

Winter 2012

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### Recommended Citation

Moore, James Y. and Bales, Richard A. (2012) "Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy," *Indiana Law Journal*: Vol. 87 : Iss. 1 , Article 10.

Available at: <https://www.repository.law.indiana.edu/ilj/vol87/iss1/10>

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# **Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy**

JAMES Y. MOORE\* AND RICHARD A. BALES\*\*

## ABSTRACT

*The secret-ballot election is the National Labor Relations Board's preferred method for employees to determine whether they wish to be represented by a union. Employer domination of the election process, however, has led many unions to opt out of elections and instead to demand recognition based on authorization cards signed by a majority of employees. The primary objection to this "card check" process is that it is less democratic than the secret-ballot election. This Article places the issue in the context of the theoretical basis for claims of industrial democracy and argues that card checks are more consistent with the basic premises of industrial democracy than are extant Board elections.*

## INTRODUCTION

The National Labor Relations Act (NLRA) was passed in 1935 and provides the framework that governs labor relations in the United States.<sup>1</sup> The NLRA was designed to protect commerce from industrial unrest by regulating the process of unionization to ensure that the free choice of employees is the primary factor in selecting who will represent labor and bargain collectively on its behalf.<sup>2</sup>

The National Labor Relations Board ("Board") favors certified elections as a way of determining what the free choice of employees actually is.<sup>3</sup> The preference for secret ballots is often analogized to the democratic political process. The central feature of the American political system and the starting point for the legitimacy of government is a secret-ballot election. The belief in the soundness of an electoral mandate has been transferred to the field of industrial democracy.<sup>4</sup>

However, to unions, their organizers, and employees sympathetic to unionization, the analogy between Board elections and democratic elections breaks down in practice. Many in the labor movement dispute the efficacy of the NLRA and its use of elections in the organization context. For instance, Lane Kirkland, former president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), famously stated that the NLRA should be repealed and

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1. See Wagner-Connery Labor Relations Act, ch. 372, § 7, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151-69 (2006)).

2. National Labor Relations Act, 29 U.S.C. § 151 (2006).

3. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

4. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821 (2005).

that workers would be “better off with the law of the jungle.”<sup>5</sup> Alternatively, many unions promote the amendment of the NLRA to include the use of neutrality agreements and card check recognition.

By contrast, many employers and politicians (and some legal scholars) continue to support the Board’s preference for the secret ballot as the sole method of certification.<sup>6</sup> A recent Rasmussen poll states that 61% of Americans believe the use of a secret ballot in labor elections is fair, while 52% of Americans believe the use of card checks is unfair.<sup>7</sup>

Both sides claim to support employee free choice. However, if employee free choice is the essential substance of industrial democracy, then the best way to protect it is to expand the use of neutrality agreements and card checks at the expense of the traditional Board-certified election. This fact can be demonstrated in three ways: The first is an exploration of what industrial democracy means and where the analogy to political democracy came from. The second is an examination of how Board elections actually work, as opposed to how neutrality agreements and card checks function. The third is an analysis of the various arguments used to support or oppose Board elections.

Part I of this Article will introduce the issue of whether the traditional Board election should give way to the use of neutrality agreements and card check recognition. Part II will examine the meaning of industrial democracy and the analogy to political democracy. Part III will give a brief synopsis of Board-election procedure and explain the tactics used by employers that make Board elections difficult for unions to win. Part IV of this Article will start with a description of the development of card checks and neutrality agreements. It will explain how neutrality agreements work and why employers might agree to them. Part V will discuss whether card check recognition erodes the basic elements of employee free choice and whether it, too, should be a vehicle for Board certification. Part VI concludes that neutrality agreements and card checks are consistent with employee free choice.

## I. THE “DEMOCRACY” ANALOG

### A. *The Democratic Model*

The analogy to political democracy that is summed up by the term “industrial democracy” is an ideology of social interaction between employers and employees that eschews outside interference and instead envisions workers sufficiently empowered to look after themselves.<sup>8</sup> According to this model, the NLRA<sup>9</sup>

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5. Cathy Trost & Leonard M. Apar, *AFL-CIO Chief Calls Labor Laws a ‘Dead Letter,’* WALL ST. J., Aug. 16, 1984, at 8.

6. See Brudney, *supra* note 4, at 841.

7. Rasmussen Reports, *61% Say Secret Ballot Is Fair Way to Vote for a Union*, [http://www.rasmussenreports.com/public\\_content/business/jobs\\_employment/march\\_2009/6\\_1\\_say\\_secret\\_ballot\\_is\\_fair\\_way\\_to\\_vote\\_for\\_a\\_union](http://www.rasmussenreports.com/public_content/business/jobs_employment/march_2009/6_1_say_secret_ballot_is_fair_way_to_vote_for_a_union).

8. See, e.g., Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955) (arguing that the collective bargaining process and the grievance procedures created therein constitute an “autonomous rule of law”); Katherine Van Wezel

establishes a framework through which employees can organize to acquire the bargaining power necessary to significantly influence wages, working conditions, and other terms and conditions of employment.<sup>10</sup>

Thus transformed, workplace relations are analogous to miniature political democracies<sup>11</sup> in which employers and employees, roughly coequal,<sup>12</sup> jointly negotiate and enforce<sup>13</sup> an agreement that establishes the terms and conditions of employment.<sup>14</sup> The process of collective bargaining thus “gives employees a voice in decisions [that significantly] influence[] their lives,”<sup>15</sup> freeing them from the dictatorships established by the lords of industry.<sup>16</sup>

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Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622–24 (1992) (discussing the industrial democratic understanding of constructing an autonomous workplace); Richard A. Bales, Note, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. LAW & PUB. POL’Y 161, 162–64 (1992) (describing the industrial democracy model and how it is embodied in the NLRA).

9. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

10. See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993) (stating that “[w]hile the diminished bargaining power of individual workers vitiated the normative force of their voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress”); Shulman, *supra* note 8, at 1000 (explaining that the NLRA established a “bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor”); see also National Labor Relations Act § 151 (citing the “inequality of bargaining power” between centralized employers and employees “who do not possess full freedom of association or actual liberty of contract” as a reason that the NLRA was needed); 78 CONG. REC. 3678 (1934) (statement of Sen. Wagner) (arguing that there must be equality of bargaining power which is accomplished through the employees’ right to participate in collective bargaining).

11. See e.g., Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 275–76 (1948) (comparing collective bargaining agreement with administrative and legislative processes); Stone, *supra* note 8 (stating that labor and management are like political parties in a democracy, each with its own constituency and agenda); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 9 (1988) (noting that “collective bargaining provide[d] a measure of industrial democracy”).

12. See JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 43 (4th rev. ed. 1936) (stating that employees are empowered by collective bargaining and minimum wage laws that create equal bargaining power between employees and their employer).

13. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 742 (1973) (noting that “[t]he enforcement mechanism . . . is the essence of the industrial collective bargaining agreement” assuming that both labor and management comply with the jointly agreed rules).

14. See CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, *THE DYNAMICS OF INDUSTRIAL DEMOCRACY* 30 (1942) (noting the role of labor and management in collective bargaining).

15. Summers, *supra* note 11 (noting the entry of democratic ideology into the workplace).

16. See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–81 (1960) (noting that collective bargaining agreements allow labor and management to

The NLRA, according to the industrial democracy model, confers no substantive employment rights, but rather establishes the framework through which employees may negotiate their own rights.<sup>17</sup> Indeed, industrial democracy signifies an end to individual employment bargaining.<sup>18</sup> The collective bargaining process is thought to be adequate to protect whatever rights workers feel are worth negotiating for, and the essentially democratic nature of union representation ensures that workers' voices are adequately represented at the bargaining table.<sup>19</sup>

### B. Collective Autonomy

The NLRA shifted workplace sovereignty from employers and the courts to employers and employees, creating a framework for the joint determination of workplace rights through the elective bargaining process.<sup>20</sup> Establishing an internal mechanism for resolving disputes between employers and employees was critical to maintaining this shift in sovereignty.<sup>21</sup> Arbitration quickly became this mechanism.<sup>22</sup>

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govern the workplace with input from both parties); GOLDEN & RUTTENBERG, *supra* note 14, at 23–47 (noting the role of labor and management in collective bargaining); Barenberg, *supra* note 10, at 1424 (recognizing the goal of collective bargaining as “freedom for self-direction, self-control [and] cooperation” (footnote omitted)); William M. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 66 (1922) (arguing that labor gained strength by organizing and thus weakened managements' absolute power).

17. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981) (noting that it is through collective bargaining that management and labor formulate the rules under which the workplace is governed).

18. See GOLDEN & RUTTENBERG, *supra* note 14, at 26 (arguing that in order to benefit from collective bargaining all workers must give up their freedom to bargain independently); Stone, *supra* note 8, at 624 (noting that the industrial democratic model is not capable of handling individual employment rights issues and instead focuses on group issues).

19. See *Warrior & Gulf Navigation*, 363 U.S. at 580 (discussing how collective bargaining provides an opportunity for input to both management and labor); GOLDEN & RUTTENBERG, *supra* note 14, at 43 (noting that the collective bargaining process attempts to build a body of industrial law between a particular employer and his employees); Stone, *supra* note 8, at 593 (noting how the NLRA aims to create a framework upon which to construct an agreement mutually beneficial to labor and management).

20. See *Warrior & Gulf Navigation*, 363 U.S. at 580 (noting that “[a] collective bargaining agreement is an effort to erect a system of industrial self-government”). An exception to this shift in sovereignty is the doctrine of reserved management rights, which permits unilateral employer decision making over issues “at the core of entrepreneurial control.” *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *accord* *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981) (concluding that an employer has no duty to bargain over a decision to close part of its operations); *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984) (holding that an employer has no duty to bargain over a decision to transfer work from one facility to another).

21. See GOLDEN & RUTTENBERG, *supra* note 14, at 37 (noting that in the early 1940s the role of the NLRB shifted from an enforcer of collective bargaining agreements to a supervisor of elections and that this event “mark[ed] the end of [an era] during which . . . unions and management looked to the government for the solution of their problems”); Leiserson, *supra* note 16, at 75 (noting the shift in sovereignty away from the

In the metaphor of industrial democracy, the workplace “legislature” promulgated the law of the shop through collective bargaining negotiations.<sup>23</sup> Arbitration, as an analog to the judiciary,<sup>24</sup> provided the mechanism by which that law was interpreted and applied. Not only did arbitration serve the instrumental function of interpreting and applying the law, it also fit the theoretical model of an autonomous system.<sup>25</sup> The arbitrator was chosen by, and served at the whim of, the two parties, and the arbitrator’s authority was derived exclusively from the terms of the collective bargaining agreement that the parties had negotiated.<sup>26</sup> Arbitration

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hands of owners and managers into a democratic system).

22. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–99 (1960) (noting that “the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process” and further discussing the federal policy toward arbitration in these agreements); *Warrior & Gulf Navigation*, 363 U.S. at 581 (noting that a collective bargaining agreement will often provide for the use of arbitration to settle disputes); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (noting that arbitration will be used for all grievances involving interpretation of the collective bargaining agreement).

23. See *Warrior & Gulf Navigation*, 363 U.S. at 581 (stating that arbitration of collective bargaining agreement provisions creates a “system of private law”); Leiserson, *supra* note 16, at 75 (stating that trade agreements result in a predictable, constitution-like form of business government); Stone, *supra* note 8, at 623 (suggesting that workplace legislation is enacted and contained in the collective bargaining agreement).

24. See Leiserson, *supra* note 16, at 63 (noting how arbitration can be used to settle grievances, much like a court’s judicial power); Stone, *supra* note 8, at 623 (stating that “private arbitration is supposed to provide a neutral vantage point for enforcing the [workplace] rules”).

25. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (noting that the integral role of the arbitrator in the industrial pluralist system helps establish industrial self-government); *Warrior & Gulf Navigation*, 363 U.S. at 581 (recognizing that “the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government” and that “[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise”); Shulman, *supra* note 8, at 1007 (noting that collective bargaining agreements force the parties to handle their disputes guided by contract terms, if dispute procedures are provided for in the agreement).

26. See *Gardner-Denver Co.*, 415 U.S. at 53 (stating that an arbitrator “has no general authority to invoke public laws that conflict with the bargain between the parties”); *Enter. Wheel & Car*, 363 U.S. at 597 (stating that an arbitral “award is legitimate only so long as it draws its essence from the collective bargaining agreement” and that an arbitration award that relies on external law instead of the collective bargaining agreement fails this test); *Warrior & Gulf Navigation*, 363 U.S. at 582 (noting that the arbitrator’s authority is only limited by the collective bargaining agreement’s terms); Harry T. Edwards, *Labor Arbitration at the Crossroads: The ‘Common Law of the Shop’ v. External Law*, 32 ARB. J. 65, 90–91 (1977) (stating that arbitrators should be reluctant to decide public law issues because they may be wrong and, if followed by a court out of deference to the arbitrator, they may distort the development of precedent); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557–59 (1967) (stating that “parties typically call on an arbitrator to construe and not to destroy their agreement”); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140–43 (1977) (stating that an award must “draw its essence” from the collective bargaining agreement in order to be valid and enforceable) (quoting *Enter. Wheel & Car*, 363 U.S. at 597). The late Dean Shulman

thus completed the metaphor of industrial organization “as a self-contained mini-democracy”—“an island of self-rule whose self-regulating mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders.”<sup>27</sup>

### III. TRADITIONAL ELECTIONS

#### A. *The Operation of a Traditional Organization Campaign*

Dissatisfaction with the NLRA’s election framework has caused unions to begin using the neutrality agreement, coupled with card checks. The neutrality agreement is a contractual agreement in which the union persuades the employer, whose employees the particular union is attempting to organize, to remain neutral and not oppose the organization efforts.<sup>28</sup> Card check recognition is usually associated with neutrality agreements.<sup>29</sup> The general rule is that, if an employer agrees to card check recognition, the employer can be required to bargain with a union that obtains cards from a majority of employees in a bargaining unit authorizing that union to represent the employees.<sup>30</sup> The neutrality agreement/card check method of organization is growing in popularity, but its preeminence is not assured.<sup>31</sup> To understand why unions are dissatisfied with the traditional Board election, a brief description of the election process may help.

The standard method of union organization is a Board-supervised election by secret ballot. As a first step in this process, employees contact a union and the organization drive begins.<sup>32</sup> The union distributes authorization cards to sympathetic employees; it is trying to get a majority of the employees to state that they want the union to be their bargaining agent.<sup>33</sup> If the union is able to get an uncoerced majority, it presents the cards to the employer; the employer has the option of voluntarily recognizing the union, or it can demand a Board election.<sup>34</sup> During the eve of the election, the employer urges its employees to vote against unionization, while the union tries to convince them to vote for it.<sup>35</sup>

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stated that

[a] proper conception of the arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.

Shulman, *supra* note 8, at 1016.

27. Stone, *supra* note 17, at 1515.

28. See William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 484 (2007).

29. See Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1590 (2008).

30. *Id.* at 1590–91.

31. Brudney, *supra* note 4, at 827.

32. *Id.* at 824.

33. *Id.*

34. *Id.*

35. See *id.*

### B. Employer Activity During Election Campaigns

The certification of a victory by the union obligates the employer to begin the collective bargaining process and protects the victorious union from challenge by rival unions.<sup>36</sup> The system may seem reasonable, but less obvious issues have caused disenchantment among unions with the current election process. Most employers are not willing to lose the Board election contest.

Employers can and do use a wide array of electioneering techniques against unions. Some legal techniques that employers often use include the hiring of outside consultants to manage the anti-union campaign, the encouragement of “Vote No” committees comprised of employees that oppose the union,” and the effective disclosure of the employers’ views on unionization through the distribution of pamphlets and the mailing of letters.<sup>37</sup> Another technique employers often use is a “captive audience speech.” The employees are rounded up on company time and required to listen to anti-labor speeches given by their employer. Captive audience speeches have “proved to be an extremely devastating technique in organizational campaigns.”<sup>38</sup> All of these techniques have an enhanced effectiveness because the employer has the power to greatly restrict union access to employees.<sup>39</sup>

The list of legal techniques does not end the discussion of anti-union activities routinely engaged in by employers.<sup>40</sup> Although it is illegal for an employer to “threaten to fire, or actually fire an employee because of that employee’s union activities,” it still occurs.<sup>41</sup> Employers regularly engage in other illegal activities such as threatening to close the operation if the employees vote for union representation as well as promising or implementing benefits, bonuses, or other changes in the terms and conditions of employment.<sup>42</sup>

### C. Remedies

In theory, employers who engage in illegal anti-organizing activities are subject to penalties under the NLRA. If a union believes the employer is using unfair labor practices to defeat its organization drive, it can file a complaint with the local National Labor Relations field office.<sup>43</sup> The local office then investigates to

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36. WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 89 (4th ed. 2004).

37. Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 *FORDHAM URB. L.J.* 247, 251–52 (2008).

38. Gould, *supra* note 28, at 484; *see also* David J. Doorey, *The Medium and the “Anti-Union” Message: “Forced Listening” and Captive Audience Meetings in Canadian Labor Law*, 29 *COMP. LAB. L. & POL’Y J.* 79 (2008); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 *COMP. LAB. L. & POL’Y J.* 209 (2008).

39. GOULD, *supra* note 36, at 72.

40. *See* Gely & Chandler, *supra* note 37, at 252 (describing various illegal activities engaged in on a regular basis).

41. *Id.*

42. *Id.*

43. Robert M. Worster, III, Case Note, *If It’s Hardly Worth Doing, It’s Hardly Worth*

determine whether the NLRA has been violated and, if so, will either encourage a settlement or file a formal complaint against the offending party.<sup>44</sup> An administrative law judge will make the initial decision, but it can be appealed to the Board. The Board's decision can be appealed to a federal court of appeals<sup>45</sup> and possibly to the Supreme Court.<sup>46</sup> If the final ruling is against the employer, then the Board may impose a number of restorative remedies.<sup>47</sup>

"Access Remedies," including cease and desist orders, are supposed to allow the union to communicate with employees free from employer interference, and "Notice Remedies" are supposed to inform employees of their rights under the NLRA and assure them of protection from their employer.<sup>48</sup> These are common remedies imposed when employers cheat during an organization drive.<sup>49</sup> "Make Whole" remedies include back pay and reinstatement, and these remedies are supposed to restore workers who have been discharged in contravention of the NLRA.<sup>50</sup>

#### *D. Traditional Election Results*

Legal and illegal employer activities greatly affect the outcome of elections. While in recent years the union success rate in elections has increased to nearly 60%,<sup>51</sup> the number is misleading when put in terms of the union members organized. The success rate steadily declines as the size of the employer increases. In elections involving 100–499 employees, the success rate drops to 42%; in elections involving 500 or more workers, the success rate is a mere 37%.<sup>52</sup> These numbers demonstrate why unions have been in search of a better option.

### IV. CARD CHECKS AND NEUTRALITY AGREEMENTS

#### *A. The Development of Card Checks*

Card checks have been around since the NLRA was passed. Under the original Act, card checks were more important than they are today. The original section 9(c) of the NLRA allowed the Board to "take a secret ballot election or utilize any other suitable method" to determine whether a union had majority support for certification purposes.<sup>53</sup> Until the 1939 *Cudahy Packing Co.*<sup>54</sup> decision ended the

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*Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1075 (2004).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1076.

48. *Id.*

49. *Id.*

50. *Id.*

51. Brudney, *supra* note 4, at 827.

52. *Id.* at 830.

53. *Recognition and Withdrawal of Recognition Without an Election*, in 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 678, 682 (Patrick Hardin et al. eds., 4th ed. 2001) [hereinafter *Recognition*] (quoting

practice, the Board used card checks as its primary “other suitable method.”<sup>55</sup> In 1947, Congress formally stripped the “other suitable method” language from section 9(c) with the Taft-Hartley Amendments.<sup>56</sup>

The next major development occurred with the Court’s decision in *NLRB v. Gissel Packing Co.*<sup>57</sup> In *Gissel*, the Court answered three questions. The first was “[w]hether the duty to bargain can arise without a Board election under the [NLRA].”<sup>58</sup> The Court held in the affirmative, stating that while certification could only occur after an election, an employer’s duty to bargain could arise without one.<sup>59</sup>

The second question the Court answered was “whether union authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid, alternate route to majority status.”<sup>60</sup> Again, the Court held in the affirmative.<sup>61</sup> Although the Court expressed a preference for an election, it decided that where an employer engages in unfair labor practices to such an extent that an election either has to be overturned or one cannot fairly be held, cards can be used to measure employee support for a union.<sup>62</sup>

Then the Court reached the question of “whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union’s majority and make a fair election an unlikely possibility.”<sup>63</sup> The only important aspect of the Court’s holding (in regard to card checks) was that where an employer merely impedes the electoral process but does not make it impossible, a union can seek a bargaining order if it can show majority status via cards.<sup>64</sup>

Following *Gissel*, the next Supreme Court case to help lay the groundwork for the modern use of the card check was *Linden Lumber Division v. NLRB*.<sup>65</sup> In *Linden Lumber Division*, the Court rejected a claim by a union for recognition based on a card majority.<sup>66</sup> The Court laid down the rule that while an employer who has not engaged in unfair labor practices cannot be forced to recognize card checks, the employer can still agree to be bound by them.<sup>67</sup> *Gissel* and *Linden Lumber Division* put in place the legal framework necessary to give rise to the modern neutrality agreement that includes a card check provision.

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Int’l Ladies’ Garment Workers’ Union v. NLRB, 366 U.S. 733 (1961)).

54. 13 N.L.R.B. 526 (1939) (deciding in a dispute between two possible representatives an election should be held to decide in favor of one, instead of relying on previously acquired cards).

55. *Recognition*, *supra* note 53, at 680–81 (emphasis in original).

56. *Id.* at 682, n.7.

57. 395 U.S. 575 (1969).

58. *Id.* at 579.

59. *Recognition*, *supra* note 53, at 690–91.

60. *Gissel Packing Co.*, 395 U.S. at 579.

61. *Id.*

62. *Recognition*, *supra* note 53, at 691.

63. *Gissel Packing Co.*, 395 U.S. at 579.

64. *Recognition*, *supra* note 53, at 693.

65. 419 U.S. 301 (1974).

66. *Recognition*, *supra* note 53, at 723.

67. *Id.* at 723–24.

A neutrality agreement was first used in 1976 between the United Auto Workers (UAW) and General Motors (GM).<sup>68</sup> GM agreed that it would “neither discourage nor encourage the [UAW’s] efforts in organizing” other GM employees.<sup>69</sup> The agreement was actually in an existing collective bargaining agreement with the UAW, but it did not take long for unions to realize they could convince employers, with whom they had no preexisting relationship, to enter into neutrality agreements.<sup>70</sup>

Increasingly, modern organization campaigns employ a neutrality agreement. The AFL-CIO organized nearly three million workers from 1998 to 2003, with less than one-fifth coming from traditional elections.<sup>71</sup> In contrast, in 2004 the AFL-CIO reported organizing 150,000 to 200,000 new members through card checks, compared to only 70,000 through traditional elections.<sup>72</sup> One union reported organizing over 100,000 workers through neutrality agreements; other studies have suggested organization campaigns under agreements that have both neutrality and card check provisions have a success rate of 78.2%.<sup>73</sup>

However, one study has challenged some of the seemingly glowing results of neutrality agreements. Rafael Gely and Timothy Chandler argue that, from 1998 to 2005, the majority of workers were organized through government-sponsored elections.<sup>74</sup> They also claim that most of the organizing success with neutrality agreements is limited to specific industries, while most employers continue to oppose card checks and prefer Board procedures.<sup>75</sup>

Under the Taft-Hartley Amendments to the NLRA, unions selected via neutrality agreements involving card check authorization do not receive the sort of protections that certification after a traditional election provides.<sup>76</sup> If a union wins a traditional election, it receives a “certification year,” a year-long period of time during which no decertification election can be held.<sup>77</sup> A union selected via a card check does not receive a “certification year.” Instead, it is given a reasonable time before it can lose its status as bargaining agent. In the past, the Board has analogized the “reasonable period of time” to the certification year.<sup>78</sup>

However, that may no longer be the case, because a recent change in Board policy threatens to challenge the use of card checks in neutrality agreements. In *Dana Corp.*, the Board established several conditions that must be satisfied before any election bar can be put in place.<sup>79</sup> For example, a notice must have been posted informing employees of the recognition of a bargaining representative and a period

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68. Cooper, *supra* note 29, at 1592.

69. Brudney, *supra* note 4, at 825, (citing *Auto Workers Approve General Motors Contract*, DAILY LAB. REP. (BNA), at A-13 (Dec. 8, 1976)).

70. Cooper, *supra* note 29, at 1592.

71. Brudney, *supra* note 4, at 828.

72. Cooper, *supra* note 29, at 1593-94.

73. *Id.* at 1594.

74. Gely & Chandler, *supra* note 37, at 250.

75. *Id.*

76. 29 U.S.C.A. § 159 (c)(1)(B) (2006).

77. See Gould, *supra* note 28, at 489.

78. *Id.*

79. 351 N.L.R.B. 434 (2007).

of forty-five days must pass without more than 30% of the employees filing a petition for decertification.<sup>80</sup> These new requirements threaten to greatly undermine the use of card checks by unions.

### *B. How Neutrality Agreements Operate*

The standard neutrality agreement is a voluntary, contractual pledge of neutrality from the employer. The only communications with the employees allowed might be to let the employer communicate “facts” to employees in response to inquiries.<sup>81</sup> The neutrality agreement may prohibit the employer from communicating opposition to the union, and may also require the employer to explain to the employees that the employer welcomes the chance to bring in the union,<sup>82</sup> or obligate the employer “to create [an election] climate free of fear, hostility, and coercion.”<sup>83</sup> The union may have obligations too, including the duty to refrain from anti-employer comments.<sup>84</sup>

Also, 65% of neutrality agreements contain provisions that obligate the employer to recognize the results of a card check drive.<sup>85</sup> More than 90% of neutrality agreements contain an alternative dispute resolution clause, usually arbitration, to solve interpretational problems with the agreement.<sup>86</sup> However, the Board will usually step in to handle disagreements over representational issues, such as the definition of the proper bargaining unit.<sup>87</sup> In *International Ladies’ Garment Workers’ Union v. NLRB*,<sup>88</sup> the Supreme Court ruled that an employer’s recognition of a union lacking majority support is an unfair labor practice regardless of good faith and thus laid down the requirement that a neutral third party verify the process.<sup>89</sup>

The neutrality agreement/card check process helps union organizing efforts;<sup>90</sup> however, it is less clear what employers have to gain from agreeing to a neutrality agreement. It appears that employers sign neutrality agreements out of a rational consideration of economic costs.<sup>91</sup> Despite considering factors such as “increased labor costs . . . , diminished attractiveness as a merger or takeover target . . . , and the possible loss of a more cooperative work culture,” entering into a neutrality agreement can make economic sense.<sup>92</sup> An employer can avoid the costs associated

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80. *Id.* at 434.

81. *See* Cooper, *supra* note 29, at 1603.

82. *Id.*

83. *Id.* (quoting Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *INDUS. & LAB. REL. REV.* 42, 53 (2001)).

84. *Id.*

85. Brudney, *supra* note 4, at 826.

86. *Id.* at 827.

87. Cooper, *supra* note 29, at 1598.

88. 366 U.S. 731 (1961).

89. Gould, *supra* note 28, at 484.

90. Gely & Chandler, *supra* note 37, at 253–54.

91. Cooper, *supra* note 29, at 1592–93.

92. Brudney, *supra* note 4, at 836.

with a work stoppage and picketing.<sup>93</sup> Employers can also avoid losses caused by secondary union activity such as a lack of access to capital or other support from municipalities and union pension funds, or boycotts by religious groups or civic organizations.<sup>94</sup>

However, employers also have less coercive reasons to abide by neutrality agreements. Employers may be able to attract new business. In a specific case, an auto parts supplier signed a neutrality agreement with the UAW; in return, the UAW pushed Ford, Chrysler, and GM to increase their business with union auto parts suppliers.<sup>95</sup> Hotel chains and health providers have been able to attract new visitors and expand their patient bases, respectively.<sup>96</sup> Unions will often agree to send their members to patronize businesses that have agreed to neutrality agreements.<sup>97</sup> Employers can also expect to get benefits from government. While gaining state financing is a major aspect of the appeal, less obvious advantages include a friendlier disposition from pro-union law makers, a favorable determination from regulatory agencies, or a favorable judicial settlement.<sup>98</sup> Casinos have used unions as a reliable source of skilled labor and are thus more willing to sign neutrality agreements.<sup>99</sup>

Once again, Gely and Chandler caution not to draw too broad a conclusion. They argue that while it may be clear that some employers can benefit financially from card checks, it does not mean that all employers will be convinced of the economic advantage.<sup>100</sup> Evidence of continued employer opposition can be seen by the list of employer organizations arrayed against card checks.<sup>101</sup> There is no real reason to expect these employers to drop their opposition to union organizing, either through neutrality agreements that incorporate card checks, or if card check recognition is ever written into law, through smarter anti-union activity.<sup>102</sup>

#### V. ELECTIONS AND INDUSTRIAL DEMOCRACY

The notion of “one person, one vote” in relation to political democracy enjoys great favor among Americans. Notwithstanding the analogy to political democracy, the Employee Free Choice Act of 2009 (EFCA) was introduced in the U.S. House with 227 cosponsors.<sup>103</sup> If passed, this bill would significantly supplant Board elections. The EFCA amends section 9(c) of the NLRA to require the Board to certify card check authorizations in addition to traditional Board supervised elections.<sup>104</sup> The reason the EFCA was introduced is that there is a stark divide

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93. *Id.* at 836.

94. *Id.*

95. *Id.* at 837 & n.79.

96. *Id.* at 837.

97. *Id.* at 837.

98. *Id.* at 837–38.

99. *See id.* at 839.

100. Gely & Chandler, *supra* note 37, at 253–55.

101. *Id.* at 255.

102. *Id.*

103. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

104. *See id.* § 2.

between those who believe the “one person, one vote” paradigm of industrial democracy should be as inviolable as it is in democratic electoral politics, and those who believe that elections are simply no longer capable of reflecting employee choice.

*A. Arguments Against Card Checks and Neutrality Agreements*

Opponents of card checks have advanced a number of arguments to either discredit the card check process itself or to support the status quo as represented by Board elections.<sup>105</sup> The first is the notion that union organizers will apply undue influence on workers. The second is that card checks result in a reduction in the amount of information about unions that is available to employees. The final argument is that the use of card checks and neutrality agreements amount to an employer providing unlawful support to a particular union.

The strongest argument against card checks is that union organizers will apply undue influence on workers, or otherwise intimidate them into signing authorization cards. One House republican stated, “[U]nion thugs had used physical force to have workers sign pro-union cards.”<sup>106</sup> In *Dana Corp.*, one of the reasons the majority considered card checks inferior to elections was perceived union misconduct.<sup>107</sup> Despite the fact that union coercion or fraud in conducting the card check campaign was never entered in the record before the Board,<sup>108</sup> the majority in *Dana Corp.* still worried about “group pressure exerted at the moment of choice.”<sup>109</sup>

Adrienne Eaton and Jill Kriesky, however, have concluded that “management’s pressure on workers to oppose unionization was significantly greater than pressure from co-workers or organizers (or management) to support the union in both card checks and elections.”<sup>110</sup> They also were able to determine that union organizers were no more likely to exert undue pressure on workers during a card-check campaign than during an election.<sup>111</sup>

Second, those who oppose the use of card checks often argue that employers will not be able to adequately explain to their employees the downside of union representation.<sup>112</sup> However, the NLRA gives employers only the right to oppose union organizing; it does not impose a duty of opposition on them.<sup>113</sup> Section 8(c)

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105. See, e.g., Richard A. Epstein, *The Case Against the Employee Free Choice Act* (Univ. of Chi. Law Sch., John M. Olin Law & Econ., Working Paper No. 452, 2009), available at <http://www.law.uchicago.edu/files/files/452/pdf>.

106. Raja Raghunath, *Stacking the Deck: Privileging “Employer Free Choice” Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 337 (2008).

107. See *id.* at 341.

108. *Id.* at 342.

109. *Dana Corp.*, 351 N.L.R.B. 434, 438 (2007).

110. Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 170 (2009).

111. *Id.* at 170.

112. Raghunath, *supra* note 106, at 337–38.

113. Brudney, *supra* note 4, at 846–47.

of the NLRA grants employers the right to speak out against union organizing.<sup>114</sup> A right can be waived if the waiver is made “voluntarily, intelligently, and knowingly . . . with full awareness of the legal consequences.”<sup>115</sup> Typically neutrality agreements, which are carefully negotiated between sophisticated parties, will satisfy the waiver standard, and there should be no issue with a denial of section 8(c) rights to the employer.<sup>116</sup>

There is a second element to the argument that neutrality agreements deprive employees of information—one the Board in *Dana Corp.* explicitly recognized: “[U]nion card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options.”<sup>117</sup> In essence, a waiver of an employer’s section 8(c) right erodes the employees’ right to freely organize.<sup>118</sup> However, the NLRA grants employees no right to receive information from an employer.<sup>119</sup>

Eaton and Kriesky found that while there is some suggestion that employees receive less information during card check organization campaigns, this is largely due to the neutrality agreement and not the use of authorization cards.<sup>120</sup> It is as much an argument to amend the NLRA to allow card check authorization without requiring a union to seek a neutrality agreement as it is an argument for elections. Further, even if the employer does not have an opportunity to give information to its employees, interested business groups and chambers of commerce are still able to discuss the downside of unions and do so with “access [that] is comparable to what unions traditionally experience in our legal regime.”<sup>121</sup>

Finally, section 8(a)(2) prohibits employers from dominating, supporting, or interfering with the formation of labor organizations.<sup>122</sup> Card check opponents argue that an employer’s agreement to remain neutral and recognize card checks is essentially “contributing unlawful support or assistance toward a labor organization’s success.”<sup>123</sup> However, the Board and the appellate courts rejected this line of argument.<sup>124</sup> A neutrality agreement is only an agreement to remain neutral, not to aid union organization. In practice, this argument also lacks a valid premise. Union competition is not usually a significant factor in the modern organizational context. Most neutrality agreements arise after a union has partially organized an employer, and a long-standing relationship has already been established between the union and that employer.<sup>125</sup> In addition, the AFL-CIO strongly discourages competition between member unions.<sup>126</sup>

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114. *Id.* at 853.

115. *Id.* at 854 (quoting *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972)).

116. *See id.*

117. *Dana Corp.*, 351 N.L.R.B. 434, 439 (2007).

118. *Id.*

119. Brudney, *supra* note 4, at 855.

120. Eaton & Kriesky, *supra* note 110, at 170–71.

121. Brudney, *supra* note 4, at 848.

122. National Labor Relations Act, 29 U.S.C. § 158(a)(2) (2006).

123. Brudney, *supra* note 4, at 845.

124. *See id.* at 846.

125. *Id.*

126. *Id.*

*B. Arguments for Card Checks and Neutrality Agreements*

From the union standpoint, card checks and neutrality agreements work. The success rates for organization drives that utilize them are higher than those that employ Board certified elections.<sup>127</sup> The number of workers organized through card checks and neutrality agreements is in the millions.<sup>128</sup> However, there are more reasons that the use of card checks and neutrality agreements should be expanded. First, they can go a long way toward correcting the imbalance caused by the weakness of NLRA remedies for employer misconduct. Second, the use of Board elections is inconsistent with industrial democracy. Finally, card checks provide an opportunity for a real industrial democracy.

During a traditional Board election, the employer resists unionization from the start.<sup>129</sup> In many cases, both legal and illegal anti-union organizing techniques are on the table.<sup>130</sup> The remedies available to unions under the existing NLRA framework often fail to deal with unfair labor practices used by employers.<sup>131</sup> One problem with the official remedy process is the weakness of available remedies.

Cease-and-desist orders basically tell the employer not to break the law again. However, if the employer does so, the Board may seek another court order to hand down an additional cease and desist command, like an “unarmed police officer’s order to ‘stop or I will say stop again.’”<sup>132</sup> A notice remedy may inform employees of their rights under the NLRA, but it does nothing to protect employees or to punish employers.<sup>133</sup> Besides, the courts will sometimes refuse to issue an order on the grounds that it may humiliate the employer and injure the employer’s relations with its employees later.<sup>134</sup>

Reinstatement remedies often fail because relatively few employees seek reinstatement.<sup>135</sup> The lack of desire to work for employers that are willing to break the law and the delays caused by both the Board’s caseload and the appeals process discourage employees from pursuing this option.<sup>136</sup> Back pay is one of the more powerful remedies available, but its effectiveness is diluted by the duty of the employee to mitigate damages and the tendency of employers to treat back pay damages as a “cost of doing business.”<sup>137</sup>

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127. *See supra* text accompanying notes 51–52, 73.

128. *See supra* text accompanying note 71.

129. *See supra* text accompanying note 35.

130. *See supra* text accompanying notes 40–42.

131. *See* Worster, *supra* note 43, at 1077.

132. *Id.* at 1078.

133. *Id.* at 1078–79.

134. *Id.* at 1080.

135. *Id.*

136. *Id.* at 1080–81.

137. *Id.* at 1083; *see also* Joseph E. Slater, *The “American Rule” that Swallows the Exception*, 11 EMP. RTS. & EMP. POL’Y J. 53 (2007) (lamenting the NLRA’s weak remedial structure); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787–91 (1983) (describing how remedies under the NLRA often are outweighed by the strong economic incentives employers have to commit unfair labor practices during election campaigns).

The use of neutrality agreements and card checks can avoid the weaknesses of NLRA remedies. Neutrality agreements can prevent an employer from bringing the full array of anti-union techniques by requiring the employer to sit on the sidelines. Even if an employer ignores its obligations, the neutrality agreement can provide for a quicker remedy through arbitration or contract claims instead of waiting for the Board to do something.<sup>138</sup> An amendment to the NLRA allowing card check certification without a neutrality agreement would help. An employer might not know about a card check campaign until after it was completed, or lack the time to wear down its employees' resolve if it did find out.

Second, a comparison of political elections with their use in industrial organization reveals another reason for the use of card checks. In a political election, both candidates get to speak directly to voters, and then only if the voter is interested in listening to the candidate. In a Board election, the employer can keep nonemployee organizers off the premises, while requiring employees to listen to anti-union speeches and fire any employees who do not attend or who publicly disagree with the message.<sup>139</sup> Such asymmetry would not be tolerated in politics, yet this is the standard in Board elections. The analogy between industrial democracy and political democracy does not work, because it is comparing apples to oranges.

Finally, Board elections are not democratic because employers are able to effectively quash employee free choice. Card check recognition and neutrality agreements, by contrast, can effectuate the basic elements of industrial democracy. An employer and union must still arrive at a collectively bargained-for agreement if an uncoerced majority of employees has organized for that purpose.<sup>140</sup> An arbitration agreement provides the means for settling disagreements between the union and employer;<sup>141</sup> this is not changed by the use of card check recognition. The individual worker's rights are still entirely defined by the agreement,<sup>142</sup> and the government will not interfere any more than it would after a Board election. The primary difference is that a card check majority has a far better chance of actually registering employee free choice.

#### CONCLUSION

The rate of private sector union membership has steadily declined since the 1970s.<sup>143</sup> Part of this decline has been the result of deregulation, technological advances, and foreign competition, and it will not go away no matter how labor law is reformed.<sup>144</sup> If American labor policy is supposed to ensure that only these

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138. *See supra* text accompanying note 85.

139. *See* Raghunath, *supra* note 106, at 334 (illustrating what general political elections would be like if run in the same manner as NLRB elections).

140. *See generally* R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 *HOUS. L. REV.* 1863, 1864 n.1 (1994) (discussing the tenets of "industrial pluralism").

141. *See id.* at 1869-71.

142. *See id.*

143. Brudney, *supra* note 4, at 875.

144. *See id.*

economic forces and the free choice of labor determine the outcome of organization efforts, then something must be done. Employers have become experts at exploiting the traditional Board election process. The arguments against card check recognition are either far weaker than they first appear or are emotional appeals to a defective analogy to political democracy. Board elections are no longer capable of effectuating the central purpose of the NLRA—the recognition of employee free choice. Not only are card checks and neutrality agreements consistent with the basic premises of industrial democracy, but they represent a way to level the playing field and give full effect to the purpose of the NLRA.

