. 225, 225–27 (1977); Royal Coach Lines, Inc., 282 N.L.R.B. 1037, 1038 (1987) ("A reasonable time is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions."); *see also* MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (finding that eleven months is reasonable in some circumstances); Ford Ctr. for the Performing Arts, 328 N.L.R.B. 1 (1999) (finding that nine months is not reasonable in some circumstances).

A number of other courts have been much more circumspect in defining a reasonable time. *See* NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1383 (2d Cir. 1973) ("There is no doubt that if the bargaining relationship between the employer and the Unions had been established by Board certification after an election, the representative status of the Unions absent unusual circumstances would be irrebuttably presumed to continue for one year and after that time the presumption could be rebutted. The Board has not fixed any period of mandated collective bargaining where uncertified unions are involved but has maintained that the employer must bargain for a reasonable time." (citations omitted)); *see also* Randall Div. of Textron, Inc. v. NLRB, 965 F.2d 141, 145 (7th Cir. 1992) ("[A]n employer usually may not withdraw recognition from a union for one year after the Board has certified the union as the employees' bargaining representative despite questions about the union's majority status. Similarly, an employer that voluntarily recognizes a union must bargain with the union for a reasonable time without questioning the union's majority status." (citations omitted)).

[131] *See Keller Plastics*, 157 N.L.R.B. at 586–87 (1966); *cf.* San Clemente Publ'g Corp., 167 N.L.R.B. 6, 8 (1967) ("There is as much reason to require an employer to give such an agreement a reasonable period in which to function without regard to a union's loss of majority status, as in the case of certifications, bargaining orders, and settlement agreements. In each, a bargaining obligation arises, whether by Board action pursuant to law, or by voluntary commitment, and it is similarly easy to visualize the obstruction to effective bargaining and denigration of statutory policy that could result if the employer in any of the given situations were permitted to repudiate his obligation solely because the union in question has lost majority status.").

[132] As discussed *supra* note 130, Board precedent has been extremely complicated and unpredictable and has varied dramatically according to the political affiliation of board members. *Compare* Tajon, Inc., 269 N.L.R.B. 327, 327–28 (1984) (considering less than two months to be sufficiently long to constitute a "reasonable time" because "the two negotiating meetings accomplished . . . substantial agreement on many issues"), *with MGM Grand Hotel*, 329 N.L.R.B. at 464 (finding that eleven months is reasonable in

some circumstances), *and* Ford Center for the Performing Arts, 328 N.L.R.B. at 1 (considering the special difficulties associated with first contract bargaining as worthy of consideration in the determination of whether a "reasonable period" has passed).

[133] E-mail from Ed Gleason, Attorney, Int'l Bhd. Teamsters, to Jennifer Dillard (May 12, 2007, 21:06 EST) (on file with authors). *Cf.* Dana Corp., 351 N.L.R.B. No. 28, at 4 n.11 (Sept. 29, 2007) ("Chairman Battista would impose a maximum of 6 months for the insulated period.").

[134] *See* Majestic Weaving, 147 N.L.R.B. 859, 860–61 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966); *see also* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel for the NLRB Div. of Advice, to Martin M. Arlook, NLRB Regional Dir. for Region 10 (June 27, 2005), *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/10-CA-35554%2806-27-05%29.pdf; *cf.* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 401–03 (2001) (describing potential *Majestic Weaving* problems associated with card-check/neutrality agreements).

[135] Seattle Mariners, 335 N.L.R.B. 563, 565 (2001); *see also MGM Grand Hotel*, 329 N.L.R.B. at 467 ("[W]e find that, in balancing the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships, the purposes of the Act are best served by a finding that a reasonable time had not elapsed at the time the instant petitions were filed. In reaching this conclusion, we recognize our dissenting colleagues' concern for protecting the employees' Section 7 right to choose their bargaining representative. We take seriously the Act's command to respect the free choice of employees as well as to promote stability in bargaining relationships. The two statutory goals often require careful balancing by the Board. In the instant case, we believe that such a balance has been achieved.").

[136] *See, e.g.*, NLRB v. Universal Gear Service Corp., 394 F.2d 396, 397–98 (6th Cir. 1968) ("In an attempt to impart some stability to bargaining relationships, the Board early adopted a rule under which a union certification, if based on a Board conducted election, must be honored for 'a reasonable period,' generally one year. . . . While the Union in the present case was not certified by the Board, there is no question but that it was lawfully designated the exclusive bargaining representative of the Company's employees by means of the authorization cards, and was recognized as such by the Company." (citations omitted)); Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243, 1247–48 (D.C. Cir. 1994) (upholding Board's decision not to order an election after employer signed card-check agreement and union showed majority cards, finding that to do otherwise would be "inconsistent with the purposes of the NLRA").

[137] Dana Corp., 351 N.L.R.B. No. 28.

[138] *Id.* at 1. It should be noted that the Board nonetheless held for the union because the Board decided to apply the rule only prospectively and declined to upset the bargaining relationships already established in reliance on the old rule. *Id.* at 2.

[139] *Id.*

[140] For example, in December 2007, forty-one of sixty-two single-union elections held by the NLRB had dissenting minorities of 30 percent of eligible employees or greater. *See*

NLRB, NLRB ELECTION REPORT 17–20 (Dec. 2007), *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Election%20Reports/December2007.pdf.
[141] Dana Corp., 351 N.L.R.B. No. 28, at 3.
[142] *Id.* at 10.
[143] *Id.* at 5 n.17.
[144] *Id.* at 5–6.
[145] The Board cites *Linden Lumber v. NLRB* for the proposition that the secret-ballot election is the best method for determining whether employees desire union representation. *See id.* at 15 n.18. *Linden Lumber* held that an employer may refuse to recognize a union based on a majority card showing. Linden Lumber Div. v. NLRB, 419 U.S. 301, 309–10 (1974). However, in *Linden Lumber*, the Court explicitly stated that the case does not affect situations where "the employer breaches his agreement to permit majority status to be determined by means other than a Board election." *Id.* at 310 n.10.
[146] Dana Corp., 351 N.L.R.B. No. 28, at 6.
[147] *Id.* at 9–10.
[148] Retail Clerks Union Local 870, 192 N.L.R.B. 240 (1971); Houston Div. of Kroger Co., 219 N.L.R.B. 388 (1975).
[149] *Kroger Co.*, 219 N.L.R.B. 388; *Retail Clerks Union*, 192 N.L.R.B. 240.
[150] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (2006). *See* Supervalu, Inc., 351 N.L.R.B. No. 41, at 11 (Sept. 30, 2007) (Biblowitz, A.L.J.) (suggesting that after-acquired clauses are enforceable under Section 301).
[151] This elegant and simple provision has been the inspiration for incredible judicial creativity. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 465 (1957) (Frankfurter, J., dissenting) ("[T]he Court makes § 301 a mountain instead of a molehill . . . ."). The Court has read from the simple words of § 301 the authority to create a new body of substantive federal common law for the interpretation of labor contracts. *Id*. at 456.
[152] 29 U.S.C. § 185(a).
[153] *See* Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566–67 (2d Cir. 1993) (enforcing a card check neutrality agreement independent of majority status and citing concurring cases in the Sixth, Ninth, Tenth, and D.C. Circuits).
[154] *See* 29 U.S.C. § 185(a).
[155] *See supra* note 153.
[156] *See, e.g.*, Supervalu, Inc., 351 N.L.R.B. No. 41, at 1 (Sept. 30, 2007) (holding that after-acquired clauses are generally a permissive subject of bargaining and can therefore be violated without implicating §8(a)(5)). *See also* Shaw's Supermarkets, 343 N.L.R.B. 963 (2004).
[157] Shaw's Supermarkets, 343 N.L.R.B. at 964 ("[W]e have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election. It is clear that the Board's election machinery is the preferred way to resolve

the question of whether employees desire union representation. That method, as compared to a card check, offers a secret ballot choice under the watchful supervision of a Board agent.").

[158] *See, e.g.*, *Hotel & Rest. Employees Union*, 996 F.2d at 566 ("Although a court as noted—deferring to the NLRB—generally will not make an initial representation decision, an employer and labor organization are not thereby foreclosed from reaching a private agreement on union recognition. Such a contract, which bypasses Board-conducted elections, provides an alternative method for employees to accept or decline union representation.").

[159] Shaw's Supermarkets, 343 N.L.R.B. at 963.

[160] *Id.*

[161] Marriott Hartford Downtown Hotel, 347 N.L.R.B. No. 87, 180 L.R.R.M. 1057 (BNA) (Aug. 4, 2006).

[162] *Id.* at 1.

[163] New Otani Hotel & Garden, 331 N.L.R.B. 1078, 1080 (2000).

[164] If a contract waiver of board election is void for public policy because it infringes on *employee* free choice, how can voluntary recognition itself be legal? A prior agreement to waive election has no more effect on the choice employees make than does a later waiver by voluntary recognition. In neither situation is an election held, and in both situations cards alone prove majority status. The only logical distinction is the effect of the waiver on the *employer's* rights; card-check/neutrality agreements prevent an employer from changing its mind between the commencement of the card campaign and the attainment of majority status.

[165] NLRB v. Gissel Packing Co., 395 U.S. 575, 600 n.17 (1969) ("Cards have been used under the act for 30 years; [the Supreme] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8 (a)(5) . . . was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history." (quoting Howard Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 861–62 (1967)).

[166] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").

[167] *See supra* notes 22, 42–44 and accompanying text.

[168] *Cf.* BEN JONSON, THE ALCHEMIST (1616), *reprinted in* THE ALCHEMIST AND OTHER PLAYS, at 211, 281–82 (Gordon Campbell ed., 1998).

("He's a divine instructor! can extract
The souls of all things by his art; call all
The virtues, and the miracles of the sun,
Into a temperate furnace; teach dull nature
What her own forces are.").

[169] *See supra* Part I.A; *infra* Part IV.

[170] *See infra* Part III.A.4.b.

[171] *See* Dana Corp., 341 N.L.R.B. 1283, 1283 (2004).

[172] The purpose of the laboratory conditions standard was originally to permit the Board to rerun an election even when no unfair labor practices were committed. *See* General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). The dissent in *General Shoe* believed that only ULPs would be grounds for setting aside an election. *See id.* at 127, 130–31 (1948).
[173] The free-speech provision of Taft-Hartley, § 8(c), presented a problem to the Board in creating fair elections. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2006). The majority in *General Shoe* ruled that the section only applied to unfair labor practices, not election objections. *General Shoe*, 77 N.L.R.B. at 127 n.10.
[174] *See* BRODY, *supra* note 51, at 106–07 ("For all its brave words, General Shoe . . . only demonstrated the futility of the law of employer free speech. General Shoe's 'laboratory standard' gave rise to another luxuriant case law, fascinating for the distinctions between the permissible and impermissible in misrepresentations of fact, racist appeals, third-party actions, and so on but of no real account for purposes of preventing 'an atmosphere calculated to render a free choice improbable.' The remedy for infractions that disqualify an election on the basis of the laboratory standard is only another election. And below the screen of that standard the determined employer interrogates workers; requires them to attend captive-audience meetings; in multitudinous ways available to him pressures them relentlessly; and, if they remain uncowed, makes their lives miserable and their futures bleak.").

The standards for finding ULPs because of employer "coercion" under § 8(a)(1) have also been criticized for being too permissive. Note the following description of a February 1993 union drive for a two-plant unit in Louisiana: "The employer adopted a single theme: Vote union and you will lose your job. This message was repeated via captive audience meetings, one-on-one discussions, written communications, bulletin boards, lawn signs, and radio ads. Walls of the factories were covered with newspaper articles, blown up to five feet by three feet, about plant closings. A twelve-foot-by-three-foot banner proclaimed, 'Wear the union label—UNEMPLOYED.' Sets of two identical pairs of pants were hung around the factories, and supervisors explained that the only difference was that one pair was made in [the plants] for five dollars per hour and the other was made in Mexico for three dollars per day. The NLRB refused to issue a complaint on unfair labor practice charges, in essence condoning the threats. The union lost the election 275–222." Richard W. Hurd & Joseph B. Uchlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 61, 63 (Sheldon Friedman et al. eds., 1994).
[175] *See* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 456 (1995) ("[T]he explicit and 'hidden' coerciveness and hierarchy of the employment relationship invest most employer speech with coercive power. . . . As a policy option, employer speech has primarily strengthened managerial authority rather than fulfilling its stated aims of equalizing power and providing valuable information for the making of a 'reasoned decision.'").
[176] *See supra* note 174 on captive audience meetings and other employer tactics.
[177] Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 174, at 75, 82.

> Under the "free speech" provisions of the NLRA, employers have virtually unlimited opportunities to communicate aggressively with their employees during union campaigns, at the same time as union access is tightly circumscribed if not totally restricted. Under current labor law these employer communications can and often do include distortion, misinformation, threats, and intimidation, with very little chance of censure or penalty by the board or courts. The pervasiveness and intensity of employer communications with the bargaining unit are measured in this study by both the number of captive audience meetings held and the number of company letters sent. Union win rates declined dramatically as the number of meetings and letters increased, from more than 40 percent for campaigns in which no captive audience meetings were held or letters sent, down to 18 percent when the employer held twenty or more captive audience meetings and 37 percent when the company sent more than five letters during the campaign. . . .
>
> The primary issues focused on by employers in these forums were strikes, dues and fines, and plant closings. According to the organizers surveyed, these messages often included blatant or veiled threats and repeated distortions or misinformation about the union. Thus, in the atmosphere created by captive audience meetings, in which the union has no access and little influence, the coercive nature of the antiunion message can be extremely damaging to the union campaign.
>
> . . . .
>
> The ever-expanding "free speech" rights of the employer, in contrast with the ever-shrinking access rights of unions, allowed many employers in this sample to mislead, misinform, and outright lie to employees about the union in captive audience meetings, leaflets, mailings, media campaigns, and public forums. Labor legislation that would better balance these rights would improve the ability of workers to make decisions regarding unionization without in any way constraining employers from expressing their opinions about unionization in a noncoercive manner.

Id. at 82, 87.

[178] NLRB v. Gissel Packing Co., 395 U.S. 575, 602–04 (1969). *See* Story, *supra* note 175.

[179] *See infra* notes 245–53 and accompanying text. The Supreme Court has recognized that the employer's ability to control the employees' paycheck has a coercive effect on the employee's free choice. *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405, 439 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). *See also* Bronfenbrenner, *supra* note 177, at 82 ("Employers granted wage increases in 30 percent of the campaigns and made promises

of improvements in wages, hours, and working conditions in 56 percent, even though both of these actions can be considered violations of Section 8(a)(1) of the NLRA.").

[180] *See Gissel Packing*, 395 U.S. at 618 ("[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 272 (1965) ("Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment en masse, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer's right to go out of business is no different.").

[181] *See infra* notes 247–51.

[182] Hurd & Uchlein, *supra* note 174, at 61 ("Particularly problematic are NLRB policies that allow employers to wage no-holds-barred antiunion campaigns. Even where there are legal restrictions on specific actions, the penalties for violations are so meager that they serve no deterrent effect."). *See also id.* at 64 ("A number of unions report that employers now are using the threat of legal delays to defeat unions."); *id.* at 66 ("Some employers are not content to work within the friendly confines of NLRB regulations. Instead, they openly violate the law, most often by discriminating against the leaders of union organizing drives. Nearly half the cases submitted to the IUD for this project included specific details of workers being disciplined, laid off, or fired for union activity. In most of them, the NLRB eventually ruled against the employer—but long after the organizing campaign had been halted by worker fear.").

[183] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("When . . . the [election] standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." (footnote omitted)).

[184] *See infra* Part III.A.1.

[185] *See, e.g.*, John R. McIntyre, *What Does 'Lawfully Entitled To Be Present and Employed' Mean to You?: Undocumented Workers & Make-Whole Remedies Under the NLRA*, 22 U. HAW. L. REV. 737, 737 (2000).

[186] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 208 (1941); Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940) ("The act is essentially remedial. It does not carry a penal program . . . ."). *Compare* National Labor Relations Act § 8(c), 29 U.S.C. §160(c) (2006), *with* Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981(a) (2006).

[187] 29 U.S.C. § 160(c).

[188] *See, e.g.*, Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 373 (2002) ("The NLRA's relatively weak remedial scheme also diminishes the effectiveness of the Act's bargaining mandate."); Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 275 (2004) ("Union critics [of the NLRA] point to NLRB election delay, laws that cripple unions, striker replacement, and remedies that are so weak as to be useless, to name only a few."); Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 63 n.23 (2002) ("Although the law prohibits employers from threatening or coercing employees, the remedies for violations of the law are weak, and the vastly

unequal access to the employees makes it difficult for a union to respond even to the employer's lawful persuasion."); Mary Ann Leuthner, Comment, *Need for a Ceasefire in the War on the Workers: Restoring the Balance and Hope of the National Labor Relations Act*, 37 J. MARSHALL L. REV. 925, 946 (2004) ("Not only do the long delays frustrate the remedies of the NLRA, but the remedies are so weak they do little to solve the devastating effect of the employer's illegal action. The remedies that are the most frequently used, namely cease and desist orders and reinstatement with back pay, do little to restore the collective rights of the surviving pro-union workers at the company.").

[189] In the controversy surrounding the *Hollywood Ceramics* rule on the Board's scrutiny of employer and union speech during the campaigns (*see* Shopping Kart Food Markets, Inc., 228 N.L.R.B. 1311 (1977); General Knit of California, Inc., 239 N.L.R.B. 619 (1978); Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982)), the Board considered an empirical study, JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 109 (1976), comparing the results of authorization card signing to elections and used its finding that campaign activity rarely changed an employee's mind as justification for relaxing coercive speech controls on the employer. However, the Board did not consider whether this pattern justified giving greater deference to the card authorizations themselves, an equally applicable inference from the same information. If employees rarely change their mind during a campaign, why go through the time, expense, and potential risk of discriminatory discharge associated with a campaign at all? *See* Bronfenbrenner, *supra* note 177, showing that ULPs do have a coercive impact, justifying the treatment of cards as better indicators of employee support. The difficulty with all of these studies (and, in a sense, the bunny in the hat for each one) is the fact that card authorization signing is assumed to be the control against which the impact of employer activity in the campaign is measured. This emphasizes the relational aspect of any realist inquiry. *See supra* notes 22, 42, 44 and accompanying text.

[190] This analysis would identify whether collective representation would be in the rational self-interest of certain employees in the absence of coercion. It would then compare the various methods (card check, elections) and determine which method most often resulted in employees voting in a manner consistent with their rational self-interest. Assuming that people act in their rational self-interest, this analysis would identify the method in which employee choice was most free from coercion. This analysis would, if taken too seriously, become another kind of formalism, in which free choice became defined as rational choice. Such economic analysis is closely associated with public choice theory and law and economics. *Cf.* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[191] GORDON LAFER, AM. RIGHTS AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS (2005), *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/FreeandFair%20FINAL.pdf.

[192] *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

[193] *See supra* notes 185, 188 and accompanying text. *See also* LAFER, *supra* note 191, at 3 (listing factors, such as equal access to voters, free speech for both candidates and voters, equal access to the media, separation of state and party, leveling the playing field by controlling campaign finance, protecting voters from economic coercion, and timely

implementation of the voters' will, as aspects of the U.S. democratic system that are lacking in the labor election context).

[194] *See, e.g.*, Press Release, Nat'l Rest. Ass'n, House Legislation Infringes on Employee Rights and Privacy (Feb. 8, 2007), *available at* http://www.restaurant.org/pressroom/print/index.cfm?ID=1379 ("'No one—employers or union organizers—should fear an election conducted by secret ballot. It is the only way to protect an individual's freedom to choose without subtle or overt coercion. Private ballots protect free choice,' said Anderson [the NRA president and CEO].").

[195] *See, e.g.*, Linden Lumber Div. v. NLRB, 419 U.S. 301, 304–07 (1974) ("To take the Board's position [of no mandatory bargaining upon showing of a card-check majority] is not to say that authorization cards are wholly unreliable as an indication of employee support of the union.").

[196] H.R. REP. NO. 80-245, at 3–6, 7–8 (1947) (*Necessity for Legislation* and *Rights of Workers*), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 100, at 294–97, 298–99; Labor Management Relations Act § 8(c)(1), 29 U.S.C. § 159(c)(1)(B) (2006) ("If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.").

[197] Glenn M. Taubman, *"Neutrality Agreements" and the Destruction of Employees' Section 7 Rights*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, May 2005, at 101, 103 ("[E]xperience shows that the process of soliciting union authorization cards relies upon coercion and misrepresentations, oftentimes with the complicity of the 'neutral' employer."); Press Release, Nat'l Right to Work Legal Defense Found., Inc., Federal Labor Board to Reconsider Validity of Union Organizing Through Controversial "Card Check" Method (June 8, 2004), *available at* http://www.nrtw.org/b/nr_318.php ("Under these coercive agreements, employers typically grant union operatives sweeping access to their workplaces and employees' personal information, strip workers of the opportunity to a secret ballot representation election, and hold mandatory 'captive audience' speeches about why employees should be unionized. Workers are typically subjected to 'card check' drives in which union operatives bully workers face-to-face to sign union authorization cards that count as a 'vote' in favor of unionization.").

[198] STAN GREER, NAT'L INST. FOR LABOR RELATIONS RESEARCH, WHAT'S 'DEMOCRATIC' ABOUT COMPULSORY UNIONISM? 10 (2003), *available at* http://www.nilrr.org/files/Whats%20Democratic%20About%20Compuslory%20Unionism.pdf ("One significant reason why signed cards don't reliably reflect employees' views is that union officials have a long, ongoing history of using threats and subterfuge to obtain them."); 151 CONG. REC. S6156 (daily ed. June 7, 2005) (statement of Sen. DeMint) ("Supporting the right to a private vote and outlawing the corrupt card check practice of allowing union thugs to bully, harass, and scare workers who object to union membership is absolutely critical to democracy and freedom of choice.").

[199] Petitioners' Reply Brief at 129, Dana Corp., 341 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519) (emphasis added), *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/petitioners.reply%20brief.pdf.

[200] *See* Brief Amici Curiae of Members of the U.S. House of Representatives at 2, Dana Corp., 341 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519), *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/_Final%20Final%20CONGRESS

%20BRIEF.pdf ("The Board's conduct of elections . . . is among the crown jewels of this nation's practice of industrial democracy." (internal quotation marks omitted)); *see also Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 8 (2007) (statement of Charles I. Cohen, U.S. Chamber of Commerce) ("Neutrality and card check agreements therefore present a direct threat to the jurisdiction of the Board and its crown jewel, the secret ballot election process.").

[201] Brief for HR Policy Ass'n, as Amicus Curiae in Support of Petitioners at 9–10, Dana Corp., 341 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519), *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/HRPolicy_DanaCorp1.pdf ("Because they safeguard employee confidentiality and freedom of choice, Board-conducted, secret-ballot elections have been recognized by Congress, the courts, and the NLRB as the best and most reliable method of resolving questions concerning union representation."); Press Release, Nat'l Rest. Ass'n, House Legislation Infringes on Employee Rights and Privacy (Feb. 8, 2007), *available at* http://www.restaurant.org/pressroom/print/index.cfm?ID=1379) ("'No one—employers or union organizers—should fear an election conducted by secret ballot. It is the only way to protect an individual's freedom to choose without subtle or overt coercion. Private ballots protect free choice,' said Anderson [the NRA president and CEO]."); 151 CONG. REC. S6156 (daily ed. June 7, 2005) (statement of Sen. DeMint) (stating that protection of worker's free choice "can be achieved by simply requiring unions to win a majority of worker support in an anonymous, secret ballot election which eliminates the shroud of union intimidation tactics.").

Indeed, one anti-card-check legislator argues that the secret ballot is the only dividing line between a repressive and a democratic government. *Id.* ("Secret ballots are an absolutely essential ingredient for any functioning democratic system. The lack of secret-ballot elections is how oppressive regimes manage to stay in power without majority support. Repelling such oppression hinges on the ability to walk into a voting booth, pull the curtain, and vote for anyone or anything we please with confidence the vote will be counted but never revealed to anyone who could use the knowledge to retaliate."). This conflation of the rights of citizens to vote in governmental elections with the employee's choice of union representation was best portrayed in *Rockwell International*, where the employer "contend[ed that] the only issue involved is the constitutional right of every American citizen to vote." Rockwell Int'l Corp., 220 N.L.R.B. 1262, 1263 (1975).

[202] Brief Amici Curiae of Members of the U.S. House of Representatives, *supra* note 200, at 10 ("In an election, competition between the employer and union for the employees' votes guarantee that the employees—whose choice is at issue—are courted by both parties. . . . This competition guarantees a substantial flow of information and assistance to the voters. The information would consist of one party's own position and a critique or refutation of the other party's positions, and the other party would provide similar information on its adversary. Assistance would include dissections of the other party's materials, warnings about the consequences of a vote, and a ready willingness to bring, or assist the employees in bringing, to the Board's attention the rival's ULP's or breaches of

laboratory conditions. In contrast, card checks, particularly when accompanied with neutrality agreements, eliminate this competition. Employees are asked to take some step which may commit them to a collective bargaining representative, but they may be furnished no or inaccurate information. There is no competing party willing to admit or provide contrary information, to warn of the consequences, or to advise employees regarding their rights and possible violations.").

[203] Taubman, *supra* note 197 ("Unions repeat the Orwellian mantra that 'secret ballot elections are unfair.'"). *See also* Petitioner's Joint Brief on the Merits at 27, Dana Corp., 343 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519), *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Petitioner.pdf ("Every American understands instinctively that [secret-ballot] elections are the cornerstone of any system that purports to be democratic."); National Restaurant Association, Public Policy Issue Briefs: Card-Check Legislation, http://www.restaurant.org/government/Issues/Issue.cfm?Issue=card-check (last visited Mar. 22, 2007) ("America's political system is based on respect for individual liberty and democracy. Abolishing secret ballots for American workers goes against what America stands for. If Congress passes [EFCA], they will be stripping away all the protections that federally protected secret ballots provide for American workers."); 153 CONG. REC. H2103 (daily ed. Mar. 1, 2007) (statement of Rep. Foxx) ("It is the Communist Party. The Communist Party of the United States favors [EFCA]. And I think it is very important that the American public understand that. Our folks are aligning themselves with the Communist Party. The people who support this bill are aligning themselves with the Communist Party of the United States. Now, I would be a little bit concerned about that if I were them, but it doesn't seem to bother them in the least that they advocate communistic practices.").

[204] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").

[205] *See, e.g.*, Petitioner's Joint Brief on the Merits, *supra* note 203 ("In secret-ballot elections, the Board provides a 'laboratory' in which an experiment may be conducted . . . . In contrast, the fundamental purpose and effect of a 'voluntary recognition agreement' is to **eliminate** Board-supervised 'laboratory conditions' protecting employee free choice, and to substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation." (citations omitted)).

[206] *See* Story, *supra* note 176, at 409 n.276 ("The laboratory conditions' test for elections—also known as the *General Shoe* doctrine—did not require a finding of employer fault, but instead focused on whether coercion was present, regardless of source. This test fell into disfavor in the late 1960s; today, a finding of employer fault stemming from intentional and demonstrable employer coercion is usually required to void an election." (citation omitted)).

[207] For example, the petitioners in *Dana/Metaldyne* rely on *General Shoe* and *Gissel* in their explanation of the requirement of laboratory conditions. *See, e.g.*, Petitioner's Joint Brief on the Merits, *supra* note 203; General Shoe Corp., 77 N.L.R.B. at 126–27 (setting aside a tainted election when employer actions violated laboratory conditions: "The significant element is the method selected by this Company's president to express his

anti-union views to the employees on the day before the election. He had them brought to his own office in some 25 groups of 20 to 25 individuals, and there, in the very room which each employee must have regarded as the locus of final authority in the plant, read every small group the same intemperate anti-union address. In our opinion, this *conduct* . . . went so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes."); NLRB v. Gissel Packing Co., 395 U.S. 575, 579 (1969) (allowing the Board to rely on cards to issue a bargaining order when the employer has committed massive unfair labor practices to undermine the employees' support of the union).

[208] *See, e.g.*, Keith J. Gross, *Separate To Unite: Will Change To Win Strengthen Organized Labor in America?*, 24 BUFF. PUB. INT. L.J. 75, 122 (2005) ("Three-quarters of employers involved in NLRB elections hire 'union-busting firms' to avoid unionization, and 25 percent of employers fire union supporters in those elections." (footnotes omitted)).

[209] *See* Brief Amicus Curiae of the Wackenhut Corp. in Support of the Petitioners, Dana Corp., 341 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519), *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Wackenhut1.pdf; *see also* NAT'L INST. FOR LABOR RELATIONS RESEARCH, BIG LABOR-FUNDED STUDY DEEPLY FLAWED 2 (2006), *available at* http://www.nilrr.org/files/Flawed%20Card%20Check%20Study.pdf ("Union officials pressure employers to grant them monopoly control over employees through card collection alone by battering them with negative PR blitzes, costly and embarrassing lawsuits, strikes, stockholder actions, and political interventions. Employers who succumb to the pressure may help union organizers collect cards by forcing employees to sit through one-sided presentations extolling unionization, as well as by giving union organizers sweeping access to company premises and employees' home addresses and phone numbers."); 151 CONG. REC. S6156 (daily ed. June 7, 2005) (statement of Sen. DeMint) ("Under current law, employers may voluntarily recognize unions based on these card checks, but are not required to do so. However, threats, boycotts, and other forms of public pressure are increasingly being used to force employers to recognize unions based on a card-check rather than the customary secret ballot election.").

[210] Brief Amicus Curiae of the Wackenhut Corp. in Support of the Petitioners, *supra* note 209, at 6 ("Coercive attempts by unions to force employers to enter into such agreements is [sic] an equally pernicious problem [as the problems that arise after the card-check agreements are signed].").

[211] Petitioners' Reply Brief, *supra* note 199, at 9 ("Indeed, [union advocates] refuse to recognize that employers and unions often enter into pre-recognition agreements with less than pure motives. This includes avoiding the 'stick' of union pressure tactics like corporate campaigns, and/or obtaining the 'carrot' of sweetheart collective bargaining agreements in the future.").

[212] *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006); Williams v. Walker-Thomas Furniture, 350 F.2d 445 (D.C. Cir. 1965); Leonard v. Terminix Int'l Co., 854 So.2d 529 (Ala. 2003).

[213] *See* Schmitz, *supra* note 212.

[214] *See* Hale, *supra* note 44, at 470–94.
[215] Press Release, Nat'l Right to Work Legal Defense Found., *supra* note 197 ("If the NLRB voids the 'voluntary recognition bar' and a decertification election is allowed and successful [in *Dana/Metaldyne*], the UAW would lose its power to act as the 'exclusive bargaining representative' of the employees at Dana and Metaldyne. The employees would then be free to negotiate their own terms and conditions of employment.").
[216] *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 50 (1990) (arguing that the inherent power imbalance prevents employees from negotiating good-cause protection from termination in at-will-employment agreements). The sole basis for identifying "at will" employment as "free" is the right of the employee to quit the job at any time. However, this fails to distinguish the employment contract from the employee/union agreement because employees are similarly free to "quit" the union any time they please by leaving the workplace. If card check is inherently coercive, despite not only the right to quit but the ULP protections of the NLRA, then at-will-employment contracts are also coercive.
[217] Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002) (finding that a mandatory arbitration agreement signed by the employee does not preclude EEOC from pursuing discrimination claim on behalf of the at-will employee).
[218] Taubman, *supra* note 197 ("[Labor union officials] advocate the card check process because they know that with it they can bring to bear enormous pressure on vulnerable employees."). Management advocates go so far as to declare that a contract cannot be relied on to show the will of the employees; instead, only an election can be relied upon. Petitioner's Joint Brief on the Merits, *supra* note 203, at 35 ("First, the dissent's argument is rooted in the assumption that an employer designating a particular union as the representative of its employees automatically means that an uncoerced majority of employees actually supported union representation at the time of employer recognition. Not only is this assumption unwarranted, it is an assumption regarding the ultimate question at issue: does the employer-recognized union, the UAW, actually have the uncoerced support of a majority of employees? An election is necessary to answer this question.").
[219] Petitioner's Joint Brief on the Merits, *supra* note 203 ("The contrast between the rules governing a Board supervised secret-ballot election and the 'rule of the jungle' governing 'card checks' could not be more stark."). This "rule of the jungle" is the common law of freedom of contract. *See also* Petitioners' Reply Brief, *supra* note 199, at 14. ("All card check campaigns are inherently coercive, precisely because they lack the requisite safeguards—like secret ballot voting—that make the Board elections the only standard entitled to 'bar quality.'").
[220] *See, e.g.*, 153 CONG. REC. E260 (daily ed. Feb. 5, 2007) (statement of Rep. George Miller, extension of remarks) ("The Employee Free Choice Act would add some fairness to the system by . . . allowing a majority of employees the opportunity to select to be represented by a union by expressing their decision through the signing of authorization cards."). Union advocates also use the contract formalism logic to support the use of neutrality agreements with employers. The employee-signed cards and the employer-signed neutrality agreements present very different issues; however, because the analogy to contract law is extremely strong in both situations, contract formalism tends to the

obscure the differences between the two. The most important relationship is the potential effect that the choice of an employer to sign a neutrality agreement may have on the environment in which employees signed cards. However, characterizing this change in the environment as more or less conducive to free choice for employees requires making assumptions and dealing with facts that are irrelevant under contract formalism. Therefore, union advocates employing the contract method must apply a kind of functionalism in order to identify and deal with these criticisms. *See* AM. RIGHTS AT WORK ISSUE BRIEF, FACT OVER FICTION: OPPOSITION TO CARD CHECK DOESN'T ADD UP 3 (2006), *available at* http://www.americanrightsatwork.org/dmdocuments/ARAW Reports/IBFactOverFictFinal.pdf ("Card check procedures are commonly paired with neutrality agreements. These voluntary pacts between employers and union representatives establish a code of conduct that prohibits each party from disparaging the other or using intimidating, coercive tactics on employees. Under this process, both parties work together to set rules that give workers a chance to freely decide to form a union without pressure or interference from either side."). Similar issues regarding free choice have arisen for a number of decades in the context of as acquired card check store clauses common in the grocery store industry. *See* Retail Clerks Int'l Ass'n Local No. 455 v. NLRB, 510 F.2d 802 (D.C. Cir. 1975).; *infra* Part III.A.3.

[221] *See, e.g.*, Brief of Amici Curiae General Motors Corp. et al. at 16, Dana Corp., 341 N.L.R.B. 1283 (2004) (Nos. 8-RD-1976, 6-RD-1518, 6-RD-1519) *available at* http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/GM%20DC%20Ford1.pdf ("The essential caveat, and one fully recognized by Dana and the Union, is that at all times the affected employees will make the ultimate decision whether they want the approach to collective bargaining indicated in the [card-check agreement], a more conventional, militant style of representation from another union, or no union at all.").

[222] In her statement to the Senate committee, Estlund demonstrated a similar attitude towards the effect of union coercion on employees' choice as the employers' attitude towards employer-instigated coercion: "Most of the controversy surrounding the proposed use of authorization cards is based on fears of union coercion and misrepresentation in the solicitation of cards. It is certainly possible for that to happen, just as it is possible for employers to coerce employees to sign cards seeking decertification of a union. In either case, the coercion would be illegal and the cards would be invalid, and the Board must pass on those issues before ordering certification or decertification." *Hearings*, *supra* note 8 (statement of Professor Cynthia Estlund, Professor of Law, New York University Law School).

[223] *See supra* Part I.B. In addressing these criticisms, card-check advocates generally emphasize that signatures obtained through "coercion" would be invalid. Dana Corp., 341 N.L.R.B. 1283, 1286 (2004) (Liebman & Walsh, Members, dissenting). This response misses the point in precisely the way that would be expected under contract formalism. By concluding that preventing "coercion" is adequate to protect free choice, card-check neutrality advocates are simply restating the assumptions of contract formalism, not truly responding to the criticism. The definition of coercion does not include uninformed or irrational decision-making. One statement of this contractual formalism is found in *Aero Corp*., where one Board member found that "the best evidence of employees' intent in signing cards is the statement on the cards to which they

put their signatures. Accordingly, absent evidence of fraud or coercion, he would not permit inquiry into the nature of the representations union solicitors may have made in soliciting membership." Aero Corp., 149 N.L.R.B. 1283, 1290 n.18 (1964). The criticisms of card check that focus on employee lack of information or subtle pressures inherent in card signing procedures are criticisms of foundational assumptions of contractualism.

[224] *See* Aero Corp., 149 N.L.R.B. at 1290 ("The validity of such affirmation can be overcome only by establishing that the Union obtained the signatures through coercion—and there is no hint of such coercion in the record—or that the Union obtained the signatures by representing to the employees that, despite the purpose clearly and expressly stated on the cards themselves, the cards would be used *only* for a different, more limited purpose. This must be done on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards." (footnote omitted)); Winco Petroleum Co., 241 N.L.R.B. 1118, 1132 (1979) (Plaine, A.L.J.) ("[E]mployees as a rule are not too unsophisticated to be bound, and should be bound, by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature . . . .").

[225] *See* NAT'L INST. FOR LABOR RELATIONS RESEARCH, *supra* note 209, at 5–6 (claiming that employees want their employers to provide information about the drawbacks of unionism); *see also* Cumberland Shoe Corp., 144 N.L.R.B. 1268, 1269 (1963) ("In this case the cards, on their face, explicitly authorized the Union only to act as bargaining agent of the employees, and . . . the failure of the Union's solicitors to affirmatively restate this authorization does not indicate that it was abandoned or ignored. Thus, there is no evidence here to negative the overt action of the employees in signing cards designating the Union as their bargaining agent, and the instant situation is not one in which the Union has beguiled employees into signing union cards.").

[226] *See, e.g.*, NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 401–02 (1952) ("The [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers."); NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978) ("Voluntary recognition is a favored element of national labor policy."); MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 466 (1999) ("It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.").

[227] National Labor Relations Act § 8(a), 29 U.S.C. § 159(a) (2006). *See* Dana Corp., 351 N.L.R.B. No. 28, at 3 (Sept. 29, 2007) ("We do not question the legality of voluntary recognition agreements based on a union's showing of majority support. Voluntary recognition itself predates the National Labor Relaions Act and is undisputedly lawful under it." (footnote omitted)); *see also* Alexia M. Kulwiec, *"On the Road Again" (to Organizing): Dana Corp., Metaldyne Corp., and the Board's Attack on Voluntary Recognition Agreements*, 21 LAB. LAW. 37, 37–38 (2005). The legislative history, particularly of the Taft-Hartley amendments to the Wagner Act, also supports this view. The conference committee specifically defeated the House version of the bill that would have made elections the only manner by which a union could become the exclusive

representative. *See* H.R.3020, 80th Cong. § 8(a)(5), at 20–21 (1947) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees currently recognized by the employer or certified as such under section 9."), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 100, at 31, 50–51. On this point, the Taft-Hartley amendments as enacted included the Senate version, which provided for management-initiated petitions for election under certain circumstances. *See* 29 U.S.C. § 159(c)(1)(B); *see also* New Otani Hotel & Garden, 331 N.L.R.B. 1078 (2000) (holding that the employer cannot file an election petition because union request for card-check neutrality agreement is not a present demand for recognition triggering employer's right to petition). The enactment of the Taft-Hartley amendments, which specifically declined to eliminate voluntary recognition after it had been recognized as a part of the Wagner Act for over a decade, is strong evidence that the Board and courts since the 1930s have historically been correct in interpreting the Act to encourage voluntary recognition.

[228] National Labor Relations Act, 29 U.S.C. §§ 157–158.

[229] *See id.* § 157.

[230] *Id.* § 158(b)(1).

[231] For example, the Board does not closely police the information that unions give to employees regarding the potential uses of the cards. *See, e.g.*, Levi Strauss & Co., 172 N.L.R.B. 732, 732 (1968) ("The Respondent has excepted to the Trial Examiner's failure to invalidate a substantial number of the 87 cards on the ground that the employees, in the course of solicitation, were told that the cards would be used to get an election, or only to get an election. The cards on their face, however, spell out in clear and unambiguous language an authorization for the Union to represent the signer for collective bargaining. The Trial Examiner found, and we agree, that although in some instances the possibility of an election was mentioned, none of these employees were told either in specific terms, or in general assurances that were susceptible to such interpretation or inference, that the cards would be used only for the purpose of getting an election. In these circumstances, we, like the Trial Examiner, find no merit in the Respondent's contention that the challenged cards on which we rely should be invalidated as having been obtained through misrepresentation.").

[232] As stated in *supra* note 220, realism creeps into the union analysis when it describes the importance of neutrality agreements.

[233] *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001) (noting that in a study of 132 organizing campaigns, 62.5 percent of card-check campaigns result in representation; 78.2 percent of card-check *neutrality* campaigns result in representation; and 45.5 percent of secret-ballot elections result in representation).

[234] *See* CHIRAG MEHTA & NIK THEODORE, AM. RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS (2005), *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEDcompressedfullreport.pdf (demonstrating that as employers increase their types of ULPs during the secret-ballot election campaign, the union success rate decreases).

[235] AM. RIGHTS AT WORK ISSUE BRIEF, *supra* note 220, at 3 ("[C]ard check and neutrality agreements [are] a viable, democratic alternative to an NLRB election process fraught with problems. . . . [A]ggressive unionbusting in the weeks before the vote and a weak labor law system that fails to protect workers from employer interference in NLRB elections corrupts [sic] the democratic integrity of this process. . . . [However, restricting union representation campaigns to the] archaic and undemocratic NLRB election process [would] severely tilt[] the playing field in the employer's favor.").

[236] Bronfenbrenner, *supra* note 177, at 75 ("Although there has been a great deal of research on the relationship between employers' unfair labor practices and election outcomes, there has been very little research on the broad range of legal and illegal tactics used by employers during the NLRB election process, regardless of whether unfair labor practices were actually filed. Even fewer studies have controlled for the influence of bargaining unit demographics, organizer background, and union tactics during organizing campaigns. In addition, only a handful of studies have examined employer and union behavior during first-contract campaigns, even though a union election victory is at best Pyrrhic without a first-contract victory. The study can therefore provide new and important insights into the impact of NLRB practices and employer behavior on election and first-contract outcomes . . ."). In the study, Bronfenbrenner compares cards collected to the ultimate outcome based on a wide variety of employer behaviors. *See* Bronfenbrenner, *supra* note 177. This is the ultimate realist analysis when it comes to elections; however, it assumes, for comparison, a baseline of card-expressed opinion. The result is that, the extent to which an election fails to measure the employees' free will is determined only in relation to cards themselves, which is contract formalism. Union-friendly studies like this do not attempt to measure the difference between opinion expressed through cards, and what the employees "really want." By isolating and analyzing as a scientific variable all the activities the employer undertakes, union advocates can portray the choices of employees made during election campaign as being improperly influenced by tactical choices made by the employer.

[237] A similar and perhaps more obvious double standard applies when unions discuss the representational methods used in decertification proceedings. Unions have advocated for secret-ballot elections as the only method for decertification of a union. The AFL-CIO argued that "employee petitions and cards advocating decertification 'are not sufficiently reliable indicia of the employees' desires,' and that employees and employers should only be able to remove a union pursuant to a secret-ballot election." Petitioners' Joint Brief on the Merits, *supra* note 203, at 25 (citing Brief of the AFL-CIO to the NLRB at 13, Chelsea Indus., 331 N.L.R.B. 1648 (2000) (No. 7-CA-36846)).

[238] *See, e.g.*, American Rights at Work, Why Majority Sign-Up Is Needed (2004), www.americanrightsatwork.org/employee-free-choice-act/resource-library/why-majority-sign-up-is-needed.html ("Union elections are unlike any other kind of elections because of the inherent coercive power that management holds over employees—the power to deprive employees of their livelihood and to control their pay, hours and working conditions. According to a survey of 400 NLRB election campaigns in 1998 and 1999, 36 percent of workers who vote against union representation explain their vote as a response to employer pressure. The NLRB election process makes matters worse by

enabling management to wage lengthy and bitter anti-union campaigns, during which workers can expect harassment, intimidation, threats and firings.").

[239] *See* General Shoe Corp., 77 N.L.R.B. 124, 126–27 (1948) ("On this record, therefore, although the respondent's activities immediately before the election, as described in the Intermediate Report, are not held to constitute unfair labor practices within the meaning of the amended Act, certain of them created an atmosphere calculated to prevent a free and untrammeled choice by the employees. . . . In our opinion, this *conduct*, and the Employer's instructions to its foremen to propagandize employees in their homes, went so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes. . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." (footnote omitted)).

[240] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610–11 (1969).

[241] *See, e.g.*, Redmond Plastics, Inc., 187 N.L.R.B. 487 (1970).

[242] *See supra* Part III.B.

[243] For an explanation of the Board's policies on information provided by union organizers during card-check campaigns, see *supra* notes 195–96 and accompanying text. Because unionization is an inherently political topic, neutral information on the benefits and drawbacks of unions is difficult, if not impossible, to find. For example, a Google search of "labor union facts" returns links to dozens of partisan sites, including, among the top ten hits, *The Center for Union Facts*, an unabashedly antiunion site; *The Forgotten Facts of American Labor History*, espousing an antiunion, freedom of contract doctrine; the AFL-CIO website, with their own *Union Facts* section; and the *WakeUp Wal-Mart* site, which advocates the unionization of Wal-Mart.

[244] For an explanation of adhesion contract coercion, see *supra* note 212 and accompanying text.

[245] *See supra* Part III.C.

[246] The at-will-employment doctrine "allows employers to fire employees 'for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.' In other words, the employment at-will doctrine allows an employer to discharge an employee for almost any reason or for no reason, as long as contrary statutory or contractual provisions do not exist." Edwin Robert Cottone, Comment, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-at-Will Doctrine*, 42 SANTA CLARA L. REV. 1259, 1259 (2002). For an explication of the *Darlington* decision allowing employers to go out of business for retaliatory reasons, see James Gray Pope, *How American Workers Lost the Right To Strike, and Other Tales*, 103 MICH. L. REV. 518, 544–50 (2004).

> [T]here is much more to retaliatory shutdowns than mere spite or malice. Like sympathy strikes and secondary strikes, they produce valuable benefits—

> benefits that are reaped not directly by the perpetrator, but by fellow members of the perpetrator's class. The shutdown operates like a public flogging, intimidating not only the victims themselves, but also every worker who hears of their plight. *Darlington* excludes this effect from consideration unless the employer stands to gain individually from the intimidation of its own remaining employees. Employers that act out of class solidarity, helping to produce a cowed and compliant workforce for their fellow employers, are privileged to commit what would otherwise be statutory violations.

Id. at 548.

These forms of legal employer coercion have an historical pedigree in America. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 676–77 (Isaac Kramnick ed., Gerald E. Bevan trans., 2003) ("I have demonstrated in a previous chapter how the aristocracy, once expelled from political life, had withdrawn into certain areas of industrial enterprise and had created its power there in a different form. This has a strong influence on the rate of wages. As one must already be very rich to take on the great industries of which I speak, the number of entrepreneurs is very small. Being few in number they can easily league together and fix the level of wages as they like. Workmen, by comparison, are very numerous and their numbers are constantly on the increase for, from time to time, extraordinary periods of prosperity occur when wages rise wildly, attracting people in the locality into the manufacturing industry. Now, once men have embarked upon this career, we have seen that they cannot escape from it because they soon pick up habits of body and mind which render them unsuited for any other work. These men usually lack education, energy, or resources. They are, therefore, at their master's mercy. When competition, or any other circumstances, reduces the master's profits, he can curb their wages almost at will and can easily recoup from them what the fortunes of business take from him. Should they choose to strike, the master, who is wealthy, is easily able to wait, without risk of ruin, until necessity brings them back since they must work every day so as not to die, for they own almost nothing but the strength of their arms. Oppression has long since reduced them to poverty and, as they become poorer, they are easier to oppress—a vicious circle from which they cannot escape.").

[247] According to the National Coalition on Health Care, most Americans with health insurance obtain coverage through their employers; however, as insurance costs rise and employers cut costs, the insurance becomes costlier for the employees or, in many cases, disappears altogether. NAT'L COAL. ON HEALTH CARE, FACTS ON HEALTH INSURANCE COVERAGE 2 (2008), *available at* http://www.nchc.org/facts/coverage_fact_sheet_2007.pdf ("It is estimated that 266,000 companies dropped their health coverage between 2000-2005."). The highly publicized spectre of thousands of employers single handedly eliminating their employees' vital health insurance heightens all employees' consciousness of the employers' power over their bodily well-being.

[248] By "ideology," we refer to the social ideology of the ruling class, as explained by Louis Althusser. The social ideology is the social mindset required to reproduce the submission of the laborers to the rules of the established order; the social ideology must reproduce itself within the society to ensure its continued viability and, by extension, the continued repressive social order. This ideology is reproduced by the Ideological State Apparatuses (ISAs), which are generally social institutions, such as the law, literature,

political parties, and the educational system, which lead the population to accept and reproduce the social ideology. The ISAs "interpellate" the people, causing them to see themselves as within and defined by the social ideology. Interpellation was first described by Althusser as analogous to the police's "hailing" of a citizen; by turning around to the policeman's "hey you," the citizen has acknowledged and defined himself as a subject to that policeman's—and thus to society's—power. *See* Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, LA PENSÉE (1970), *available at* http://www.marx2mao.com/Other/LPOE70ii.html#s5.

For a more generalized description of ideology, see Mark Barenburg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 813 (1994) ("Ideology need not take the form of a system of descriptive and prescriptive propositions embodied in a reigning, abstract 'comprehensive view' such as liberalism or socialism. It can instead inhere in more practical, action-oriented systems of thought, feeling, and speech, in what . . . Pierre Bourdieu dubs 'habitus'—the prereflective dispositions and discursive performances, the inarticulate, spontaneous practices and emotions that suffuse everyday experience.").

[249] No single influence on the employee can account for the interpellation, but the total experience of being an employee creates the interpellating effect. *See* Judith Butler, *"Conscience Doth Make Subjects of Us All"*, 88 YALE FRENCH STUD. 6, 6 (1995) ("[T]he 'call' arrives severally and in implicit and unspoken ways. . . . If we accept that [Althusser's police hailing scene] is exemplary and allegorical, then it never needs to happen for its effectivity to be presumed. Indeed, if it is allegorical . . . then the process literalized by the allegory is precisely that which resists narration, that is, that exceeds the narrativizability of events.").

[250] *See* KARL MARX, *Economic and Philosophical Manuscripts of 1844*, *reprinted in* THE MARX-ENGELS READER 66 (Robert C. Tucker ed., 2d ed. 1978).

> The worker becomes all the poorer the more wealth he produces, the more his production increases in power and range. . . . With the *increasing value* of the world of things proceeds in direct proportion the *devaluation* of the world of men. Labour produces not only commodities; it produces itself and the worker as a commodity—and does so in the proportion in which it produces commodities generally.
>
> This fact expresses merely that the object which labour produces—labour's product—confronts it as *something alien*, as a *power independent* of the producer. The product of labour is labour which has been congealed in an object, which has become material: it is the *objectification* of labour. . . .
>
> . . . So much does objectification appear as loss of the object that the worker is robbed of the objects most necessary not only for his life but for his work….
>
> All these consequences are contained in the definition that the worker is related to the *product of his labour* as to an *alien* object. For on this premise it is clear that the more the worker spends himself, the more powerful the alien objective world becomes which he creates over-against himself, the poorer he himself—his inner world—becomes, the less belongs to him as his own.

Id. at 71–72 (emphasis in original).

[251] Althusser, *supra* note 248, at 154 ("All ideological State apparatuses, whatever they are, contribute to the same result: the reproduction of the relations of production, i.e., of capitalist relations of exploitation."). Interestingly, Althusser points to traditional trade unions as a main Ideological State Apparatus, perhaps a prelude to Karl Klare's argument that the labor law structure has played a key role in preventing the true liberation of workers from the repressive employment structure. *Id.* at 142 n.7; s*ee* Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L. J. 450 (1981).

[252] This production of ideology does not have the trappings of the type of coercion that the Board is currently willing to address. *See* Barenburg, *supra* note 248, at 813 ("[C]ompliance by a subordinate group [to the social ideology] need reflect neither coercion nor normative consent.").

[253] Whether an actual "free choice" exists is also a question, if workers are always already a subject of the social ideology. "[F]or Althusser one is entered into the 'ritual' of ideology regardless of whether there is a prior and authenticating belief in that ideology." JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 24 (1997). However, while labor law cannot extricate the worker from the problem of social ideology, labor law can alleviate, or at least refrain from exacerbating, the more damaging forms of ideological coercion.

[254] *See supra* Part III.A.4.a.

[255] *See supra* Part II.B.

[256] National Labor Relations Act § 8, 29 U.S.C. § 151 (2006) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstruction 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 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.").

[257] *Id.* § 157 ("[Employees] shall also have the right to refrain from any or all of such [organizing, collective bargaining, and concerted] activities.").

[258] *See To Create a National Labor Board*, *supra* note 43, at 47 (statement of Sen. Wagner) ("I think it has been recognized that, due to our industrial growth, it is simply absured [sic] to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employer's terms, faces ruin for his family. The so-called freedom of contract does not exist under such circumstances. The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining. When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power.").

[259] *See supra* Part II.D.

[260] In social science this is known as the "observer effect." The observer effect is "[t]he difference that is made to an activity or a person by it being observed. People may well not behave in their usual manner whilst aware of being watched, or when being

interviewed while carrying out an activity. Many forms of research involve similar problems and allowing for these in interpretation is a key professional skill for researchers." Association for Qualitative Research, Observer Effect Definition, http://www.aqr.org.uk (follow "Library" hyperlink; then follow "Glossary of Terms" hyperlink; then follow "Observer Effect" hyperlink) (last visited Apr. 24, 2008). This effect is certainly not accounted for in current Board practices, which take a "snapshot" of the employees' preference in a highly orchestrated process, rather than accounting for the effect of that process on the employees' stated choice. *See supra* Part III.A.2.

[261] As an analogy, the decision of whom to date may involve the weighing of numerous factors, many of which may be considered appropriate or inappropriate, depending on the circumstance and on the observer's personal preference. For example, is it appropriate to consider the potential date's wealth? Career prospects? Habits? Height? Appearance? Age? Gender? Ability to reproduce? Family status? Whether the prospective date's parent is carrying a loaded shotgun? In any particular experiment, at least some of these factors must be deliberately overlooked because they are so integral to the choice as to make the decision meaningless without them. However, it is impossible to delineate which factors would be appropriate in every situation (and must therefore be controlled such that the effect of other factors is measurable) and which would be inappropriate.

[262] If every circumstantial influence on the choice is coercive, laboratory conditions can only be achieved by flipping a coin.

[263] See *supra* Part III.A.4 for the Board's lack of principle and use of policy preference in its policing of the electoral conditions.

[264] *See* John B. Thompson, *Editor's Introduction* to PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 1, 14 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991) ("But when individuals act, they always do so in specific social contexts or settings. Hence particular practices or perceptions should be seen, not as the product of the habitus [the "set of dispositions which incline agents to act and react in certain ways," which are inculcated in the person by society] as such, but as the product of the *relation between* the habitus, on the one hand, and the specific social contexts or 'fields' within which individuals act, on the other.") (emphasis in orginal).

[265] It should be noted that this argument "proves too much" in the sense that it applies to any attempt to isolate "free choice" through a particular formal process, including the political elections commonplace in western countries. This is only a fault if one believes that political elections in western countries successfully isolate "free choice." If so, which ones? Proportional? Majoritarian? Plurality? First-past-the-post? Absolute majority? Approval voting? Single transferable? Instant run-off?

[266] *See* Hurd & Uehlein, *supra* note 174.

[267] *See* 78 CONG. REC. 3443, 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEG. HIST. WAGNER ACT, *supra* note 43, at 16 ("Simple, common sense tells us that a man does not possess this freedom [to act freely in his interest, bargain candidly] when he bargains with those who control his source of livelihood."); *see also* ATLESON, *supra* note 30, at 178–89 ("The notion of contract stresses the voluntary exchange of freely bargained promises, appealing to values of individualism, while simultaneously completely ignoring the economic reality of the 'bargain.' . . . The worker has to sell his labour power to live whereas the employer is not similarly constrained to buy labour. . .

The asymmetry of the relation goes even further. While the employee receives a defined rate for the job, the employer receives a potential whose ultimate development is largely for it to determine. The employer's side of the bargain is, therefore, essentially open ended. While employers impose rules of great specificity which reduces employee discretion to minimal levels, employers possess maximum discretion in making decisions concerning the goals and methods of production and the behavior and rewards of all participants. This asymmetry has been maintained by economic and state power." (quotations omitted)).

[268] Roy Adams, *Union Certification as an Instrument of Labor Policy: A Comparative Perspective*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 174, at 260, 266 ("The certification election is justified as being similar to a political election campaign, and the association with democratic political institutions provides an ethical basis for it. Although this argument is convincing to many labor relations experts as well as members of the general public, it is, when closely examined, a specious analogy. The political election campaign is designed to pick leaders who will develop policy within the institutional framework of a democratic system. The certification election, by contrast, is more like a constitutional referendum. The choice is not between leaders within an established political system but rather between political systems. It is a choice between the perpetuation of industrial autocracy or the establishment of a form of industrial democracy. Within a democratic society, no such choice should ever be seriously entertained. Within a democratic society, the only legitimate discussion should be over the means for establishing industrial democracy and the type of plans that would qualify as democratic. . . . The implication of this argument is that the certification election has no legitimacy whatsoever because one of the choices available to the electors is to continue a system of organizational governance that is repugnant to democratic values. For those who cherish such values, and there are very few North Americans who do not, the labor law reform debate should focus on alternative means for the establishment of universal industrial democracy. No consideration at all should be given to the continuation of an archaic industrial political system that has no place in a democratic society." (citations omitted)).

[269] Comparison to totalitarianism has become a bit of a cliché, so we thought it necessary to clarify our use of this analogy. Employment-at-will is not more oppressive than a totalitarian state; the totalitarian has direct control over life and death itself, while the employer only has control over livelihood. While livelihood is of central importance, it is less important than death, and thus, the situation is substantially more coercive under totalitarianism. However, the employer's control over the livelihood of the employee is greater than the totalitarian's control over life because the employer need take no affirmative action to terminate employment, but can simply stop paying for the work. *Cf.* OFFICE SPACE (Twentieth Century Fox-Film Corp. 1999), *available at* http://www.awesomefilm.com/script/office_space_transcript.html ("Just a second there, Professor. We, uh, we fixed the glitch. So he won't be receiving a paycheck anymore. So it'll just work itself out naturally.").

[270] *See supra* note 68 (citing the statement of purpose of the 1934 Wagner bill).

[271] By necessity, the outline that follows is just a very rough sketch suggesting the general direction that reforms should take to ensure employee freedom.

[272] Unlike most similar schemes in other nations, we are of the opinion that smaller units (though in some sense less powerful) are better suited than large units for the kind of collective action that has the potential for ideological transformation. *Cf.* OLSON, *supra* note 190, at 66–70 (arguing that small organizations are better suited to obtain collective goods).

[273] *See* Adams, *supra* note 268.