

# A Moral/Contractual Approach to Labor Law Reform

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*When laws cease to operate as intended, legislators and scholars tend to propose new laws to replace or amend them. This Article posits an alternative: offering regulated parties the opportunity to contractually bind themselves to behave ethically. The perfect test case for this proposal is labor law, because (1) labor law has not been amended for decades, (2) proposals to amend it have failed for political reasons and are focused on union election win rates and less on the election process itself, (3) it is an area of law already statutorily regulating parties' reciprocal contractual obligations, and (4) moral means of self-regulation derived from contract are more likely to be effective when parties have ongoing relationships like those between management and labor organizations. The Article explains how the current law and proposed amendments fail because they focus on fairness as a function of union win rates, and then outlines a plan to leverage strong moral contractual obligations and related norms of behavior to create as fair a process as possible for employees to vote unions up or down.*

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## INTRODUCTION

A formidable body of literature and a growing set of empirical research confirm that people obey the law for a host of reasons independent from a positivist rationale of obeying for the sake of obeying.<sup>1</sup> Rationales offered include instrumental,<sup>2</sup> social/relational,<sup>3</sup> and

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1. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985); see also PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

2. See, e.g., Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349,

moral.<sup>4</sup> Recent research on contractual obedience suggests that morally framing an obligation to perform as contractually obligated yields greater likelihood and magnitude of performing an undesirable task as compared to framing the request to obey the same contract in terms of a legal threat.<sup>5</sup> While extralegal effects like this are well recognized and, in some instances, may be more powerful than law by itself as a means of affecting behavior,<sup>6</sup> to the Authors' knowledge, they are not incorporated into plans for legal reform. That is, if tort law is *broken*, legislators and scholars most often suggest revising tort laws, not crafting nonlegal incentive structures like relational, social, or moral constraints that operate independently from the law or in conjunction therewith. We suggest doing just that as a means of reforming labor law. Specifically, we propose incorporating a set of *moral principles* embodied in a *contract* to which union and management would both be incentivized to agree, which would make the process of certifying unions as agents of collective bargaining significantly fair and would result in a less costly administrative system.

Labor law is the perfect test case for such a proposal. Labor law involves state regulation of a tripartite relationship among labor

1349–61 (2009) (presenting an instrumental view of contracts); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 635 (2010) (describing the economic prediction of human behavior as one in which an individual will breach a contract if breaching yields an extra dollar earned); see also Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453, 454–57 (2003) (examining the cost of evicting tenants as a function of whether a judicial system is based on civil law or common law).

3. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–74 (1998) (using sociological and social-psychological literature to explain behavioral economics in law); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963) (finding that parties in the automobile industry rely more heavily and often on relational grounds for enforcing contracts than on legal sanctions contained therein). See generally Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCHOL. REV. 323 (1997).

4. See generally Zev J. Eigen, *When and Why Individuals Obey Form-Adhesive Contracts: Experimental Evidence of Consent, Compliance, Promise and Performance*, 41 J. LEGAL STUD. (forthcoming 2012), available at <http://ssrn.com/abstract=1640245>; Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5 (2011); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

5. Eigen, *supra* note 4 (manuscript at 23).

6. *Id.*

7. We use the term “moral” throughout this Article loosely. As noted by others, there is lack of convergence among scholars on what is meant by “morals,” “ethics,” or “values” broadly. See, e.g., Steven Hitlin & Jane Allyn Piliavin, *Values: Reviving a Dormant Concept*, 30 ANN. REV. SOC. 359, 360 (2004). For the purposes of this Article, it is unnecessary to distinguish among the various conceptualizations and operationalizations of the term. We mean simply to refer to the set of constraints on behavior derivative from one’s sense of obligation based on communal norms of acceptable behavior; ideals about desirable characteristics, states, or actions; or evaluative beliefs on how to orient ourselves in contemporary life. Short of picking an unnecessary etymological fight for which the Authors are woefully unprepared, we use this term as a synthetic catch-all of definitions.

organizations, employers, and employees. The interrelationship among these actors may be legally constrained, but ultimately, most of the means of enforcement already lie in nonlegal, quasi-legal, and informal mechanisms, perhaps more so than in many other areas of law.<sup>8</sup> By comparison, a dispute about how much federal income tax one owes will be resolved directly between the state and the individual, with the tax code as the legal standard indisputably relied upon by all. Unions and employers routinely rely heavily on their ongoing relationships to resolve legally valenced disputes (like employment discrimination) informally, leveraging the power of the parties' ongoing relationship to fashion remedies all can accept.<sup>9</sup> Labor law, therefore, has a built-in, preexisting basis for nonlegal compliance that heavily leverages the parties' collective set of norms of behavior, reciprocity, morality, fairness, and justice. Additionally, labor law is ultimately a means of facilitating parties' self-regulation via *contract*. Contract is deeply rooted in morality, social constraints, and norms of fairness and reciprocity, such that proposing extralegal ways of self-policing them may be *more* effective than purely legal means. These two factors make labor law an ideal space in which to test the Authors' extralegal reform hypotheses.

Before suggesting this reform, it is necessary to explain why such (perhaps) seemingly drastic reform is necessary. To do so, this Article asks two questions: Are the rights to be represented by a union and to collectively bargain with employers over wages, hours, and terms and conditions of employment worth saving, and, if they are, what is the best way to go about saving them? Considering the shocking lack of change to labor law since the passage of the National Labor Relations Act ("NLRA")<sup>10</sup> in 1935 relative to the steadfast and voluminous changes to other laws regulating the workplace passed since that time,<sup>11</sup> labor law reform is considered by many to be long overdue.<sup>12</sup> However, labor law reform has been a failed promise under the previous two Democratic administrations, and likely will be under the current one as well.

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8. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532 (2002); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 181 (1996).

9. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 418 (1990).

10. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2010)).

11. Katherine Van Wezel 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, 584-93 (1992).

12. See, e.g., WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 9 (1993); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 828 (1996); 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, 374 n.8 (2001); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97 (1993).

President Carter proposed sweeping reform, including shortening the time for union elections, standardizing the rules for defining bargaining units, and increasing the penalties against employers who violate the law.<sup>13</sup> Carter's proposed reform lost on the Senate floor.<sup>14</sup> President Clinton proposed prohibiting employers from permanently replacing striking employees.<sup>15</sup> This proposed reform ended with the midterm elections of 1994.<sup>16</sup> President Obama announced plans for the most aggressive labor law reform of the three presidents: the Employee Free Choice Act ("EFCA").<sup>17</sup> Under EFCA, an employer would have to recognize a union as the exclusive agent of the employees for collective bargaining over terms and conditions of employment if the union

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13. Labor Reform Act of 1977, S. 1883, 95th Congress (1977). The following is an excerpt from a July 18, 1977, speech President Carter made to Congress:

An election on union representation should be held within a fixed, brief period of time after a request for an election is filed with the Board. This period should be as short as is administratively feasible. The Board, however, should be allowed some additional time to deal with complex cases.

The Board should be instructed to establish clear rules defining appropriate bargaining units. This change would not only help to streamline the time-consuming, case-by-case procedures now in effect, but would also allow labor and management to rely more fully on individual Board decisions.

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When employers are found to have refused to bargain for a first contract, the Board should be able to order them to compensate workers for the wages that were lost during the period of unfair delay. . . .

The Board should be authorized to award double back-pay without mitigation to workers who were illegally discharged before the initial contract. This flat-rate formula would simplify the present time-consuming back-pay process and would more fully compensate employees for the real cost of a lost job.

The Board should be authorized to prohibit a firm from obtaining Federal contracts for a period of three years, if the firm is found to have willfully and repeatedly violated NLRB orders. Such a debarment should be limited to cases of serious violations and should not affect existing contracts. . . .

. . . . The Board should also be required to seek preliminary injunctions against certain unfair labor practices which interfere seriously with employee rights, such as unlawful discharges.

James Earl Carter, President of the U.S., Labor Law Reform Message to the Congress Transmitting Proposed Legislation (July 18, 1977), *available at* <http://www.presidency.ucsb.edu/ws/?pid=7821>.

14. On June 22, 1978, Senate Bill 1883 (renumbered S. 2467), was recommitted to the Senate Human Resources Committee and did not reemerge. 124 Cong. Rec. 18,393-400 (1978).

15. Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong. (1993). The bill was passed in the House of Representatives but died in the Senate.

16. In a last-ditch effort to effectuate some form of labor reform, President Clinton instituted an Executive Order prohibiting government contracts with employers who permanently replaced striking workers. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995). The Executive Order was overturned by the D.C. Circuit on the grounds that it was preempted by the NLRA, which guarantees employers the right to replace striking workers. *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

17. Employee Free Choice Act of 2009, S. 560, 111th Cong.

presented the employer with “authorization cards” signed by employees stating that they want the union to represent them.<sup>18</sup> Essentially, this authorization-card method for obtaining recognition would supplant the secret-ballot election whereby unions petition the National Labor Relations Board (“NLRB”)<sup>19</sup> asking that the unit of employees they seek to represent vote for or against the union some thirty or more days following the petition, typically after both the employer and the union campaign for their votes.<sup>20</sup> Under EFCA, the penalties for violations of the NLRA and related statutes would triple,<sup>21</sup> and parties that did not reach a first contract within 120 days would be forced to submit their proposals to interest arbitration.<sup>22</sup> Like with President Clinton, the midterm elections of President Obama’s first term have, for all intents and purposes, terminated the possibility of legislative labor law reform, especially as sweeping as EFCA promised to be.<sup>23</sup> Labor law reform under President Obama, however, is not dead. Instead, the Obama administration’s NLRB<sup>24</sup> has the power and, seemingly, the desire, to promulgate rules and hand down decisions that could satisfy organized labor’s most pressing goal: increasing union membership by making it easier to organize.

It is understandable why labor seeks to increase union density in the U.S. At its height in the mid-1950s, organized labor represented about 35% of the U.S. workforce.<sup>25</sup> That percentage has declined steadily since that time, to 11.9%.<sup>26</sup> In the private sector today, only 6.9% of the

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18. *Id.* § 2.

19. The NLRB was established by the National Labor Relations Act of 1935, 29 U.S.C. § 153 (2010). The NLRB is made up of five members appointed by the President for staggered five-year terms. *Id.* § 153(a).

20. S. 560 § 2(a).

21. *Id.* § 4(b)(1).

22. *Id.* § 3. Interest arbitration, traditionally used in the public sector, would result in an arbitrator deciding the wages, hours, and terms and conditions of employment for private-sector employees and employers.

23. The Democrats lost their majority in the House in 2010 and now are not close to the sixty votes needed in the Senate.

24. Traditionally, the NLRB consists of three members of the President’s party and two members of the party not in power. WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 54 (2000). When President Bush left office, the NLRB had only two members. Currently, there are four members, three of whom are Democrats. *See Board Members Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Feb. 14, 2012).

25. PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 46 (2001).

26. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among All Wage and Salary Workers, 1973–2010*, UNIONSTATS.COM, <http://www.unionstats.com> (follow “html” hyperlink located below “All Wage & Salary Workers”) (last visited Feb. 14, 2012); *see also News Release, Union Members—2011*, BUREAU LAB. STAT. (Jan. 27, 2012), <http://www.bls.gov/news.release/pdf/union2.pdf> (reporting an 11.8% union membership rate in the U.S. in 2011).

workforce is unionized<sup>27</sup>—the approximate level just before the New Deal.<sup>28</sup> What is unclear is whether labor law reform aimed at increasing union density is good for the U.S. economy, good for employees, good for employers and their customers, and whether employees ultimately want to unionize. Union leaders often answer these questions swiftly and definitively. According to organized labor, unionization benefits employees, customers, and the U.S. economy, and therefore should be encouraged whether employers like it or not.<sup>29</sup> With regard to employee choice, organized labor contends that nearly all employees want to be unionized (or at least would want to be organized once the benefits of unionization are explained), and only reject unions in secret-ballot elections because the organizing system unfairly favors employers by allowing companies to get away with coercing and intimidating employees.<sup>30</sup> Underlying these claims are some assumptions about the continued need for and utility of unionism in contemporary workplaces in the U.S. This Article evaluates these critical assumptions, addresses the most recent labor law reform attempt embodied in EFCA, and explains how an alternative reform approach endorsed by the Authors relies less on normative assumptions about whether unions should regain their dominance or should be allowed to continue to wither, and more on an essential underlying feature of modern liberal democratic theory: the right to freely elect one's representatives or to remain free from representation. The proposed reform also departs from pure reliance on legal amendments, shifting to reliance on unions' and employers' joint and symbiotic reciprocity and collective moral obligation as a means of leveraging enforcement that theoretically could result in a greater likelihood of election results that closer accord the ultimate preferences of employees and in lower administrative costs of enforcement.

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27. Hirsch & Macpherson, *supra* note 26 (follow "html" hyperlink located below "Private Sector").

28. OSTERMAN, *supra* note 25, at 46.

29. See, e.g., *Unions Are Good for Business, Productivity and the Economy*, AFL-CIO, <http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff8.cfm> (last visited Feb. 14, 2012); see also HARLEY SHAIKEN, CTR. FOR AM. PROGRESS, *THE HIGH ROAD TO A COMPETITIVE ECONOMY: A LABOR LAW STRATEGY* (2004) (arguing that unionization benefits the economy and productivity, and advocating for card-check authorization against elections).

30. See, e.g., Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 546–600 (1993) (advocating against employer free speech in union elections and arguing that the existing process is wildly biased in favor of employers); Rafael Gomez & Morley Gunderson, *The Experience Good Model of Trade Union Membership*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 92, 108 (Phanindra V. Wunnava ed., 2004) (concluding that the benefits of unions are opaque to nonunion members); *Interactive Map: Unions Are Good for Workers and the Economy in Every State*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 15, 2009), [http://www.americanprogressaction.org/issues/2009/02/unions\\_workers.html](http://www.americanprogressaction.org/issues/2009/02/unions_workers.html) [hereinafter *Union Map*].

Part I reviews research on the effects of unionization on employees and employers to address the question of whether a primary goal of national policy should be to abolish unions, champion their resurrection, or perpetuate the status quo. We conclude that existing scholarship does not support either abolishing or championing unionization, but that the status quo deserves to be revisited because the focus of advocates for reforming the current system is on win rates, and not sufficiently on employee choice. Part II then sets out a fair system maximizing employee free choice to unionize or not. Fairness ought not be defined exclusively by results, as in a distributive-justice-focused approach in which a high union win rate equals a fair system and a low union win rate equals an unfair system. Instead, we posit that a fair system is one that maximizes employees' opportunities to make fully informed choices free of coercion or intimidation—embodying a procedural-justice focused approach. Part III analyzes the current systems in use and being proposed and finds that neither the status quo nor proposals by legislators or the NLRB satisfy our conceptualization of procedural-justice focused fairness. Part IV outlines a system that does satisfy our standard of fairness by capitalizing on extralegal behavioral norms derived in part from the long-standing moral principle of “living up to one’s word.” This would result in a system with greater self-regulation by the parties, lower administrative costs, and greater opportunity for employees to exercise their rights to vote for their representatives or to vote not to be represented in the workplace based on more complete information, free from coercion and intimidation. We conclude by discussing the implications of adopting the proposal advanced, and opportunities for extending it to other areas of law.

#### I. ARE EMPLOYEES AND EMPLOYERS BETTER OR WORSE OFF WHEN ORGANIZED?

Unions may be assessed by how they impact the U.S. economy, employees, employers, and customers or recipients of the goods and services provided by organized workplaces. The ultimate question of whether the U.S. economy is better off with greater union density is complex and beyond the scope of this Article. Organized labor, industrial-relations theorists, and some academics, however, believe that unions are a net positive for the economy and that greater union density correlates linearly with improved economic prosperity.<sup>31</sup> According to

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31. See generally Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 *INDUS. & LAB. REL. REV.* 3, 5–7 (2003) (discussing the early views of John R. Commons, a prominent institutionalist in the industrial-relations scholarship tradition, who came to believe that trade unions could improve the conditions of laboring people by using the “device of the common rule” and collective bargaining to “stabilize labor markets and equalize bargaining power, while also using methods of collective voice to replace industrial autocracy with industrial



organized labor, unions consistently provide higher wages and greater job security.<sup>32</sup> This in turn “primes the consumption pump” and increases demand for goods and services.<sup>33</sup> Increased demand requires employers to increase supplies of goods and services, which creates jobs (and therefore decreases unemployment) and increases GDP.<sup>34</sup> To support this contention, labor points to the 1950s as a time of unprecedented and subsequently unmatched growth in unionization, union density, parity between rich and poor, and economic prosperity. This argument has appeal, but may be too simplistic. In the 1950s there was no real threat of foreign competition to U.S. employers, particularly those in heavily unionized workplaces.<sup>35</sup> Europe and Japan were slowly recovering from the devastation of World War II, and the rest of today’s current and rising powers were still developing. Moreover, 1950s transportation and information systems obviously impeded foreign competition.<sup>36</sup> Finally, the U.S. had seemingly unlimited natural resources. Thus, while it makes sense to credit unions with increasing wages, reducing the gap between rich and poor, and increasing consumers’ purchasing power, one could argue that high costs of unionization forced U.S. manufacturers to produce their goods outside of the U.S. and, thus, instead of being a solution to America’s economic woes, unionization was the cause. The positive union effect might have been short-term and conditional on historical context. Regardless of whether unionization is a reason for some of America’s trade and economic woes, it seems naïve to argue that the solution to America’s struggles in this global economy, where the U.S. has exported the vast majority of its manufacturing to reduce costs, is to increase wages through unionization. On the other hand, the argument that the gap between rich and poor depletes the middle class and reduces GDP because capital remains with the wealthy instead of being dispersed to those who will put the money back into the economy is very appealing.

There is ample academic literature devoted to whether employees are better off when unionized. The general conclusion is that employees are better compensated but less satisfied.<sup>37</sup> An early empirical examination of the impacts of unionization in the workplace begins with

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democracy”).

32. See David Madland & Karla Walter, *Unions Are Good for the American Economy*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 18, 2009), [http://www.americanprogressaction.org/issues/2009/02/efca\\_factsheets.html](http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html); see also *Union Map*, *supra* note 30.

33. See Madland & Walter, *supra* note 32.

34. *Id.*

35. See, e.g., William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939–1980*, 64 REV. ECON. & STAT. 613, 620–22 & tbl.4 (1982).

36. Michael E. Porter, *Competition in Global Industries: A Conceptual Framework*, in *COMPETITION IN GLOBAL INDUSTRIES* 15, 42–45 (Michael E. Porter ed., 1986).

37. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 20–21 (1984).

the observation that “unions alter nearly every . . . measurable aspect of the operation of workplaces.”<sup>38</sup> This study has been credited as the first to stimulate scholarly interest in how unions affect factors beyond wages, including satisfaction, productivity, business profitability, investment, and the economy.<sup>39</sup> Labor-relations scholars have since endeavored to uncover unionism’s effects on these various aspects.

While unionization results in an increase in wages,<sup>40</sup> it does not come with a concomitant increase in productivity, and therefore the increased salary expense reduces employer profit.<sup>41</sup> For example, a 2004 study of thirteen years of operating, financial, and employment data for major airlines found union-imposed wage increases correlated with decreased employee productivity, decreased airplane productivity, and overall decreased operating margins.<sup>42</sup> Interestingly, the study found that the “quality of labor relations” was a significant control variable.<sup>43</sup> Sandra Black and Lisa Lynch confirm this dimension.<sup>44</sup> In their analysis of a national survey of businesses, they found that firms with traditional labor-management relations had significantly lower productivity than did nonunion firms.<sup>45</sup> However, when controlling for the presence of certain employee-empowering practices (for example, total quality management and profit sharing), the impact of unionization on productivity dwindled to statistical insignificance.<sup>46</sup> Similarly, Harry Holzer analyzed a 1982

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38. *Id.* at 19.

39. See James T. Bennett & Bruce E. Kaufman, *What Do Unions Do?: A Twenty-Year Perspective*, 25 J. LAB. RES. 339, 339 (2004); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 415 (2004).

40. That unionization increases wages is generally accepted among scholars. See FREEMAN & MEDOFF, *supra* note 37, at 20 (finding that unionization results in increased wages and fringe benefits); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 406–07 (2004) (finding that unionization does not increase wages as much as it did in the 1970s but that the wage premium is substantial).

41. See John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 92 (1989) (reviewing several studies and concluding that, on average, unionization is associated with decreased productivity); Hirsch, *supra* note 39, at 430–31 (reconciling a number of studies and concluding that unionization does not increase productivity, and thus that the increased wages may result in decreased profitability); cf. John T. Addison, *The Determinants of Firm Performance: Unions, Works Councils, and Employee Involvement/High-Performance Work Practices*, 52 SCOT. J. POL. ECON. 406, 416 (2005) (finding the small positive effect of unionization on productivity unable to compensate for the increased wage expense). *But see* Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 682 (2003) (reporting results of a meta-regression analysis that found a neutral or positive effect of unionization on productivity, especially in manufacturing).

42. Jody Hoffer Gittel et al., *Mutual Gains or Zero-Sum? Labor Relations and Firm Performance in the Airline Industry*, 57 INDUS. & LAB. REL. REV. 163, 174–77 & tbl.3 (2004).

43. *Id.*

44. Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*, 83 REV. ECON. & STAT. 434, 444 (2001).

45. *Id.*

46. *Id.* at 440–41.

survey of firms, finding the negative effect of wage increases on profit was greater if a union imposed the wage increase than if the firm itself imposed the increase.<sup>47</sup>

Despite higher wages, union workers tend to report lower job satisfaction than nonunion workers. Richard Freeman and James Medoff synthesized a broad range of research and concluded that, while unionization results in higher wages and fringe benefits, it also correlates with decreased employee satisfaction, especially with respect to working conditions and relationships with management.<sup>48</sup> Similarly, a 1983 national survey found that unionized workers reported higher satisfaction with pay than did nonunion workers, but lower satisfaction with respect to work duties, coworkers, supervisors, and promotions, leading to lower global satisfaction ratings.<sup>49</sup>

Scholars have posed a number of theories to explain this apparent paradox, including that: (1) “unions galvanize worker discontent in order to make a strong case in negotiations with management”;<sup>50</sup> (2) the grievance and negotiation experience primes employees to perceive negative conditions more saliently;<sup>51</sup> (3) dissatisfied union workers continue working under conditions where their nonunion counterparts would quit, thereby self-selecting out of the dataset<sup>52</sup> (the “exit-voice”

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47. Harry J. Holzer, *Wages, Employer Costs, and Employee Performance in the Firm*, 43 *INDUS. & LAB. REL. REV.* (SPECIAL ISSUE) 147, 161–163 (1990). Empirical studies have uncovered manifold other disadvantages that employers suffer as a result of unionization. See, e.g., FREEMAN & MEDOFF, *supra* note 37, at 21 (less overall flexibility in business operations); Addison & Hirsch, *supra* note 41, at 99 (reduced investment in physical capital and research and development); David J. Flanagan & Satish P. Deshpande, *Top Management's Perceptions of Changes in HRM Practices After Union Elections in Small Firms: Implications for Building Competitive Advantage*, 34 *J. SMALL BUS. MGMT.* 23, 29–33 & tbl.4 (1996) (reduced ability to implement “innovative” human-resource policies, such as merit-based promotion and compensation and internal recruiting); Hirsch, *supra* note 39, at 436 (reduced investment in physical capital and research and development).

48. FREEMAN & MEDOFF, *supra* note 37, at 21.

49. Chris J. Berger et al., *Effects of Unions on Job Satisfaction: The Role of Work-Related Values and Perceived Rewards*, 32 *ORG. BEHAV. & HUM. PERFORMANCE* 289, 304, 308, 310, 314 (1983); see also Tove Helland Hammer & Ariel Avgar, *The Impact of Unions on Job Satisfaction, Organizational Commitment, and Turnover*, 26 *J. LAB. RES.* 241, 257 (2005) (synthesizing job-satisfaction research and concluding that the negative impact on satisfaction is explained by dissatisfaction with job quality, supervision, and the labor-management relations climate); Charles A. Odewahn & M.M. Petty, *A Comparison of Levels of Job Satisfaction, Role Stress, and Personal Competence Between Union Members and Nonmembers*, 23 *ACAD. MGMT. J.* 150, 153 (1980) (finding that union workers report significantly lower satisfaction with work and pay than do nonmembers). But see Luis R. Gomez-Mejia & David B. Balkan, *Faculty Satisfaction with Pay and Other Job Dimensions Under Union and Nonunion Conditions*, 27 *ACAD. MGMT. J.* 591, 600 (1984) (finding that union faculty had higher pay satisfaction, and finding no relationship between unionism and other aspects of satisfaction).

50. FREEMAN & MEDOFF, *supra* note 37, at 21.

51. George J. Borjas, *Job Satisfaction, Wages, and Unions*, 14 *J. HUM. RESOURCES* 21, 38 (1979); Hammer & Avgar, *supra* note 49, at 242–43.

52. Borjas, *supra* note 51; see also Joni Hersch & Joe A. Stone, *Is Union Job Dissatisfaction Real?*, 25 *J. HUM. RESOURCES* 736, 750 (1990) (reporting empirical results consistent with the exit-voice hypothesis).

hypothesis<sup>53</sup>); (4) poor labor-management relations drive dissatisfaction;<sup>54</sup> (5) union members seek out union jobs because these employees have higher aspirations and expectations;<sup>55</sup> and (6) unions organize where working conditions are worse to begin with.<sup>56</sup> Nonetheless, no single theory has garnered a consensus.

In addition to the firm-based research cited above, anecdotal evidence supports the argument that unionized businesses are less profitable than are nonunion firms in the same sector. An example of such anecdotal evidence is found in the hotel industry. Hotel owners and operators believe that their union properties are less profitable than their nonunion properties.<sup>57</sup> Industry experts claim that union work rules (regarding job duties and working hours) and health and welfare obligations will make an organized hotel less profitable than a nonunion hotel even if the latter has higher wages.<sup>58</sup> Indeed, one hotel evaluator stated that in evaluating a property for sale, unionization will, depending on the contract and the union, result in a 10% to 20% decrease in value.<sup>59</sup> Another real estate investor stated that because of increased costs, the

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53. ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). Hirschman defined voice as the decision to complain about a perceived deterioration of a condition or set of conditions experienced at an organization. *Id.* at 4. He regarded voice as somewhat mutually exclusive to “exit” (the decision to remove oneself from the offending condition). *Id.* He theorized, somewhat tautologically perhaps, that the likelihood of voice increases with the degree of “loyalty” to the organization. *Id.* at 78. It should be noted that voice can be conceptualized as a form of complaining about work conditions, or it can be characterized by participation in a pluralist, democratic process. The latter is the view taken by institutionalists, see John R. Commons, *American Shoemakers, 1648–1895: A Sketch of Industrial Evolution*, 24 Q.J. ECON. 39 (1909), and industrial relations scholars, see JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE* (2004); H.A. Clegg, *Pluralism in Industrial Relations*, 13 BRIT. J. INDUS. REL. 309 (1975).

54. Keith A. Bender & Peter J. Sloane, *Job Satisfaction, Trade Unions, and Exit-Voice Revisited*, 51 INDUS. & LAB. REL. REV. 222, 231–32 & tbls.3 & 4, 235 (1998); cf. James W. Carillon & Robert I. Sutton, *The Relationship Between Union Effectiveness and the Quality of Members’ Worklife*, 3 J. OCCUPATIONAL BEHAV. 171, 178 (1982) (studying public schoolteachers and finding a positive effect on job satisfaction when the union excelled in five areas: economic bargaining, member protection, working-conditions bargaining, involving members in decisions, and improving relations with coworkers).

55. See Alex Bryson et al., *Does Union Membership Really Reduce Job Satisfaction?*, 42 BRIT. J. INDUS. REL. 439, 452 (2004) (studying unionized employees in the U.K.); Hammer & Avgar, *supra* note 49, at 258–59.

56. Borjas, *supra* note 51, at 28.

57. In November of 2008 Professor Sherwyn, who was serving as the academic director of the Center for Hospitality Research, hosted a real estate finance roundtable at the law offices of Proskauer Rose in New York City. The Roundtable featured hotel owners, operators, bankers, consultants, deal makers, and professors. The consensus of the group was that unionized hotels would provide lower returns than would nonunion hotels and that unionization could be a deal breaker in many situations. See Ctr. for Hosp. Res., Cornell Univ. Sch. of Hotel Admin., *Real Estate Finance Roundtable* (Nov. 10, 2008).

58. *Id.*

59. *Id.*

unionization status of a hotel will determine whether or not a company will purchase a property.<sup>60</sup> Hotel operators contend that the inefficiencies caused by union work rules discourage investors from investing in properties because they will not provide an adequate return, causing a reduction in those willing to build, own, or operate hotels.<sup>61</sup> The logical extension of this argument is that such investor decisions will not only reduce jobs in the hotel industry, but that related industries such as construction, food service, airlines, recreation, and retail will all suffer as well.

While unions contest the argument that union hotels are less profitable than nonunion properties,<sup>62</sup> they also ask, “so what?” Union advocates argue that exchanging profits for higher wages, increased job security, employee voice, and all other union benefits is a positive trade.<sup>63</sup> Indeed, union advocates can compare the wages and benefits in unionized cities like New York and Las Vegas to, for example, Dallas and Atlanta and show that in unionized hotels, housekeepers and banquet waiters lead middle-class and, sometimes, upper-middle-class lives.<sup>64</sup> Alternatively, employer advocates may point to the fact that nonunion hotels in Chicago and San Francisco pay higher wages than their unionized counterparts.<sup>65</sup> Unionists argue that it is the threat of unionization that causes the high wages and that the free-rider problem should be eliminated, not perpetuated.<sup>66</sup>

Despite the assertions from those on both sides of the debate that the U.S. would be better off were it to favor either labor or capital, there is no clear answer to this question and, thus, neither the parties’ opinions nor their lobbying dollars should define national policy on this matter. Instead, we argue that the focus should be on the microdata. The evidence, however, is mixed. Employees are better off, but less satisfied,

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60. Paul Wagner, an attorney with Stokes, Roberts, & Wagner, was hired by a major real estate developer to examine whether the developer could open a nonunion hotel in a city with a neutrality agreement. Wagner reports that the developer stated that he could not afford to open the hotel if it were unionized. Interview with Paul Wagner, Attorney, Stokes, Roberts & Wagner, in Ithaca, N.Y. (Aug. 21, 2010).

61. See Real Estate Finance Roundtable, *supra* note 57.

62. In a 2006 speech at Cornell University’s School of Industrial and Labor Relations, Workers United president Bruce Raynor stated that union hotels are more profitable and provide better service than nonunion properties. Raynor admitted he had no data to support this statement. Bruce Raynor, President, Workers United, Address at Cornell Univ. Sch. of Indus. & Labor Rel. (Oct. 26, 2006).

63. *Id.*

64. *Id.*

65. At the Tenth Annual Labor and Employment Roundtable sponsored by Cornell’s Schools of Hotel Administration, Industrial & Labor Relations, and Law, hotel negotiators stated that many nonunion hotels in Chicago and San Francisco pay higher wages than do union properties. See Cornell Univ. Sch. of Hotel Admin., Labor & Employment Roundtable (May 15, 2011).

66. See Raynor, *supra* note 62; see also Ozkan Eren, *Does Membership Pay Off for Covered Workers? A Distributional Analysis of the Free Rider Problem*, 62 INDUS. & LAB. REL. REV. 367, 367–68 (2009).

when unionized. Unionized employers enjoy lower profits than nonunion firms. Without evidence to support either side's macro position, we should not enact labor law reform whose sole purpose is to either enhance or reduce union influence. Instead, we contend that national policy regarding union organizing should be to ensure that the system is fair. Below, we define what we believe to be fair and then analyze (1) the current system, (2) labor's preferred system (neutrality agreements with card check or EFCA), and (3) the latest proposed fix to the problem—short elections. After explaining why these systems fail to meet our definition of fairness, we introduce the moral principles of union organizing embodied in a contractual arrangement between management and labor and explain why this system should be enacted.

## II. WHAT IS FAIR?

Commentators, scholars, legislators, and advocates seem to habitually overweigh the *results* of systems (such as adjudication outcomes or election results) to determine the fairness of systems being evaluated. For example, there is substantial literature comparing the results of discrimination cases resolved in litigation with those resolved in arbitration.<sup>67</sup> One underlying theme of this work is that systems are fair if they have comparable results.<sup>68</sup> Alternatively, according to some, there is a positive relationship between plaintiff victories and fairness.<sup>69</sup> Similarly, there are those who point to the results of union-organizing drives and elections and make conclusions about the fairness of the process by looking at the results.<sup>70</sup> The system is fair, according to some, if the union wins the majority of elections and is unfair when the union win rate drops. In fact, we contend that, standing alone, the results of an

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67. See, e.g., David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78, 1586–91 (2005) (reviewing prior empirical research and presenting the results of a case study finding arbitration faster and more efficient than litigation); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 308–12 (2004); see also Curtis Brown, *Cost-Effective, Fast and Fair: What the Empirical Data Indicate About ADR*, METRO. CORP. COUNSEL, NOV. 2004, at 56, 70 (summarizing several empirical studies comparing litigation with arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 48 & tbl.1; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

68. See, e.g., Sullivan, *supra* note 67, at 309 (asserting that arbitration is fair to plaintiffs because they are more successful in arbitration than in litigation).

69. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1262–63 (2009) (arguing that the empirical evidence tends to suggest that mandatory arbitration is unfair, as measured by aggregate pro-plaintiff dispositions).

70. Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison* (Econ. Policy Inst., Working Paper No. 113, 1994), available at <http://digitalcommons.ilr.cornell.edu/articles/19/>.

adjudication system or a union-representation election do not reveal anything about fairness, regardless of how many cases are analyzed.

An analogy illustrates our point. Assume one of the Authors of this Article, a middle-aged professor who was once an average high school basketball player on a bad high school team, is set to play ten games of one-on-one basketball. The rules are as follows: games to eleven, one point for each basket, the scorer keeps possession of the ball, and players call their own fouls. The professor loses all ten games 11–0. An argument that the rules of the games played were unfair based solely on the observed outcomes is flawed because it does not account for the identity of the professor's opponent. If it turns out that the opponent is Michael Jordan (regarded as one of the greatest players ever to play the game professionally), claims that the games were "unfair" are undoubtedly spurious at worst and grossly incomplete at best. Conversely, if Professors Sherwyn and Eigen were to play ten games and the rules were such that Eigen had to adhere to the regular rules of basketball, but Sherwyn got to shoot on a basket that was eight feet off the ground (two feet closer to the ground than a regulation basketball rim), did not have to dribble the ball, and was allowed to foul Eigen, we would hopefully agree that the rules were unfair, regardless of the results. Outcomes alone do not define fairness, nor should they automatically lead one to assume unfair rules or cheating.<sup>71</sup>

The fairness correlation between rules and outcomes can be assessed only if we have determinative information prior to the time that we invoke the system. In sports, we would need to know the abilities of the teams. If the teams are equal, then a fair system would result in each team winning about half the games. In discrimination claims, we would need to know if the employer violated the law. Thus, if plaintiffs who go to trial in discrimination cases were in fact discriminated against 90% of the time, a fair system should generate approximately a 90% employee win rate. If plaintiffs were discriminated against only 10% of the time, we should expect to see a 10% win rate. With respect to discrimination, because the trial determines liability, we cannot judge the fairness of the system merely by analyzing results. Put another way, the so-called "base

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71. Interestingly, if instead of Sherwyn versus Eigen in the second hypothetical set of games, it were again Sherwyn versus Michael Jordan, and Sherwyn received the benefit not being bound by the standard rules, one might argue for a different view of the fairness of the system. If one expects the players to be unequal in terms of resources available, one would be more likely to perceive unbalanced rules as leveling a playing field and, hence, as more fair. In the employment setting, one might perceive employers as possessing more resources and information and, hence, if the rules of litigation applied to employers the same way as employees, one would expect outcomes to disproportionately favor employers. Ironically, attempts made to level the litigation playing field by giving employees greater access to adjudication on the merits via arbitration are sometimes perceived as a creating a less fair system than litigation.

rate fallacy”<sup>72</sup> underlies our complaint about fairness here. Without information on the reference category’s base rate (how much employers discriminate in our example above), there is insufficient information on which to base a decision on fairness. This often does not stop people from making incorrect assumptions or backing into assumptions, as described above.<sup>73</sup>

Union advocates often argue that in union elections we do in fact know employees’ desires prior to the election system. As explained below, to petition for an election, unions need 30%,<sup>74</sup> but often get over 60%, of employees to sign cards saying they wish to be represented by the union.<sup>75</sup> Because unions almost always have enough support to win an election before the campaign begins, they contend that the system is unfair because despite such support, unions lose anywhere from 28% to 69% of elections each year.<sup>76</sup> In fact, according to a recent study of 22,382 organizing drives occurring between 1994 and 2004 that filed an election petition, secret-ballot elections were held in only 14,615 (65%).<sup>77</sup> Of those 14,615 elections, unions won 8155, or 56%.<sup>78</sup>

However, many employees sign authorization cards not because they want a union, but because they are willing to vote for or against a union in a secret-ballot election.<sup>79</sup> This might be due to the low perceived cost of saying yes to such a process, or it might be due to employees not wanting to be a hold out if other employees want to vote. It might reflect employees’ respect for the American ideal of the democratic process of voting for one’s representative, even if employees sign cards planning to vote against the union. It might be due to lawful (or unlawful) pressure exerted by union organizers on employees. Moreover, the signing of cards represents the culmination of the union’s unilateral attempt to organize the employees. During the card-signing time the employees hear only one side of the story. By the time of the election, employees have heard both sides and may make a more *informed* decision. Is it possible that employers intimidate and otherwise unfairly influence

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72. Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative, and Methodological Challenges*, 19 BEHAV. & BRAIN SCI. 1, 1 (1996) (using an example of a coach on an Olympic basketball team trying to decide between two players to make a final attempt at shooting the game-winning basket, to illustrate the author’s point on base-rate fallacy).

73. *Id.*

74. 29 U.S.C. § 159(e)(1) (2010).

75. See Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires*, 113 AM. J. SOC. 1067, 1072 (2008) (contending that many unions will not file for a certification election until a majority of workers sign authorization cards).

76. See *id.* at 1089 tbl.7, 1096 fig.A-2.

77. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 6 tbl.1 (2009).

78. *Id.*

79. See *Terrible Tactics*, SEIU EXPOSED, <http://www.seiuxposed.com/tactics.cfm> (last visited Feb. 14, 2012).



employees? Of course. On the other hand, the drop in union support could be the result of more complete information. For example, few would argue that an election for political office was unfair if the following occurred: the voters were introduced to one candidate, were inundated with positive information about the candidate, overwhelmingly signed a petition approving the candidate's ability to run for office, and then voted for a second candidate who came onto the scene four weeks before the election and told a better story than the first candidate.

Union losses could also reflect significant change in American taste for organized labor and collective rights and voice in the workplace. For example, from the 1940s through the 1970s, the height of the private-sector union movement, pro-union messages abounded in popular culture. Anecdotally, but for purposes of illustration and comparison, Woody Guthrie sang about joining unions,<sup>80</sup> textile workers had little kids singing "look for the union label,"<sup>81</sup> and Sally Field won the Academy Award in 1979 for her role as employee and union organizer Norma Rae.<sup>82</sup> Even *On the Waterfront*, a 1954 Academy Award-winning film<sup>83</sup> that portrayed unions in less than positive terms, concluded with employees getting their union back and running it on the "up and up."<sup>84</sup> Today, in contrast, unions are the entities that cost us the World Series in 1994,<sup>85</sup> have parents and education advocates *Waiting for "Superman"* to break union power,<sup>86</sup> and are being blamed for driving states into near bankruptcy.<sup>87</sup> Accordingly, a 2009 Gallup poll indicated a sharp decline in Americans' approval of labor unions—48% approve, down from 59% the year before.<sup>88</sup> A corresponding poll in 2010 reported a 52% approval rating.<sup>89</sup> For comparison, in 1936 and 1957, the approval ratings were 72% and 75%, respectively.<sup>90</sup>

80. WOODY GUTHRIE, *Union Maid, on HARD TRAVELIN': THE ASCH RECORDINGS*, VOL. 3 (Smithsonian Folkways Recordings 1999); WOODY GUTHRIE, *Union Burying Ground, on STRUGGLE* (Smithsonian Folkways Recordings 1990).

81. See *Look for the Union Label Commercial* (1981).

82. See *Oscar Legacy: The 52nd Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/52nd.html> (last visited Feb. 14, 2012).

83. See *Oscar Legacy: The 27th Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., <http://www.oscars.org/awards/academyawards/legacy/ceremony/27th.html> (last visited Feb. 14, 2012).

84. *ON THE WATERFRONT* (Columbia Pictures 1954).

85. See *Year in Review: 1994 National League*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr1994n.shtml> (last visited Feb. 14, 2012);

86. *WAITING FOR "SUPERMAN"* (Electric Kinney Films 2010).

87. See, e.g., *Can You Blame Unions for Golden State's Fiscal Problems?*, FOX BUS. (Oct. 27, 2011), <http://video.foxbusiness.com/v/1243118545001/can-you-blame-unions-for-golden-states-fiscal-problems/>.

88. Lydia Saad, *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP (Sept. 3, 2009) <http://www.gallup.com/poll/122744/Labor-Unions-Sharp-Slide-Public-Support.aspx>.

89. Jeffrey M. Jones, *U.S. Approval of Labor Unions Remains near Record Low*, GALLUP (Aug. 12, 2010) <http://www.gallup.com/poll/142007/Americans-Approval-Labor-Unions-Remains-Near-Record-Low.aspx>.

90. *Id.*

In Wisconsin, Governor Scott Walker introduced a “Budget Repair” bill on February 11, 2011, that directly targets unions.<sup>91</sup> As of the writing of this Article, several other states, including Tennessee, Ohio, and Nevada, are expected to follow suit.<sup>92</sup> Four states’ attorneys general have announced their intention to “vigorously defend” state constitutional provisions mandating secret-ballot elections.<sup>93</sup> On February 1, 2012, the Indiana Senate voted 28–22 to pass a right-to-work bill, making Indiana the twenty-third state in the nation with such a law,<sup>94</sup> and legislators in Michigan (long known as the strongest of union states) are contemplating a proposal that would make that state the nation’s twenty-fourth right-to-work state.<sup>95</sup>

Do employees want to be represented by unions? Are Americans now more anti-union than we were in the Fifties? Does full information lead to greater unionization or to union losses? Do unions fail to organize because employers intimidate employees? Because there are simply too many uncontrollable factors to judge, we contend that election *results* simply do not provide evidence of whether or not the system itself is *fair*. Accordingly, it is time to change the paradigm on how we judge fairness.

We contend that a fair system will result in employees believing that they had enough information to make an informed decision, that they were respected, and that they were not intimidated, threatened or coerced. Such a system would be fair regardless of whether unions win or lose the majority of elections held. Below, we examine the current and proposed systems to see if they are fair under our new standard. We also

91. See *Governor Walker Introduces Budget Repair*, SCOTTWALKER.ORG (Feb. 11, 2011), <http://www.scottwalker.org/news/2011/02/governor-walker-introduces-budget-repair>.

92. *Republicans Challenging Unions in State Capitols*, ABCNEWS.COM (Feb. 18, 2011), <http://abcnews.go.com/US/wireStory?id=12946800>.

93. Letter from Alan Wilson, S.C. Att’y Gen., et al., to Lafe E. Solomon, Acting Gen. Counsel, NLRB (Jan. 27, 2011), available at [http://nlrb.gov/sites/default/files/documents/234/ag4\\_letter\\_to\\_nlrbc\\_1-27-2011.pdf](http://nlrb.gov/sites/default/files/documents/234/ag4_letter_to_nlrbc_1-27-2011.pdf); see also Lawrence E. Dube, *Four States Defend Secret Ballot Laws, as GOP Senators Back Them with New Bill*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 27, 2011).

94. Susan Guyett, *Indiana Becomes 23rd “Right-to-Work” State*, REUTERS, Feb. 1, 2012, available at <http://www.reuters.com/article/2012/02/01/us-unions-indiana-righttowork-idUSTRE81018920120201>.

95. See H.R. 6348, 95th Leg., Reg. Sess. (Mich. 2010). For the twenty-two other right-to-work states’ laws, see ARIZ. CONST. art XXV; ARK. CONST. amend. XXXIV; FLA. CONST. art. I, § 6; KAN. CONST. art. XV, § 12; MISS. CONST. art. VII, § 198-A; NEB. CONST. art. XV, § 13; OKLA. CONST. art. XXIII, § 1A; S.D. CONST. art. VI, § 2; ALA. CODE § 25-7-30 (2011); GA. CODE ANN. § 34-6-21 (2010); IDAHO CODE ANN. § 44-2003 (2011); IOWA CODE §§ 731.1–8 (2011); LA. REV. STAT. ANN. § 23:981 (2011); NEV. REV. STAT. §§ 613.130, 613.230, 613.250 (2011); N.C. GEN. STAT. § 95-80 (2011); N.D. CENT. CODE § 34-01-14 (2011); S.C. CODE ANN. § 41-7-10 (2011); TENN. CODE ANN. § 50-1-201 (2011); TEX. LAB. CODE ANN. § 101.301 (2011); UTAH CODE ANN. §§ 34-34-1 to -17 (2011); VA. CODE ANN. §§ 40.1-58 to -69 (2011); WYO. STAT. ANN. §§ 27-7-108 to -115 (2011). New Hampshire’s recent right-to-work proposal, H.R. 474-FN, 2011 Leg. (N.H. 2011), was vetoed by the governor. See *Governor Lynch’s Veto Message Regarding HB 474*, N.H. OFF. GOVERNOR (May 11, 2011), <http://www.governor.nh.gov/media/news/2011/051111-veto-hb474.htm>.

analyze the current and proposed systems to see if they would solve the problems they wish to resolve and would produce desired results.

### III. THE TRADITIONAL SYSTEM FOR UNION ORGANIZING AND ATTEMPTS TO REFORM IT

The union-organizing process begins in one of several ways. Sometimes, dissatisfied employees seek out a union.<sup>96</sup> Other times, unions initiate discussions with employees.<sup>97</sup> In fact, organizers may enter an employer's property and hand out authorization cards or set up picket lines at the entrances and exits to the property.<sup>98</sup> Unions may use current employees to "sell" the union to coworkers.<sup>99</sup> Finally, unions sometimes send their members to apply for jobs with nonunion employers the unions wish to organize.<sup>100</sup> Regardless of how the organizing begins, the union must soon meet with a number of employees to see if there is interest in organizing.

#### A. NLRB RULES FOR ORGANIZING AND SECRET-BALLOT ELECTIONS

The NLRA sets forth the laws regulating this form of employee organization.<sup>101</sup> Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, called a bargaining unit, vote for or against union representation in a secret-ballot election monitored by the NLRB.<sup>102</sup> In most cases, the NLRB seeks to schedule such an election approximately six to eight weeks after the union initiates the process by filing a representation petition.<sup>103</sup> This time period may be extended if the

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96. Employees often seek out unions because of perceived failures in one or more of five key areas: lack of recognition, weak management, poor communication, substandard working conditions, and noncompetitive wages and benefits. See MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* 49 (1993).

97. *Labor Union Organizing in the United States Workplace*, HRHERO.COM, <http://www.hrhero.com/topics/union.html> (last visited Feb. 14, 2012).

98. See, e.g., *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 240-42 (6th Cir. 1995) (enforcing a NLRB order finding that an employer unlawfully interfered with its employees' section 7 rights where the employer excluded union representatives from distributing union literature on state-owned property outside the employer's place of business).

99. See *Labor Union Organizing*, *supra* note 97.

100. The applicants' reason for seeking employment is to organize the *real* employees. This method, referred to as "salting," was the subject of a Supreme Court case in which the Court held that an employer cannot refuse to hire a "salt" simply because the real reason the employee seeks employment with the company is to organize it. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 96-98 (1995).

101. 29 U.S.C. §§ 151-69 (2010).

102. *Id.* § 159(e)(1).

103. See *Customer Service Standards: Representation Cases*, NLRB, <https://www.nlr.gov/customer-service-standards#representation> (last visited Feb. 14, 2012). In 2010, the median time period between filing the petition and the initial election was thirty-eight days, and 95.1% of all initial elections occurred within fifty-six days of the filing. Memorandum GC 11-03 from Lafe E. Solomon,

employer contests the bargaining unit or if other issues arise.<sup>104</sup> In a recent study of 22,382 organizing drives from 1999–2004, the average case that went to election did so in forty-one days, and 95% of elections were held within seventy-five days of filing.<sup>105</sup> It is during this time period, often referred to quite appropriately as the “campaign period,” that employers and unions try to persuade the voting employees. Unionists argue that more time translates into more opportunities for management to threaten, intimidate, and coerce employees into voting against the union.<sup>106</sup> Others posit that more time in the campaign period translates into a greater likelihood that employees will render informed decisions on voting day.<sup>107</sup> Regardless of which is correct, it is clear that delay helps management.<sup>108</sup> In fact, there is evidence to suggest that even a one-day delay can affect the election in the employer’s favor.<sup>109</sup>

Under the NLRB’s rules, a union may request the secret-ballot election only if a minimum of 30% of the employees in an appropriate bargaining unit have signed authorization cards.<sup>110</sup> As a practical matter, however, most national unions will not file a petition unless *at least* 60% of the employees have signed cards.<sup>111</sup> To prevail in the election, the union needs a simple majority of those who actually vote, not a majority of those who would be represented in the bargaining unit.<sup>112</sup> Thus, if fifty

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Gen. Counsel, NLRB, to Employees of the Office of the Gen. Counsel 5 (Jan. 10, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d4580434379>.

104. GORDON LAFER, AM. RIGHTS AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS 22 (2005).

105. Ferguson, *supra* note 77, at 10 n.9.

106. JOHN LOGAN ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH. & EDUC., NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE 2–4 (2011).

107. See Richard Epstein, *The Case Against the Employee Free Choice Act* 25–26 (Univ. of Chi. Law Sch. Inst. for Law & Econ., Working Paper No. 452, 2009).

108. See Ferguson, *supra* note 77, at 14 (noting the negative impact of delay on union election win rates). See generally Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75 (presenting a model of election outcomes that includes delay as a significant predictor).

109. See Ferguson, *supra* note 77, at 14.

110. 29 U.S.C. § 159(e)(1) (2010).

111. Telephone Interview with Richard W. Hurd, Professor of Indus. & Lab. Rel., Cornell Univ. (June 28, 2001); accord Jack Fiorito, *Union Organizing in the United States*, in UNION ORGANIZING: CAMPAIGNING FOR TRADE UNION RECOGNITION 191, 200 (Gregor Gall ed., 2003); Martin, *supra* note 75, at 1072 (contending that many unions will not file for a certification election until a majority of workers sign authorization cards). Frankly, this is a conservative estimate based on conversations the Authors have had with union officials over the past seven years. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75% and 90%.

112. The relevant provision reads: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . .” 29 U.S.C. § 159(a). Although this language seems to require a majority of all employees in a bargaining unit, it has been interpreted to require only a majority of those employees who vote. *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 588 (2d Cir. 1941).

employees are in the proposed bargaining unit but only twenty-one vote, the union needs only eleven votes to win. Employers win in the event of a tie.<sup>113</sup>

#### B. NLRB RULES REGARDING CAMPAIGNING BEFORE ELECTIONS AND ARGUMENTS ABOUT THE EFFECTS OF THE RULES ON THE PROCESS

The current rules state that during the campaign period, employers may not threaten,<sup>114</sup> interrogate,<sup>115</sup> make promises to,<sup>116</sup> or engage in surveillance of employees.<sup>117</sup> In addition, employers may not solicit grievances<sup>118</sup> or confer benefits.<sup>119</sup> If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.<sup>120</sup>

Under the law, employers may, however, engage in numerous campaign activities to convince employees to vote against the union. During the campaign period, employers provide employees with the management perspective of employees' rights and the consequences of voting in favor of the union.<sup>121</sup> To get their message across, employers can

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113. C.J. Krehbiel Co. v. NLRB, 844 F.2d 880, 884 (D.C. Cir. 1988).

114. See 29 U.S.C. § 158(c) (2010); NLRB v. St. Francis Healthcare Ctr., 212 F.3d 945, 962 (6th Cir. 2000) (finding that the employer unlawfully interfered with a representation election by threatening to close the facility if the union were elected).

115. See *Tamper, Inc.*, 207 N.L.R.B. 907, 938 (1973) (finding an unfair labor practice where the employer coercively interrogated its employees about their union sympathies).

116. See NLRB v. Wis-Pak Foods, Inc., 125 F.3d 518, 522–23 (7th Cir. 1997) (finding that a promise to increase wages constituted an unlawful promise of benefit); Gen. Elec. Co. v. NLRB, 117 F.3d 627, 637 (D.C. Cir. 1997) (finding that a promise of a postelection gift constituted an unlawful promise of benefit).

117. See *Cal. Acrylic Indus., Inc.*, 322 N.L.R.B. 41, 63 (1996) (finding that the employer violated the Act where it videotaped meetings between employees and union representatives).

118. See NLRB v. V & S Schuler Eng'g, Inc., 309 F.3d 362, 371 (6th Cir. 2002) (finding that the employer violated the Act by soliciting grievances when he had not done so before, creating a "compelling inference that he is implicitly promising to correct those inequities . . . mak[ing] union representation unnecessary" (quoting *Orbit Lightspeed Courier Sys.*, 323 N.L.R.B. 380, 393 (1997))).

119. *Wis-Pak*, 125 F.3d at 522, 524–25 (finding that favorable changes to overtime and attendance policies constituted an unlawful grant of benefits).

120. NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969) (upholding the NLRB's power to order the employer to bargain with the union where the employer's unfair labor practices are so severe that ordering a new election is not an adequate remedy, and where the union can demonstrate previous majority support). A bargaining order is an NLRB mandate requiring a company to "cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices." *Id.* at 614.

121. As long as informing employees of the consequences does not rise to the level of a threat. 29 U.S.C. § 158(c) (2010). Employers typically raise some or all of the following issues, based in part on advice from counsel and from their unique circumstances, industry, and employee demographics: whether unions may "guarantee" increased pay, benefits, or anything else; how collective bargaining really works; what happens when strikes are called or picketing is conducted; what it costs to be a union member in terms of dues and initiation fees; where that money goes, how it is used, and by whom; whether the union's leaders are trustworthy and capable; the employer's record of

and will require all employees to attend so-called “captive audience” speeches,<sup>122</sup> will send letters home,<sup>123</sup> and will spend significant time and money on communicating their message, often employing law firms and consulting firms that specialize in crafting anti-union campaign strategies.<sup>124</sup> Management may mandate attendance at their meetings.<sup>125</sup> Unions may not hold captive-audience speeches<sup>126</sup> and, in fact, have no right to come onto an employer’s property.<sup>127</sup> Unions are, however, entitled to a list of eligible employees<sup>128</sup> and, unlike employers, no rule prohibits unions from making promises, interrogating employees, or soliciting grievances.<sup>129</sup> Both sides may lie to employees but may not provide the employees with forgeries intended to deceive.<sup>130</sup>

responsiveness to employee issues; the fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free; whether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and whether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership). See Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *How Unions Organize New Hotels Without an Employee Ballot: Neutrality Agreements*, 42 CORNELL HOSPITALITY Q. 86 (2001).

122. See KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 73 tbl.8 (2000) (finding that, of four hundred union campaigns studied, 92% included captive-audience meetings).

123. *Id.* However, in-person visits by management to employees’ homes are per se prohibited. See *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The union, on the other hand, may make home visits, as long as those visits are not threatening or coercive. *Cf. Simo v. Union of Needletrades*, 322 F.3d 602, 620–21 (9th Cir. 2003) (discussing Supreme Court and NLRB cases suggesting that union home visits are permissible).

124. See Kate Bronfenbrenner et al., *Introduction*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES I*, 4 (Kate Bronfenbrenner et al. eds., 1998).

125. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953); see also Estlund, *supra* note 8, at 1536–37.

126. See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958) (stating, of captive-audience speeches, that unions are not “entitled to use a medium of communication simply because the employer is using it”); see also *Livingston Shirt Corp.*, 107 N.L.R.B. at 406.

127. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992); see also *Republic Aviation Corp. v. NLRB*, 342 U.S. 793, 803 n.10 (1945) (finding rules against solicitation during work hours presumptively valid); *cf. NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955) (creating an exception to the rule that an employer may bar nonemployee union members from the employer’s property when the location of the employees’ workplace and homes make reasonable nontrespassory efforts ineffective); *Supervalu Holdings, Inc.*, 347 N.L.R.B. 425, 425 (2006) (finding a no-distribution rule invalid because it was enforced discriminatorily against union activity); *Dillon Cos.*, 340 N.L.R.B. 1260, 1260 (2003) (finding unlawful a no-solicitation rule that was previously unenforced but resurrected at the beginning of the union’s campaign).

128. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (establishing the disclosure requirement); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (affirming the *Excelsior* rule).

129. *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1311 (1977); *Shirlington Supermarket, Inc.*, 106 N.L.R.B. 666, 667 (1953). *But see Stericycle, Inc.*, 37 N.L.R.B. No. 61, 2010-2011 NLRB Dec. ¶ 15,471 (Aug. 23, 2011) (holding that a union could not initiate litigation during the critical period).

130. See *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (“[W]e will no longer probe into the truth or falsity of the parties’ campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”); see also

Employers could argue that the ability to interact socially with employees provides unions with a level playing field (at worst), and a significant advantage (at best). Not surprisingly, unions often hold a very different view of campaigns. Union advocates contend that the reason for labor's failure to organize, and the consequential drop in union density, is that the rules of organizing unfairly favor employers.<sup>131</sup> The assumption is that employers intimidate employees and either violate the law with impunity because there is no real enforcement, or act within the law because objectionable and effective conduct is not unlawful, but should be. Indeed, union advocates claim that during most campaigns, employers illegally threaten, intimidate, and terminate employees who favor the union.<sup>132</sup> According to a 2005 report by the University of Illinois at Chicago's Center for Urban Economic Development, when faced with organizing drives, 30% of employers fire pro-union workers, 49% threaten to close a worksite if the union prevails, and 51% coerce workers into opposing unions with bribery or favoritism.<sup>133</sup> Unions point to the numerous unfair-labor-practice charges filed against employers, to evidence suggesting a connection between meritorious unfair-labor-practice charges filed and a lower likelihood of union election victories,<sup>134</sup> and to anecdotal evidence of outrageous employer behavior, and contend that because unions lose numerous elections, the system is unfair.

Others advance the related theory that employers pose stronger resistance to unions by pressing on the weak spots in the law and that the law has responded inadequately.<sup>135</sup> According to Paul Weiler:

[T]he employer . . . will be tempted to utilize a variety of measures designed to make collective bargaining unpalatable to its employees: a vigorous campaign against the union in which management regularly raises the spectre of strikes and job losses, and adds credibility to the

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Metro. Life Ins. Co., 266 N.L.R.B. 507, 507-08 (1983); 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, 209 (2008).

131. See William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570-71 (1983) (concluding that employers' captive-audience speeches have statistically significant effects on voting in union-certification elections).

132. *Id.*; see Bronfenbrenner, *supra* note 122, at 73 tbl.8.

133. CHIRAG MEHTA & NIK THEODORE, AM. RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 5, 9 (2005); accord Bronfenbrenner, *supra* note 122, at 73 tbl.8 (reporting similarly staggering statistics, including that, of employers in 400 union campaigns, 34% used bribes or special favors, 48% made unlawful promises of improvement, and 25% discharged union activists); Bronfenbrenner et al., *supra* note 124, at 1, 4-5.

134. See Ferguson, *supra* note 77, at 15 tbl.6 (finding that meritorious unfair labor practice charges filed by unions against employers had a statistically significant impact on the likelihood of unions winning elections, reducing the success rate by 52%).

135. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 111 (1990).

threats through selective discriminatory action against key union supporters. If the union wins the election nonetheless, the employer will simply carry on its resistance at the next stage by stonewalling at the bargaining table, forcing the union members out on strike, and hiring permanent replacements to fill their jobs . . . .<sup>136</sup>

Weiler cites as evidence the increase of discriminatory discharges and bad faith bargaining during the period of decline in union density.<sup>137</sup> Craver contends that employers engage in tactics during organizing drives that chill employees from voicing pro-union opinions and regularly hire labor consultants to strategize the anti-unionization campaign.<sup>138</sup> They openly encourage dissatisfied union workers to file decertification petitions, contributing to the jump from 300 decertification elections in the 1960s to 900 in the early 1980s.<sup>139</sup> Given the choice, companies will prefer to invest in their nonunion plants rather than their union plants (which explains the growth of production plants in the Sunbelt—where workers are less supportive of labor organizations).<sup>140</sup> Similarly, Richard Freeman and Morris Kleiner analyzed employer and organizer surveys and concluded that employers' brazen opposition to unionization contributed to union decline.<sup>141</sup> They based this conclusion on the finding that supervisor opposition to unionization was the most significant determinant of representation-election outcomes.<sup>142</sup>

Other scholars argue that fundamental macroeconomic changes, like globalization, do much to explain the decline.<sup>143</sup> Kate Bronfenbrenner advances a combined theory of increased capital mobility and increased employer opposition.<sup>144</sup> She explains that employers have greater ability and willingness to close plants and outsource those activities, or to threaten to do so.<sup>145</sup> Between this and

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136. *Id.* (footnote omitted).

137. *Id.* at 112.

138. CHARLES A. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 49 (1993).

139. *Id.* at 50.

140. *Id.*

141. Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *INDUS. & LAB. REL. REV.* 351, 364 (1990).

142. *Id.* at 361. Interestingly, Freeman and Kleiner also found that the use of unfair campaign tactics by employers is positively correlated with the odds that the union will win, in seeming contradiction to the assertions of some union advocates. *Id.*; accord Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 *ST. LOUIS UNIV. L.J.* 575, 582 (1997) (acknowledging that his own research uncovered no relationship between employer success and illegal tactics). This finding is also at odds with recent findings by John-Paul Ferguson that nonmeritorious unfair-labor-practice charges had little impact on election results as compared to meritorious ones, which significantly decreased the odds that unions would win. Ferguson, *supra* note 77, at 18.

143. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 *CHI.-KENT L. REV.* 3, 6 (1993) (attributing the decline in part to the rise of competitive product markets).

144. Bronfenbrenner, *supra* note 122, at 53.

145. *Id.*



other employer anti-union tactics, employers are extremely effective at avoiding unionization.<sup>146</sup>

Employers and some scholars argue that unions have nothing left to sell to employees<sup>147</sup> because traditional labor-management relations simply do not serve employees' interests<sup>148</sup> and unions are perceived as less trustworthy due to their inability to carry through on promises made.<sup>149</sup> Others attribute the drop in union density to internal union weaknesses.<sup>150</sup>

We contend that organized labor has failed to adapt with the times, and part of this failure is due to unions' failure to connect to a new generation of workers. Younger workers may aspire less to be lifetime employees with great benefits and job security and more to be like management, independent contractors, entrepreneurs, inventors, or someone who attains celebrity status and avoids *work* for the rest of her life. Others have argued that *collective* employment rights have been eclipsed by the staggering enactment of legislation protecting *individual* employee rights.<sup>151</sup> Some point to shifts in the U.S. economy, in particular that it is moving towards an "enterprise based" system of industrial relations in private industry in which unions negotiate with single firms instead of with corporations or industries.<sup>152</sup> Such shifts preclude the kind

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146. *Id.*

147. According to management-side labor lawyers, one of the key strategies in this regard is to examine what the union is selling and to explain to the employees that the costs outweigh the benefits. One problem for the unions, according to some, is that organized labor does not always have much to sell. For example, one lawyer discussed a union-organizing drive in which the union represented to employees that it would demand that the employer implement the union's health insurance plan if it were elected. The union extolled the fact that it would insist that the employer pay 100% of the cost of the plan, as opposed to their current plan under which the employees paid a portion of the cost. The employer held a meeting in which it compared the two plans side-by-side. While the union plan did not feature any up-front costs, the coverage was clearly so inferior that the employees concluded that they were better off with the employer plan and voted against the union. Employers contend that this insurance issue is a typical example of the current state of union organizing: at first, the union pitch sounds great, but after close examination the employees do not want to buy what the union is selling. Employers could argue that this is one reason why companies are able to defeat unions in elections.

148. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 56 (1999) (finding a desire among employees for an organization run "jointly" by both labor and management).

149. *See supra* note 147.

150. Bronfenbrenner et al. suggested that unions focused too little effort on recruitment during the 1970s and 1980s and failed to adapt their organizing strategies to new challenges. Bronfenbrenner et al., *supra* note 124, at 5-6. Julius Getman agrees that unions' failure to adapt their thinking contributed to the demise, and points to other internal weaknesses: internal politics, inability to coordinate with other locals, corruption, and a divide between leadership and rank-and-file employees. *See* Getman, *supra* note 142, at 583-93.

151. Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 *INDUS. REL.* 319, 301-04 (2006).

152. Ronald W. Schatz, *From Commons to Dunlop: Rethinking the Field and Theory of Industrial Relations*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 87, 88 (Nelson Lichtenstein & Howell John Harris eds., 1993).

of industrial democracy and industrial stability based on unionism that industrial-relations theorists and union advocates have contemplated.<sup>153</sup> Still others mark the advent of enlightened human-resource policies as explaining labor's inability to organize and the drop in union density.<sup>154</sup> In fact, management often contends that simply informing employees of the "truth" will allow them to prevail.<sup>155</sup> Therefore, employers argue that the system is fair because the lack of union density reflects the will of the people. These theories are consistent with the staggering decline in public support for unions.<sup>156</sup> Unionists argue that the statistics prove that the system is unfair.<sup>157</sup> We contend that the system is unfair not because of the results, but because of the process.<sup>158</sup>

Like the Sherwyn-versus-Eigen hypothetical one-on-one basketball game described above, the current system has two different sets of rules for the two sides. Employers have the advantage of access to employees. Captive-audience meetings and other impromptu conversations allow employers to get their respective messages across. Unions have the advantage of being able to make promises, visit employees' homes, and party with the employees. Employers have the inherent power advantage, while unions often have a head start in the race to the election. There are some rules that apply to both sides. Both sides can lie to the employees, trash the other side, and pressure the employees to vote one way or the other.<sup>159</sup> The result is that at the end of the campaign, the employees feel like the rope in a tug of war. The employees likely have little, if any, ability to gauge the accuracy of the information received; they often fear reprisals for voting for either side, and they likely feel like pawns in the age-old labor-versus-capital dispute where

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<sup>153.</sup> *Id.*

<sup>154.</sup> Jack Fiorito & Cheryl L. Maranto, *The Contemporary Decline of Union Strength*, CONTEMP. POL'Y ISSUES, Oct. 1987, at 12, 16–17.

<sup>155.</sup> Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend, at least indirectly. See, e.g., *Workers Weigh in on Alleged Coercion During Card Check Campaign and NLRB Elections*, AM. RIGHTS AT WORK (Mar. 21, 2006) <http://www.americanrightsatwork.org/press-center/2006-press-releases/workers-weigh-in-on-alleged-coercion-during-card-check-campaigns-and-nlr-elections-20060320-239-345-345.html>.

<sup>156.</sup> See *supra* notes 88–90 and accompanying text.

<sup>157.</sup> There are those who go beyond the statistics and make a normative assessment of the NLRA, arguing that it is biased in favor of employers. However, these analyses tend to omit or undervalue the advantages the Act accords unions and to emphasize the advantages accorded employers. See, e.g., Getman, *supra* note 142, at 578–84.

<sup>158.</sup> Others, a rare minority by our account of the current state of this relevant scholarship, have suggested that systemic factors potentially account for a greater percentage of variation in win rates and union density than do the other factors described above. See Ferguson, *supra* note 77, at 18; Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998*, 57 INDUS. & LAB. REL. REV. 493, 495 (2004).

<sup>159.</sup> Note well that all of this can be done without engaging in, for example, threats, interrogation, or recording campaign activity—tactics that neither management nor the union can employ. See *supra* notes 114–17 and accompanying text.

their desires are subordinated to the desires of two large entities each claiming to care about employee well-being more than the other: Management swears that it learned a lesson from the experience and vows to change, while the union swears that no change management might implement would remain intact without the perpetual threat of organization attainable only by certifying the union as the employees' representative.<sup>160</sup>

### C. CARD-CHECK NEUTRALITY AGREEMENTS AND THE EMPLOYEE FREE CHOICE ACT

Perhaps the most discussed means of reforming the broken, outdated means of selecting workplace labor organization representation is card-check neutrality. This was most recently embodied, in part, in the proposed Employee Free Choice Act.<sup>161</sup> The logic behind EFCA focuses (incorrectly in our view) on results, not process, and in the end, would attenuate perhaps the most critical component of the process's fairness—employees' right to freely choose their representative or to choose not to be represented at all. With respect to neutrality agreements, five questions must be addressed: (1) what are they, (2) what effect do they have on unionization, (3) why do employers sign them, (4) what is their legal status, and (5) do they result in a fair system under our newly described criteria. We address the first four questions in this Part, and the fairness question in Part IV.

#### 1. *What Are Neutrality Agreements?*

Although neutrality agreements come in several forms, the common denominator for all of them is that employers agree to remain neutral with regard to the union's attempt to organize the workforce.<sup>162</sup> Some agreements simply state that the employer will remain neutral but contain no specific provisions, while other agreements are more detailed.<sup>163</sup> For example, Hotel Employees and Restaurant Employees

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160. LEVITT, *supra* note 96, at 89.

161. Employee Free Choice Act of 2009, S. 560, 111th Congress (2009). As discussed above, EFCA provides for recognition based on card checks, *see supra* text accompanying notes 17–18, but does not require employer neutrality.

162. While most agreements contain a definition of neutrality, the definitions vary widely. Most Communication Workers of America, United Auto Workers, and United Steelworkers of America agreements define neutrality as “neither helping nor hindering” the union's organizing effort, yet still allow employers to communicate facts to the employees. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47 (2001). A different approach is apparent from the Hotel and Restaurant Employees Union agreements that prohibit the employer from communicating any opposition to the union. *Id.* Less typical definitions provide that management will make an affirmative statement to their employees that it welcomes their choice of a representative. *Id.*

163. Agreements may state that the employer will not attack or demean the union; the employer

Union agreements stated that employers would not “communicate opposition” to the union’s efforts.<sup>164</sup>

Neutrality agreements commonly give the union access to employees in the form of a list of their names and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property during work hours for the purpose of collecting authorization cards.<sup>165</sup> This differs from the guidelines established by the NLRB and the courts, under which an employer has no obligation to provide the union with such sweeping access to its employees, and may actually be prohibited from doing so.<sup>166</sup>

Finally, most neutrality agreements include a “card check” provision, which requires the employer to recognize the union if a majority of the bargaining-unit employees sign authorization cards.<sup>167</sup> Under a card-check agreement, the employees do not vote for the union in a secret-ballot election monitored by the NLRB.<sup>168</sup> Instead, the employer recognizes the union if it presents the company with the requisite number of signed authorization cards, at which point the neutrality agreement is no longer needed and expires.<sup>169</sup>

## 2. *What Effect Do Neutrality Agreements Have on Unionization?*

Neutrality agreements radically change the landscape of union organizing. With the aid of such agreements, unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections.<sup>170</sup> The difference between 46% and 78% actually *understates* the effect of the neutrality agreement, in part because the sampled populations for the two figures are different. Elections only occur when the union can show that 30% of the employees have signed authorization cards.<sup>171</sup> As stated above, however, in almost every situation where a union goes to election,

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will not refer to the union as a third party; the parties will strive to create a campaign free of fear, hostility, and coercion; the parties will campaign in a positive manner; the parties will keep their statements pro-company or pro-union; and the employer will not state that it is corporate policy to avoid unionization. *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot*, CORNELL HOTEL & REST. ADMIN. Q., Oct.–Nov. 2001, at 86, 89.

<sup>166</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992).

<sup>167</sup> Eaton & Kriesky, *supra* note 162, at 47 tbl.1 (finding that 73% of neutrality agreements studied had card-check language).

<sup>168</sup> Stokes et al., *supra* note 165, at 86.

<sup>169</sup> *Id.*

<sup>170</sup> Eaton & Kriesky, *supra* note 162, at 52 & tbl.3; *see also* Riddell, *supra* note 158, at 509 (finding a union success-rate difference of approximately 19% in British Columbia attributable to card-check procedures as compared to mandatory-voting procedures).

<sup>171</sup> *See supra* note 110 and accompanying text.

it has more than 50% of the employees sign cards.<sup>172</sup> Thus, the sampled population in the 46% win figure includes only companies where it is likely that at least 60% of the employees signed cards. Companies where the union could not get at least 51% of the employees to sign cards did not go to election and never became part of that figure. Conversely, the sampled population in the neutrality side of the study includes all employers who signed such agreements. Those employers whose employees had no interest represent the 22% of companies that remained nonunion. In other words, it is likely that 100% of the companies that went to election would have been unionized under a neutrality with card check, and the 22% of those under card-check agreements would never have gone to election. The net effect is quite simple. Assuming there is enough employee interest to warrant an election in the first place, the company's chances of becoming unionized are less than 50% under the NLRB's election procedures and nearly guaranteed under a neutrality agreement with a card-check provision.

It follows that employers wishing to remain nonunion or to give their employees an opportunity to exercise their right to choose their elected representative by secret ballot should refuse to sign a neutrality agreement. This begs the question of why an employer would ever accede to a neutrality agreement.

### 3. *Why Do Employers Sign Neutrality Agreements?*

The question "why do employers sign neutrality agreements?" is perplexing to the casual observer. The answer is fairly simple. Employers sign neutrality agreements because they have to or because it makes business sense. There are two reasons why employers have to sign neutrality agreements. First, local governments may require neutrality agreements. For example, San Francisco enacted a labor-peace ordinance that required neutrality to get a building permit or to do business at the airport or other city-owned property.<sup>173</sup> Other cities have had similar such requirements.<sup>174</sup> Historically, there has been little public opposition to such requirements and even fewer legal challenges.

Second, employers who are parties to certain collective-bargaining agreements must agree to a neutrality agreement. For example, the collective-bargaining agreements covering the hotel employers' associations in New York City and Chicago contain neutrality agreements.<sup>175</sup> Because the major brands and operators are all parties to

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172. See *supra* note 111 and accompanying text.

173. See MICHAEL REICH ET AL., *INST. INDUS. REL., LIVING WAGES AND ECONOMIC PERFORMANCE: THE SAN FRANCISCO AIRPORT MODEL*, at 7 (2003).

174. For example, there is a similar ordinance in Los Angeles County. See L.A. CNTY., CAL., ADMIN. CODE § 2.201.050 (2011).

175. These agreements are on file with the Authors.

these agreements, any new owner who wishes to use an established operator or brand must agree to neutrality.

Of course, the next question is why the brands and operators agreed to neutrality. While it is difficult to state with authority why employers agreed to something so long ago, one can make some logical assumptions. Neutrality is a huge gain for the union, and unions should and do give up other demands in exchange for neutrality. An owner who does not plan on owning another hotel has no disincentive and, in fact, has an incentive to force the other brands and operators to sign neutrality agreements. During negotiations, the union's willingness to trade wage increases, for example, for neutrality has an immediate positive effect on current owners. In addition, it has a long-term positive effect. Now, if a brand opens a competing hotel, the unionized owner knows the new hotel likely will be union and, thus, the playing field will be level.<sup>176</sup>

Other times, neutrality simply makes business sense. For example, SBC Communications, a telephone company, and the Communications Workers of America entered into an agreement in which the parties executed neutrality agreements that included card checks for all current SBC employees and those employed by all firms acquired by SBC in the future.<sup>177</sup> SBC accepted the neutrality agreement in exchange for the union's promise to lobby on the company's behalf regarding antitrust complications arising out of present and future mergers and acquisitions.<sup>178</sup> Put simply, the company was willing, for all intents and purposes, to accept that all of its present and future employees would have one union as their exclusive representative in exchange for the union's lobbying assistance. While it may have been a good deal for the

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176. See MORRIS A. HOROWITZ, *THE NEW YORK HOTEL INDUSTRY: A LABOR RELATIONS STUDY* 30 (1960) ("It was unquestionably becoming clear to the Hotel Association [of New York City], at this point, that with the growing strength of the unions, it was only a matter of time before a significant number of hotels would settle with any of the various unions in the field. If this happened, different hotels would deal with different unions on different terms, and . . . it would be most impractical to have different wage scales among competitive hotels. . . . [A] uniform union structure in all the hotels would be economically advantageous to the hotels . . .").

177. Eaton & Kriesky, *supra* note 163, at 44; Harry C. Katz et al., *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 *INDUS. & LAB. REL. REV.* 573, 586-87 (2003).

178. Katz et al., *supra* note 177, at 587; see also Interview with Harry C. Katz, Dean and Professor of Collective Bargaining, Cornell Univ. Sch. of Indus. & Lab. Rel., in Ithaca, N.Y. (July 23, 2001); *CWA Tells FCC: Bell Atlantic-GTE, SBC-Ameritech Mergers Will Boost Competition and Benefit All Consumers*, *COMM. WORKERS OF AM.* (Dec. 13, 1998), [http://www.cwa-union.org/news/entry/cwa\\_tells\\_fcc\\_bell\\_atlantic-gte\\_sbc-ameritech\\_mergers\\_will\\_boost\\_competitio](http://www.cwa-union.org/news/entry/cwa_tells_fcc_bell_atlantic-gte_sbc-ameritech_mergers_will_boost_competitio) (illustrating the antitrust lobbying the CWA performed on behalf of SBC); *Justice Dept. Approves SBC-Ameritech Deal*, *COMM. WORKERS OF AM.* (Apr. 1, 1999), [http://www.cwa-union.org/news/entry/justice\\_dept\\_approves\\_sbc-ameritech\\_deal](http://www.cwa-union.org/news/entry/justice_dept_approves_sbc-ameritech_deal) (same).

employer, and it certainly was a great deal for the union, the employees were deprived of information and choice.

#### 4. *What Is the Legal Status of Neutrality Agreements?*

In assessing the legality of neutrality one needs to distinguish between that required by government and that entered into by private employers. The former may be unlawful; the latter is not.

##### a. *Government-Mandated Neutrality*

The legality of government-mandated neutrality suffered its first serious blow in 2001 when Judge Vaughn Walker of the District Court for the Northern District of California granted a preliminary injunction that prevented the San Francisco International Airport from enforcing its labor-peace and card-check rules against an employer who operated at the airport.<sup>179</sup> The court held that the airport's labor-peace rule was unenforceable because it likely conflicted with the so-called preemption principle of the NLRA,<sup>180</sup> which prohibits state and local regulation of activities that the NLRA "protects, prohibits, or arguably protects or prohibits."<sup>181</sup> Accordingly, a city, state, or local statute, regulation, or ordinance that conflicts or interferes with the disposition of issues under the NLRA is unenforceable.<sup>182</sup>

*Chamber of Commerce of the United States v. Brown*, handed down by the Supreme Court in 2008, further calls the legality of government-mandated neutrality into serious doubt.<sup>183</sup> In *Brown*, the Court struck down a California statute that prohibited employers who did business with the state from using state funds to "assist, promote, or deter union organizing."<sup>184</sup> Justice John Paul Stevens, writing for a 7–2 majority that reversed the en banc Ninth Circuit, held that the NLRA preempted the state statute, relying on a different but related preemption doctrine from that relied on by Judge Walker.<sup>185</sup> According to the Court, the Labor Management Relations Act (the "Taft-Hartley Act"),<sup>186</sup> a law passed to level the playing field of the pro-union NLRA, manifested a "congressional intent to encourage free debate on issues dividing labor

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179. *Aeroground, Inc. v. City of S.F.*, 170 F. Supp. 2d 950, 959 (N.D. Cal. 2001).

180. *Id.* at 955–56 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

181. *Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

182. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959).

183. 554 U.S. 60, 74 (2008).

184. *Id.* at 71–74 (quoting CAL. GOV'T CODE §§ 16645.1–.8 (2010)).

185. *Id.* at 76; *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 150–51 (1976) ("[A] regulation by the state is impermissible because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting *Hill v. Florida*, 324 U.S. 538, 542 (1945))).

186. Labor Management Relations Act of 1947 ("Taft-Hartley Act"), Pub. L. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2010)).

and management.”<sup>187</sup> The Court found both explicit and implicit congressional intent to leave noncoercive employer speech unregulated because it is impermissible to “chill[] one side of ‘the robust debate which has been protected under the NLRA.’”<sup>188</sup>

Although labor-peace statutes differ in some respects from the statute at issue in *Brown*,<sup>189</sup> they raise many of the same concerns. The statutes deny employees the “implied . . . underlying right” to information opposing unionization and discourage free debate of labor-management issues by stifling one side of the dialogue.<sup>190</sup> Labor-peace statutes thus embody state policies on organizing—policies that “stand[] as an obstacle” to the policy Congress pronounced on that issue in the Taft-Hartley Act.<sup>191</sup>

Even more on point is Judge Richard Posner’s decision in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*.<sup>192</sup> In *Metropolitan Milwaukee*, the Seventh Circuit struck down a Milwaukee ordinance that required certain transportation contractors to negotiate neutrality agreements as a condition to receiving payment from the county.<sup>193</sup> The ordinance required that these agreements include clauses subjecting labor disputes to binding arbitration, prohibiting employers from holding captive-audience speeches and expressing “false or misleading” information intended to influence an employee’s vote, and requiring the employer to provide the union with an employee contact list and “timely and reasonable access” to the workplace.<sup>194</sup> The court held that a state may regulate labor relations with its contractors only for limited purposes, such as increasing the quality or reducing the cost of the services performed.<sup>195</sup> However, a state may not regulate labor relations to promote a policy it views as superior to that embodied in the NLRA.<sup>196</sup>

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187. *Brown*, 554 U.S. at 67 (quoting *Linn v. United Plant Guard Workers of Am., Local 1114*, 383 U.S. 53, 62 (1966)).

188. *Id.* at 73 (quoting *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974)); see also *Healthcare Ass’n. of N.Y. State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 25 (N.D.N.Y. 2005) (striking down, as preempted by the NLRA, N.Y. LAB. L. § 211-a (McKinney 2004), which prohibited use of state funds to “encourage or discourage union organization”), *rev’d*, 471 F.3d 87, 109 (2d Cir. 2006) (reversing grant of summary judgment based on the presence of fact issues, but accepting the lower court’s determination that the NLRA might preempt the New York statute).

189. For example, the statute at issue in *Brown* arguably was even more pro-union in that it permitted the use of funds toward expenses in connection with allowing union representatives access to the employer’s premises or “[n]egotiating, entering into, or carrying out a voluntary recognition agreement.” CAL. GOV’T CODE § 16647 (2010).

190. 554 U.S. at 68.

191. *Machinists*, 427 U.S. at 150 (quoting *Hill v. Florida*, 324 U.S. 538, 542 (1945)).

192. 431 F.3d 277 (7th Cir. 2005).

193. *Id.* at 277–78.

194. CNTY. OF MILWAUKEE, WIS., CODE GEN. ORDINANCES § 31.02(f) (2000).

195. *Metro. Milwaukee*, 431 F.3d at 277–78.

196. *Id.* at 278–79. The county argued in the alternative that the scheme was not regulation, but



*b. Private Neutrality Agreements*

There are three arguments why private neutrality agreements violate the law: (1) section 302 of the Taft-Hartley Act makes it unlawful for an employer to give or agree to give a “thing of value” to any labor organization and for a labor organization to receive a thing of value from any employer,<sup>197</sup> (2) the Taft-Hartley Act allows employers the right to campaign against the union,<sup>198</sup> and (3) the NLRA prohibits so-called “company unions.”<sup>199</sup> Below we first describe why a private neutrality agreement violates the law. We then describe how the courts and the NLRB have ruled on these issues.

The first question is whether a neutrality agreement itself constitutes a thing of value provided to a labor organization. Courts use a seemingly broad interpretation of “thing of value” in section 302. For instance, in *United States v. Schiffman*, the question before the court was whether the request for a reduced room rate constituted a thing of value and thus violated section 302.<sup>200</sup> In that case, a union official who represented a bargaining unit at a Hyatt property in Florida requested that an Atlanta Hyatt provide the official with a room rate that was almost 50% less than Hyatt’s corporate rate.<sup>201</sup> The court found that the room-rate reduction was a thing of value and that the requested favor violated section 302.<sup>202</sup> Similarly, in *United States v. Boffa*, the court found that an employer unlawfully provided a thing of value when it provided a union official with the use of a 1975 Lincoln Continental without charge for a four-month period.<sup>203</sup> This broad definition of “thing of value” in section 302 is consistent with the judicial interpretation of the same term when it is found in other statutes.<sup>204</sup> Those holdings suggest

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allocation of state funds. However, the court held that express regulation versus the use of the county’s spending power was “a distinction without a difference.” *Id.* at 279 (quoting *Wis. Dep’t of Indus., Labor, & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986)).

197. 29 U.S.C. § 186 (2010).

198. 29 U.S.C. § 156(c) (2010).

199. *Id.* § 158(a)(2).

200. 552 F.2d 1124, 1125 (5th Cir. 1977).

201. *Id.*

202. *Id.*

203. 688 F.2d 919, 924, 936 (3d Cir. 1982).

204. *See, e.g., United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (holding that 18 U.S.C. § 641, which prohibits embezzling, stealing, purloining, or knowingly converting “any record, voucher, money, or thing of value” of the U.S. or of any department of agency thereof, includes actions involving “intangible” property). Other federal statutes use the phrase “anything of value.” *See* 18 U.S.C. § 201 (2010) (defining criminal bribery and prohibiting any person from giving or attempting to give “anything of value” to a government official with the intention of influencing their official actions and reciprocally prohibiting any public official from receiving or attempting to solicit anything of value in return for official action); 18 U.S.C. § 666 (2010) (imposing criminal sanctions for soliciting or demanding corruptly for the benefit of any person, or accepting or agreeing to accept “anything of value” from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of

that a similarly broad interpretation would apply to a thing of value under section 302 of the Taft-Hartley Act.

Neutrality agreements almost always require the employer to provide at least four things that have been or logically would be characterized by the courts as things of value under this broad definition of the term: access to the hotel's premises so the union can speak to the employees, a list of employees, a card-check provision, and exclusivity to one union. If any of those are benefits that constitute a thing of value, the typical neutrality agreement would violate section 302 of the Taft-Hartley Act. Indeed, it seems clear that these four items are things of value. As explained above, the value of the card check is significant: it substantially increases the likelihood of union success in an organizing drive.<sup>205</sup> Similarly, access to employees, directories, and exclusive dealings<sup>206</sup> are not required by the law and seemingly would help the union in its efforts. One would presume that significant help in organizing an employer—the main goal of the union—would constitute a thing of value.<sup>207</sup>

The second argument that private neutrality agreements violate the law stems from section 7 of the NLRA, which grants employees the right to organize or to refrain from organizing.<sup>208</sup> The right to refrain from organizing was added to the NLRA in the Taft-Hartley Act.<sup>209</sup> To operationalize this right, Taft-Hartley allows employers and employees to file unfair-labor-practice charges against unions when the unions' conduct interferes with the section 7 rights of employees,<sup>210</sup> and gives employers the right to exercise free speech with regard to union organizing as long as they do not threaten, make promises to, interrogate, confer benefits on, or solicit grievances from employees.<sup>211</sup> It seems that the purpose of these free-speech guarantees is to allow employees access

value of \$5,000 or more).

205. *See supra* notes 170–72 and accompanying text.

206. Exclusive dealing means that only the union that was a party to the agreement, and not rival unions, would have access and directories.

207. *See supra* notes 173–79 and accompanying text.

208. *See* 29 U.S.C. § 157 (2010) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .”).

209. Labor Management Relations Act of 1947, Pub. L. 80-101, § 101, 61 Stat. 136, 140 (codified as amended at 29 U.S.C. § 157).

210. *Id.* § 101, 29 U.S.C. § 158(b) (2010). Prior to Taft-Hartley, unfair-labor-practice claims could be filed only against employers. *See* Pub. L. No. 74-198, § 8, 49 Stat. 449, 453 (1935).

211. *Uarco, Inc.*, 216 N.L.R.B. 1, 1–2 (1974) (holding that it is not the solicitation of grievances itself that is coercive and violative of section 8(a)(1), but the promise to correct grievances, and that solicitation of grievances raises a rebuttable inference that the employer is making such a promise); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.”).

to information so that they can be fully informed before deciding whether to organize or to refrain from organizing. Consequently, an employer's decision to remain neutral seems to deprive employees of access to information critical of the union and thereby may interfere with employees' right to refrain from unionizing.

Finally, private neutrality agreements may violate section 8(a)(2) of the NLRA, which prohibits employers from assisting unions by giving them financial or other support, a provision that eliminated the so-called company unions of days past.<sup>212</sup> Like the employers' right to engage in free speech, the purpose of section 8(a)(2) is to preserve the free exercise of employees' section 7 rights. Because collusion between an employer and a union can detrimentally affect employees by interfering with their rights to refrain from organizing, it would seem that a neutrality agreement violates section 8(a)(2).

While there is no case on point, the NLRB's analysis of section 8(a)(2) supports this argument. In reviewing alleged 8(a)(2) violations, the NLRB has noted the Supreme Court's direction that courts need to carefully scrutinize "all factors, often subtle, which restrain an employee's choice and for which the employer may be said to be responsible."<sup>213</sup> Under this totality-of-the-circumstances test, the NLRB has found that the following factors may constitute evidence of a violation of section 8(a)(2): the employer's introducing the union to its employees, the employer's permitting the union to solicit employees to sign cards on the employer's property and during work hours, the employer's extending recognition to a union that had not collected valid recognition cards, and the employer's executing a collective-bargaining agreement before the union had demonstrated that it represented an uncoerced majority of employees.<sup>214</sup> Moreover, the NLRB has found that "signed cards . . . cannot be considered reliable representation of employee sentiments when there is evidence of the employer's assistance to the union."<sup>215</sup>

While allowing a union the use of company time and property is not a per se violation of section 8(a)(2),<sup>216</sup> that factor in addition to the fact that the employer has chosen which union it will introduce to its employees, along with the other neutrality requirements described

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212. See 29 U.S.C. § 158(a)(2) (2010) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .").

213. *Windsor Place Corp.*, 276 N.L.R.B. 445, 448 (1985) (citing Int'l Ass'n of Machinists Lodge No. 35 v. NLRB, 311 U.S. 72 (1946)).

214. *Windsor Place Corp.*, 276 N.L.R.B. at 449.

215. *Id.*

216. *Id.* at 448 (citing *Manuela Mfg. Co.*, 143 N.L.R.B. 379 (1963)).

above, compels the conclusion that such agreements violate section 8(a)(2).<sup>217</sup>

Despite the above arguments, the NLRB and the federal courts consistently uphold neutrality agreements. In *Hotel Employees and Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, the Third Circuit addressed the issue of whether a neutrality agreement was a “thing of value.”<sup>218</sup> In three short paragraphs devoid of any real analysis, the court rejected the thing-of-value argument.<sup>219</sup> The basis for this rejection was the court’s interpretation of the purposes of the statute and the effect of neutrality agreements.<sup>220</sup> According to the court, the prohibition against providing a thing of value was passed “to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers.”<sup>221</sup> This prohibition, the court continued, is limited to bribery, extortion, and other corrupt practices conducted in secret and only addresses agreements to pay, loan, or deliver any money or thing of value.<sup>222</sup> The court then held that a neutrality agreement benefited both parties with efficiencies and cost savings and did not involve the payment, loan, or delivery of anything.<sup>223</sup>

This analysis is woefully lacking in an understanding of the relevant case law and of the nature of labor relations. For example, the reduced hotel room rate in *Schiffman* was neither bribery, nor extortion, nor corruption. Moreover, it did not involve the payment, loan, or delivery of anything. What it did do, rather, was create a situation where the union official may have felt indebted to the employer, arguably hindering his ability to fully represent the employees. We dispute that a savings of \$20 would have such an effect, but the court held it could.<sup>224</sup> On the other hand, a neutrality agreement granting exclusive collective-bargaining rights to one union could result in dues of \$35 to \$50 per month from thousands of employees. Hundreds of thousands of dollars per month seems like a thing of value. Would a union, for example, give up its demands for increases in wages or health and safety measures in exchange for that kind of money and power? Of course it would. In fact, that is exactly what UNITE-HERE did in the summer of 2006 when it

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217. Moreover, under a neutrality agreement, employers recognize unions based on signatures that result from employer assistance to the union. Those cards should not be considered reliable and the NLRB should not certify the union.

218. 390 F.3d 206, 218 (3d Cir. 2004).

219. *Id.* at 218–19.

220. *Id.*

221. *Id.* (quoting *Turner v. Local Union No. 302, Int’l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979)).

222. *Id.* at 219.

223. *Id.*

224. *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977).

threatened an industry-wide strike if employers did not agree to neutrality agreements and reduced demands that would have benefited the current employees in exchange for the ability to organize nonunion hotels.<sup>225</sup> This seems like what section 302 was designed to prevent. The courts, however, do not agree. In fact, the Fourth Circuit<sup>226</sup> and at least two federal district courts<sup>227</sup> followed *Sage Hospitality*. In addition, in *Dana Corporation*, the NLRB followed *Sage Hospitality*, holding that card-check neutrality furthers the NLRA's purpose of promoting labor peace.<sup>228</sup> In other words, an agreement that is provided at the expense of current members' wages, hours, and terms and conditions of employment and that jeopardizes the employees' section 7 right to refrain from joining a union is permissible as long as it furthers labor peace.

We believe that card-check neutrality agreements violate section 302 and the NLRA and therefore should not be enforced. Our belief, however, does not reflect the current state of the law and thus, for the time being, neutrality agreements are alive and well.

#### D. LEGISLATIVE AND ADJUDICATIVE INITIATIVES

EFCA would have put part of the section 302 issue to rest because it would have mandated employers to recognize unions as the exclusive representative of petitioned-for units of employees on the basis of signed authorization cards from a majority of employees in those units.<sup>229</sup> The midterm elections destroyed any chance of this statute being passed during President Obama's first term. While the passage of EFCA may no longer be viable, its aftereffects remain on both sides of the table. The concept of "free choice" ending the process of secret-ballot elections was an anomaly that not only doomed the statute, but that also resulted in proposed state legislation that would outlaw card checks. In November of 2010, voters in four states—Arizona, South Carolina, South Dakota, and Utah—voted to amend their state constitutions to require secret-ballot elections for union certification.<sup>230</sup> The NLRB has taken the position that these amendments are preempted by the NLRA and thus

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225. Richard W. Hurd, *Neutrality Agreements: Innovative, Controversial, and Labor's Hope for the Future*, NEW LAB. FORUM, Spring 2008, at 35, 36–37; David Sherwyn, Zev J. Eigen & Paul Wagner, *The Hotel Industry's Summer of 2006: A Watershed Moment for America's Labor Unions?*, 47 CORNELL HOTEL & REST. ADMIN. Q. 337, 343–45 (2006).

226. See *Adcock v. Freightliner, LLC*, 550 F.3d 369, 376 (4th Cir. 2008).

227. See *United Steel Workers Int'l Union v. Hibbing Joint Venture*, No. 06-4820, 2007 WL 2580546, at \*5–6 (D. Minn. Sept. 4, 2007); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 724 (N.D. Ohio 2006).

228. 356 N.L.R.B. No. 49, 2010-2011 NLRB Dec. ¶ 15,369 (Dec. 6, 2010).

229. S. 560, 111th Cong., § 2(a)(6) (2009).

230. ARIZ. CONST. art. II, § 37; S.C. CONST. art. II, § 12; S.D. CONST. art. VI, § 28; UTAH CONST. art. IV, § 8(1).

are unenforceable.<sup>231</sup> These issues will be played out before the NLRB and ultimately the courts.<sup>232</sup> In addition, as stated above, numerous states are discussing right-to-work legislation.<sup>233</sup> Currently there are twenty-three right-to-work states.<sup>234</sup>

On the other side of the ledger, organized labor is lobbying the NLRB to change its rules and shorten the time between the filing of the petition and the election. Commentators are proposing a time period of twenty, ten, or even five days between the filing of the petition and the election.<sup>235</sup> Labor argues that a shortened time period would allow a secret-ballot election but would curtail management's ability to threaten, intimidate, coerce, promise benefits to, and surveil employees.<sup>236</sup>

There are two problems with a shortened-election scheme. First, assuming that a fully informed electorate is desirable, five or ten days simply is not enough time for management to convey its side of the story. Unfortunately, this is a trade-off between interests that likely cannot be reconciled. The second problem, however, hurts both sides. Before holding a union election, several issues must be resolved, the most difficult one being the scope of the bargaining unit. Those advocating for quick elections argue that a "vote now and litigate later" approach will sufficiently address these issues.<sup>237</sup> This play on the classic collective-bargaining mantra, "work now and grieve later," will not work. Currently, management decides whether to contest the bargaining unit before the election.<sup>238</sup> While delay can help management in the election, employers often consent to the proposed unit to avoid the expense of challenging the proposal, the risk of losing the challenge, and the

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231. *State Constitutional Amendments Conflict with the NLRA*, NLRB (Jan. 14, 2011), <http://nlrb.gov/sites/default/files/documents/234/statesfactsheet.pdf>.

232. See Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Tom Horne, Ariz. Att'y Gen. (Jan. 13, 2011), available at [http://nlrb.gov/sites/default/files/documents/234/letter\\_az.pdf](http://nlrb.gov/sites/default/files/documents/234/letter_az.pdf) (threatening litigation); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Alan Wilson, S.C. Att'y Gen. (Jan. 13, 2011), available at [http://nlrb.gov/sites/default/files/documents/234/letter\\_sc.pdf](http://nlrb.gov/sites/default/files/documents/234/letter_sc.pdf) (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Marty J. Jackley, S.D. Att'y Gen. (Jan. 13, 2011), available at [http://nlrb.gov/sites/default/files/documents/234/letter\\_sd.pdf](http://nlrb.gov/sites/default/files/documents/234/letter_sd.pdf) (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Mark L. Shurtleff, Utah Att'y Gen. (Jan. 13, 2011), available at [http://nlrb.gov/sites/default/files/documents/234/letter\\_ut.pdf](http://nlrb.gov/sites/default/files/documents/234/letter_ut.pdf) (same).

233. See *supra* note 95 and accompanying text.

234. See *supra* note 95 and accompanying text.

235. See 155 CONG. REC. S3, 636 (daily ed. Mar. 24, 2009) (statement of Sen. Arlen Specter) (proposing a quick-election scheme where the initial election would be held within twenty-one days of the filing of the petition); *Implications of the Employee Free Choice Act*, METRO. CORP. COUNSEL, Sept. 2009, at 12.

236. The NLRB held a hearing on June 18 and 19 to discuss shortening the elections, where professionals and academics opined on the topic. See *Open Meeting on Proposed Election Process Rules*, NLRB, <http://www.nlr.gov/openmeeting> (last visited Feb. 14, 2012).

237. See *Proposed Election Rule Changes, Hearing Before the NLRB 358* (July 19, 2011), available at <http://www.nlr.gov/sites/default/files/documents/525/publicmeeting07-19-11-corrected.pdf> (statement of union-side attorney Joe Paller).

238. See Stokes et al., *supra* note 165, at 88.

potential of appearing obstructionist to employees. In contrast, if “vote now and litigate later” were the norm, once management lost, they would have every incentive to litigate. Management lawyers invoking the need for discovery, briefs, open hearing dates, and other litigation instruments could delay certification for months or even years. In effect, “vote now and litigate later” would provide employers with a legitimate excuse to tie up union victories in litigation for years, while under the current scheme employers lose credibility if they engage in such dilatory tactics.

#### IV. DEVELOPING A NEW SYSTEM FOR UNION ORGANIZING

As stated above, we contend that a fair system would be one in which employees have full information (or as full of an opportunity to obtain complete information as possible) and feel that during the process they were treated with respect and not threatened or intimidated by either side. The current status quo, neutrality agreements, card checks (with or without neutrality), and quick elections all fail to meet our standard. Under current NLRB rules, the sides can lie to each other, employees report being fired and intimidated, and each side uses its respective weapons to defeat the other. Neutrality and quick elections axiomatically expose employees to only one side of the story, and card check is subject to intimidation by unions.<sup>239</sup>

It is our belief that some approach the conversation about how to improve the collective labor-representation election system with the preexisting belief that employees should be represented by a union (because that is what is in their best interest, whether employees realize it or not), and some approach the conversation with the view that employees should not be represented by unions (whether employees realize that it is in their best interest or not). Hence, some of the focus is on developing reform that tilts results in one direction or the other. For instance, the normative debate about neutrality reveals much of this paternalistic orientation. Some are willing to sacrifice what we believe to be one of the core tenets of democracy and workplace governance—namely employees’ right to vote for their representative, or vote not to be represented at all—in the name of increasing union win rates, because of the belief that higher union density is better for everyone, including employers and employees, both represented and nonrepresented.

Our mantra is that a system for electing labor organizations needs to be focused on what is best for voting employees, deferring to them to

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239. Some union advocates laugh at the concept of union intimidation. But union organizers make a name for themselves and remain employed if they are successful. It is naïve to assert that a union organizer two cards away from victory would not be more likely to resort to intimidation or other less than desirous means to secure success.

make the decisions that directly affect them before worrying about what is good for the U.S. economy or other employees across town. We therefore endeavored to find or develop a system that would operationalize our core beliefs, which are summarized as follows: (1) unionization will benefit some employees, but will not benefit others; (2) some employees want a union and others do not; (3) employee choice, rather than achieving labor peace regardless of the cost, should drive policy; (4) employees should have full information, or at least the maximum opportunity for exposure to full information; (5) employees should vote in a secret-ballot election; (6) management and unions have corrupted the current NLRA rules so that the goal is to win and not to facilitate employee choice; and (7) a union organizing system will be successful if, regardless of the result, at its conclusion the employees feel they have been respected, fully informed, not intimidated, and are satisfied that they made the choice they wanted to make.

#### A. THE PRINCIPLES FOR ETHICAL CONDUCT DURING UNION REPRESENTATIONAL CAMPAIGNS

Before developing our own system, we looked to find a proposal or practice that satisfied our goals. There is one. We encourage unions, management, and ultimately Congress to adopt the *Principles for Ethical Conduct During Union Representational Campaigns* (the “Principles”) developed by the Institute for Employee Choice.<sup>240</sup> However, we raise some significant questions about the way in which the Principles should be implemented. These questions carry important consequences, more broadly than in the labor-management relations context, about the differences between positivistic legal rules and normative, sociomoral, self-imposed constraints as optimal means of enforcement regimes.

The Institute for Employee Choice is the brainchild of Richard Bensinger and Dick Shubert. Bensinger is a long-time union organizer whose resume includes being the first head of organizing for the AFL-CIO, as well as working with UNITE-HERE, the United Auto Workers (“UAW”), and other unions.<sup>241</sup> Shubert is the former CEO of Bethlehem Steel and former Deputy Secretary of Labor under the Nixon and Ford administrations.<sup>242</sup> Both men grew frustrated by the current system and its perverse incentives for both unions and management.<sup>243</sup> Despite coming from opposite sides of a polarized issue, Bensinger and Shubert

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240. Richard Bensinger & Dick Shubert, Inst. for Emp. Choice, *Principles for Ethical Conduct During Union Representational Campaigns* (unpublished manuscript) (on file with the Authors).

241. *Institute Directors*, INST. FOR EMP. CHOICE, <http://www.employeechoice.org> (select “About Us”) (last visited Feb. 14, 2012).

242. *Id.*

243. Richard Bensinger, Co-Chair, Inst. for Emp. Choice, Lecture at Cornell University (Feb. 13, 2012).



share the core beliefs listed above.<sup>244</sup> Their experiences and their beliefs led them to create an institute grounded on two principles: to do what is best for employees and to be governed by ethics—not law.<sup>245</sup>

The Ethical Principles are as follows:

These principles define ethical conduct for both unions and employers and are based on the premise that employees will make the decision about organizing through a contested secret ballot election.

(1): Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, the Institute for Employee Choice, a joint labor/management entity, will provide an opinion.

(2): No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.

(3): No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA employers are prohibited but unions are allowed to make promises. Under these principles unions are also forbidden to make promises to gain votes.

(4): It is not fair to imply that the exception is the rule. A common way of distorting the truth is by presenting an unusual situation, and implying that this is the norm. The parties must not use extreme examples to sway opinion. And also should tell the whole story.

(5): Corporate campaigns. If employers agree to these principles, then unions should not undertake “corporate campaign” strategies designed to pressure the employer. These principles presume that both parties reach out to employees to present their case. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.

(6): Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union’s organizing committee should submit the termination to immediate arbitration. Penalties for discharging a union supporter should include quadruple back pay as well as punitive damages to discourage such conduct. The reason that multiple backpay and reinstatement is not a sufficient deterrent is because this behavior has such a drastic chilling [e]ffect on the rest of the workforce. Punitive damages as appropriate are essential to deter such conduct.

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244. *Id.*

245. *Id.*

(7): Equal time, equal access, equal posting rights and all meetings are voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer's campaign. A series of debates between management and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one on one meetings about the union between supervisors and employees. The union must be granted equal space to post literature on company property.

(8): Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.

(9): No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.

(10): Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to be respected. Neither party should engage in smear tactics.

(11): Stacking the deck. Neither party should attempt to "stack the deck." If employers accept these principles, then the union may not ethically plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.

(12): The final principle is not a specific ethical guideline, but the Golden Rule—do unto others as you would have them do to unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself. The Institute for Employee Choice is available to support and commend employers and unions who agree to adhere to these principles<sup>246</sup>

The substance of the Principles appeals to us for a number of reasons. The obvious reasons are that they provide for elections, full information, and truthfulness, and they prohibit coercion and intimidation. More important, they address the more subtle issues. The NLRA prohibits explicit threats, but any good management lawyer can make sure that the company's implicit threats are lawfully conveyed.<sup>247</sup> In addition, we support the Principles because they have one set of rules for both sides. Employees will get equal access to both sides and neither side will be able to exploit the rules to gain an advantage. While employers may bristle at inviting the union onto the premises, the elimination of

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246. Bensinger & Shubert, *supra* note 240.

247. For example, compare what an employer cannot lawfully tell its employees ("If you vote for the union there will eventually be a strike, and there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over") with what employers may lawfully tell employees, ("We will bargain in good faith, but will not agree to unreasonable union demands. If the union does not accept our offer its only choice will be to call a strike. The company hopes this does not happen, but if it does, there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over. We hope this does not happen, but it's a real concern if you vote for the union.").

corporate campaigns, which are driven by union intimidation and management's fear of the loss of business, should make an acceptable trade.

In addition to satisfying our goals, the Principles are attractive because they may soon be operationalized. While the Institute has held only one election, the UAW recently announced a plan to operate under the Principles for all new elections.<sup>248</sup> The UAW is currently in negotiations with the major multinational car manufacturers to make the Principles the method for all future elections.<sup>249</sup>

Anecdotal evidence from the one past election showed that the employees who voted did, in fact, believe that they had full information to make a choice free from intimidation.<sup>250</sup> The fact that these Principles may be used allows us to make a call for future research. We propose a commissioned study where researchers survey employees who have gone through organizing under the NLRA procedures, neutrality, and the Principles to determine if any system truly satisfies the goals outlined above.

There are, of course, some issues that need to be addressed. The Principles prohibit one-on-one supervisor-employee conversations but do not address union organizers doing the same. We would allow supervisor conversations as long as they otherwise complied with the Principles. We would also allow union organizers to have similar conversations on an employer's property. After the petition is filed, we would prohibit off-site campaigning by either side.

#### B. ENACTING THE PRINCIPLES

Finally, perhaps the most interesting issue at the heart of this Article is determining the optimal way to maximize the enforceability of the Principles. There are three possible approaches: (1) codify the Principles statutorily and impose legal sanctions for violations, (2) codify the Principles as an optional component part of the law, and provide incentives for unions and employers to agree to them and to comply, or (3) leave the Principles out of the law books, keeping their authority and enforceability entirely derived from extralegal sources. We address each of these options below.

Codifying the Principles into law with legal sanctions in place for noncompliance seems like the mechanism least likely to yield the desired results. This mechanism most closely resembles the current scheme of the

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248. *UAW Principles for Fair Union Elections*, UAW (Jan. 3, 2011), <http://www.uaw.org/articles/uaw-principles-fair-union-elections>; see Joan Silvi, *Answering UAW's Call: Doing the Right Thing*, SOLIDARITY MAG. (Jan.-Feb. 2011), <http://www.uaw.org/story/answering-uaw's-call>.

249. Paul Ingrassia, *The United Auto Workers Test Drive a New Model*, WALL ST. J. ONLINE (Feb. 6, 2011), <http://online.wsj.com/article/SB10001424052748704709304576123822184484398.html>.

250. Telephone Interview with Richard Bensinger, Co-Chair, Inst. for Emp. Choice (Feb. 7, 2011).

NLRA; implementing the Principles this way would do little more than reform a law plagued by inefficient system gaming by piling on more law ready to be equally inefficient and gamed by management and unions seeking to win. As they have done for decades under existing statutory regulation, unions and employers would have their lawyers opine on optimal ways of subverting and circumventing the rules, testing statutory language for interpretive weaknesses (for example, what is a “delay tactic” under the eighth principle—what if something has the effect of causing delay, but is done for some ulterior purpose?). The assumption some could make is that the cost of the sanction to the violator, discounted by the likelihood of being found in violation, is less than or equal to the administrative costs of investigation plus the costs of imposing those sanctions. These costs could be weighed against the benefits of circumventing the Principles. The probability that more employers and unions would make this calculus their primary means of determining whether to adhere to the Principles, and would engage in strategizing ways to subvert the Principles, would be greater under this implementation because neither unions nor employers would have any *choice* in agreeing to the terms. The contractual element of the Principles would be stripped away.

There is substantial theory and some empirical evidence to support the argument we make here that entering into contracts (with the same terms) might make unions and employers more likely to feel bound by the terms of the agreement and to conceive of their obligations to perform the terms of the agreement out of moral or social/normative constraints instead of doing the cost-benefit calculus alone.<sup>251</sup> We submit that enacting into law what really amounts to a moral obligation to “do the right thing” in union campaigns tethered with sanctions penalizing violations is likely to be as effective as music producers relying on intellectual property rights protection laws to police music pirating. The lessons learned from the Recording Industry Association of America’s difficulties fighting digital music piracy suggest that when moral obligations are framed as legal ones, with the threat of a sanction for failure to comply, less effective enforcement is likely to result.<sup>252</sup> In fact, it may be the case that building a fence (in the form of statutes) prompts those perceived as fenced out to conceive of ways of jumping over the fence, and perhaps even implicitly challenges them to do so. The fence

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251. Robert J. Bies & Tom R. Tyler, *The “Litigation Mentality” in Organizations: A Test of Alternative Psychological Explanations*, 4 *ORG. SCI.* 352, 352 (1993) (identifying different psychological factors that could explain why employees consider suing their employers); Tyler, *supra* note 1, at 70–73 (suggesting that individuals comply because of their long-term commitment to membership in a society rather than because of their short-term self-interests).

252. See Sudip Bhattacharjee et al., *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 *J. LAW & ECON.* 91, 110 (2006).

shifts the perceived responsibility for the parameters on behavior to lawmakers and diminishes the moral responsibility for violations of the *spirit* of the law.

It seems this is true for treatment of new proposals to amend labor law that do little more than add more laws. For instance, when President Obama was elected and EFCA seemed likely to pass, labor-and-employment law firms responded by releasing memoranda to their clients advising them how to maximize management's existing goals, perpetuating the status quo, and how to challenge the law directly and indirectly.<sup>253</sup> Our claim is further bolstered by recent empirical work demonstrating that a legal threat to enforce a contract purporting to obligate individuals to perform an undesirable task is slightly *less* effective than a naked request to perform the same task.<sup>254</sup>

We have a more difficult time adjudicating between the second and third proposed enforcement mechanisms than we do rejecting the first. Under the second proposed enforcement regime, employers and labor organizations would still have existing regulation setting the floor for their behavior. For the reasons discussed above, this floor is suboptimal. However, it does enjoy the undeniable advantage of augmented predictability and certainty. This should not be underestimated. If the Principles were codified as optionally available, such that both sides had to jointly register their agreement with the NLRB, creating a public certification thereof, this would create opportunities for increased enforcement through administrative channels. This would cost more, surely. What effect would it have on the parties' behavior? In part, the effect likely would be a function of the kinds of incentives offered for agreement and compliance with the Principles. Two advantages of this enforcement scheme are incentives to agree to the Principles via a centralized agency, and casting a wider net to capture more organizing drives. We propose that the incentive for agreeing to the Principles is being listed in a publicly available database (that lists all petitions filed) as having agreed to the Principles. Employers and unions that agreed would also become eligible for tax incentives and for priority bidding rights on government contracting. Failing to agree would render an employer ineligible for such incentives and government contract work, and the public record would reflect which party or parties refused to sign the agreement. Parties that fully complied with the Principles (as determined by a neutral mediator-arbitrator, as described below, in the

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253. See, e.g., ROBERT J. BATTISTA ET AL., LITTLER MENDELSON, P.C., *THE EMPLOYEE FREE CHOICE ACT: A CRITICAL ANALYSIS* (2008); PETER D. CONRAD ET AL., PROSKAUER ROSE LLP, *THE EMPLOYEE FREE CHOICE ACT: ARE YOU A TARGET?* (2008); *The EFCA, Organized Labor's Legislative Agenda and Its Impact on Your Business*, FISHER & PHILLIPS LLP (Mar. 10, 2009), <http://www.laborlawyers.com/shownews.aspx?Show=10884&Type=1122#Threat>.

254. Eigen, *supra* note 4 (manuscript at 9).

event charges were filed alleging breach, or where no charges were filed at all) would be listed on the public database as having agreed to *and* complied with the Principles. Employers or unions that breached the agreement would lose their eligibility for tax incentives and government contract bidding, and would be listed on the public site as having agreed to the Principles and then failing to comply with them.

The main advantage of this enforcement scheme is the set of options available to the parties, but this could also be a disadvantage because parties would self-select into or out of an enforcement regime we might prefer to see applied to all employers and unions. In some respects, this sorting could be viewed as a kind of proxy for prioritization for the kinds of workplaces, employment, and labor organizations that would be able to benefit. For instance, entertainment-industry guilds like the Writers' Guild of America, the Screen Actors Guild, and the Directors Guild of America likely would be in the group that would benefit from this kind of incentive scheme, but perhaps not so for entertainment-industry unions that represent "below the line" employees like the Teamsters (representing transportation and casting directors), the International Alliance of Theatrical Stage Employees, or the National Association of Broadcast Employees and Technicians. The first category of labor organizations cares more about its public reputation than does the latter. However, one way this problem could be ameliorated is by requiring unions and employers to complete a form when they submit their response to either agree to be bound by the Principles or not, which essentially would place them in a supply chain. For instance, if the Teamsters represent truck drivers of the Acme Truck Company, a company with a mostly unknown brand name, it might be difficult to discover where that company is in a supply chain. However, if Acme delivered coffee to Starbucks, Acme would be more readily discoverable because of that affiliation, making it and other similarly situated employers and unions more accountable under our proposed system.

While this enforcement scheme seems better than the first one, it still might suffer from the *moral obligation framed as a legal enforcement scheme* problem identified above. Employers and unions will still see a cost-benefit analysis as the primary framing of the question of whether to agree to the Principles in a given election. Nonetheless, in the study cited above, morally framing a *legally valenced contractual obligation* sufficiently motivated parties to conform to the agreed-upon obligation.<sup>255</sup> That is, perhaps it is the moral obligation partially connected to obeying the law, not just "living up to one's word," that makes the effects of a moral framing of contract enforceability so powerful in the cited experimental

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255. *Id.* at 27.

study. This conforms with other recent empirical research in this area.<sup>256</sup> It is therefore unclear whether this enforcement scheme would produce the benefit of the moral framing's powerful self-regulating motivation *and* the benefit of an instrumental framing's motivation. It is also unclear whether this regime is better than the one evaluated next, in which the moral component of the agreement is made independently from a codified legal obligation.

The third possible enforcement regime is perhaps the closest to a pure morally derived authority for enforcement as possible. Under this regime, the law would remain as it is now, and parties would be allowed to agree to the Principles on an ad hoc basis. The incentives to agree would be the same as they are now. This regime likely would result in the fewest number of total elections governed by the Principles, but perhaps also the lowest administrative cost of enforcement. The parties who agreed to the Principles under this regime probably would be the most likely to feel bound by the terms for moral reasons, or would otherwise have agreed because they had intended to behave in accordance with the Principles anyway, or because the employer would not have campaigned at all if indifferent to its workforce being unionized. Enforcement would be grounded in the same moral basis as some contracts are.<sup>257</sup> This should not be underestimated. It could be argued that this enforcement regime would do better than the second one *because* the moral obligation is divorced from a legal one. Perhaps where contracts are concerned, the moral obligation, derivative even from the Bible, to live up to one's word<sup>258</sup> works in spite of any positivistic power of contract obedience (that the law requires enforcement of valid contracts). Promise and doctrinal contract have clearly intertwined roots,<sup>259</sup> but there is little empirical evidence of how parties would interpret a promise like that embodied in the Principles and even less evidence of whether that promise would more likely be self-enforced with or without legal basis and obligation.

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256. Feldman & Teichman, *supra* note 4, at 25–27; Wilkinson-Ryan & Baron, *supra* note 4, at 420–23; Yuval Feldman & Tom Tyler, Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace 2 (June 7, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1133521>.

257. See CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981) (“An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence . . . [T]o abuse that confidence now is like . . . lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.”). *But see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 652–59 (1979) (discussing the decline in the acceptance of a moral basis for contractual obligations).

258. “If a man . . . takes an oath to bind himself . . . he shall not violate his word . . .” *Numbers* 30:2 (New Am. Std.).

259. Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285, 297 (2007).

In sum, it is difficult to determine whether embedding the Principles in the law as an optional, incentivized moral contract would result in less instrumentally minded decisionmaking and more moral-based decisionmaking than would leaving the Principles entirely outside of the law as a pure creature of contract. However, given the significant advantages of casting a wider net with the positive-incentive scheme identified above, especially the public accountability unavailable in the third regime-implementation option,<sup>260</sup> we espouse the second option over the third.

### C. ENFORCING AGREEMENTS TO BE BOUND BY THE PRINCIPLES

In this Subpart, we address how we envision disputes over violations of the Principles being adjudicated and resolved. The NLRB would assign a mediator to each petitioned bargaining unit in which the parties agree to the Principles. If either side alleged a violation of the Principles *before* the election were held, the mediator would mediate this dispute. If the parties were unable to resolve their dispute through this process, the mediator would render a decision that could take one of four forms. The mediator would be empowered to conduct an arbitration hearing, taking testimony and evidence in the traditional manner. The mediator-arbitrator then would determine whether the alleged offense violated the parties' agreement, and if it did, what remedy to fashion. If the offense by management was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might issue a bargaining order. The bar for such an order should be significantly lower than it is under current NLRB law. That is, the penalty associated with highly egregious violations of the Principles should be high. If the offense by the union was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might rule that no election was to be held and that the union was barred from attempting to organize the employees for up to three years. For nonegregious violations of the Principles by management or the union, or in the event that employees (not privy to the agreement itself) were found to have done something that violated the terms of the agreement, the arbitrator would be empowered to fashion awards as she deemed necessary to facilitate a fair election procedure. This might include, but certainly would not be limited to, requiring management and the union to issue joint statements, or requiring one or the other to issue unilateral statements that ameliorated any tainting effects of conduct found to violate the Principles.

After elections were held, the results would be not be released or publicized in any way for six days. Employers and unions may use this

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260. This is because it would be very difficult to ensure that all petitions—even ones in which the union does not propose agreeing to the Principles—would be tracked.



time to determine whether any violations of the Principles occurred and to bring a claim to the mediator. If no claims were lodged, after this time the results of the election would be released and both sides by default would have waived their rights to allege any violations of the Principles or to challenge any of the votes for any reason other than issues relating to interpreting intentions of voters from their ballots. If charges were filed during the six-day period, the mediator would mediate the dispute and, failing successful mediation, arbitrate in the same manner as described above. Again, the mediator-arbitrator would be empowered to issue any manner of award, including issuing a bargaining order for egregious employer violations, or an election bar for up to three years for egregious union violations.

A mediation/arbitration system like this one is likely to work best because it offers informality and flexibility, two important qualities of a dispute-resolution system for resolving claims arising out of a morally valenced contract.<sup>261</sup> More control over the process should beget more control over the resolution of disputes and should result in more creative integrative solutions than would an adjudicatory process by itself.<sup>262</sup> The opportunity for greater ownership over the dispute-resolution process and the ability to exert more influence over the outcomes of disputes should also be held out as a significant incentive for agreeing to the Principles.

There are two primary means of evaluating the effectiveness of our proposed system. First, one would expect to see an increase in the number of elections held as a percentage of petitions filed where the Principles are agreed to as compared to instances where the Principles are not agreed to. This would be a victory in and of itself. Currently, the rate at which elections are held as a proportion of petitions filed is 65% by one estimate.<sup>263</sup> Whether unions withdraw their petitions because of newly discovered information, because events that transpire that lead them to believe that they can no longer win, because the employer commits unfair labor practices that the union believes render victory impossible, or because the costs of victory appear too great, we suspect that where the Principles were agreed to, this rate would go up significantly. This would be considered a victory under the conceptualization of fairness advocated herein because more employee choice would determine the ultimate question of whether employees

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261. Roy J. Lewicki & Blair H. Sheppard, *Choosing How to Intervene: Factors Affecting the Use of Process and Outcome Control in Third Party Dispute Resolution*, 6 J. OCCUPATIONAL BEHAV. 49, 63 (1985); see also ANN DOUGLAS, *INDUSTRIAL PEACEMAKING* 3-4 (1962); RICHARD E. WALTON, *INTERPERSONAL PEACEMAKING: CONFRONTATIONS AND THIRD-PARTY CONSULTATION* 117-21 (1969).

262. Corinne Bendersky, *Organizational Dispute Resolution Systems: A Complementarities Model*, 28 ACAD. MGMT. REV. 643, 650-651 (2003).

263. Ferguson, *supra* note 77, at 6 tbl.1.

wish to be represented or not than would other considerations such as union strategy, union expenses, employer strategy, gamesmanship, or other factors that further divorce election results from true employee preferences.<sup>264</sup>

Second, we expect that employees would perceive the election procedure under the Principles as more fair. Increased perceived procedural fairness likely would lead to greater acceptance of the final outcome and, hence, less industrial strife.<sup>265</sup> As mentioned earlier, the UAW has proposed following the Principles.<sup>266</sup> Anecdotally, reports indicate improved perceived fairness, but no empirical work has been done to date that shows this to be true.<sup>267</sup> Ideally, it would be useful to observe how employees regard the process under the Principles as compared to traditional campaigns pursuant to the NLRA (the current status quo) and as compared to the process when employers sign neutrality agreements. No such study has been done as yet, but such data would be instrumental in evaluating the ultimate effectiveness of the reform proposed herein.

#### CONCLUSION

The right to collectively organize in the workplace is an important one, even when union density is at such dismal levels. Public reaction to then-recently elected Governor Walker's proposal in Wisconsin to eviscerate collective-bargaining rights for some public-sector unions shows that even if unions are unpopular, Americans seem to believe in the right to vote for or against a union and collectively bargain with employers.<sup>268</sup> This core belief in the principle of the right to democratically elect one's representatives—in public office or in the workplace—is at the heart of the conceptualization of fairness espoused herein. We propose aiming for revised procedures that most accord with this American ideal, without regard to election results. The focus should be on making the process as fair and just as possible, independently of the goal of turning around dwindling union-density trends. The law should not simply perform the function of a teeter-totter—pushing win-rates up and then, at some time in the future when union density rises, pushing rates back down. This position should not be confused for a

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264. The rate of contracts reached in the data noted in Ferguson, *supra* note 77, is only about 38% of the petitions filed. This rate would hopefully also go up significantly for petitions guided by the Principles as a function of the instances in which unions won elections.

265. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993).

266. Silvi, *supra* note 248.

267. Bensinger, *supra* note 243.

268. See Lydia Saad, *Scaling Back State Programs is Least of Three Fiscal Evils*, GALLUP (Feb. 22, 2011), <http://www.gallup.com/poll/146276/Scaling-Back-State-Programs-Least-Three-Fiscal-Evils.aspx> (finding 61% of Americans would oppose the kind of bill proposed in Wisconsin).

desire to see union rates remain low or to decline further. To the contrary, the Authors recognize that there are serious gains that ought not to be overlooked that come from collective democratic participation by workers.<sup>269</sup> However, reforming a system by presuming what employees want because they should want it seems backwards and even counterproductive if the end goal is increasing union density. Perhaps the focus ought to be shifted away from counting union shops and win rates, and towards revising the electoral process for collective representation in the workplace—something that American citizens seem to regard as a sacred component of our democracy.

This does not stop us from wondering what effect the Principles incorporated into law as proposed would have on union density. As noted above, we expect the percentage of elections held as a function of petitions filed to go up, but there could also be a rise in the number of petitions filed. The leverage of the public specter of dishonesty or failure to abide by American principles of letting employees fairly vote up or down on a union could incentivize labor to file more petitions. Increasing the rate of petitions filed could inflate the denominator such that even if win rates remained constant, the win-rate percentage could drop. The question is whether improved procedural fairness will end up reflecting what unionists have told us—that employees really do want to be represented by unions but have been afraid to vote their true desires for fear of retribution. Or, will employers *voluntarily* imposing on themselves procedurally fair conditions signal the opposite of threats of retribution—that the employer is willing to respond reasonably to employee concerns—and *lower* the likelihood of unions winning more elections? An alternative signal to be gleaned from an employer signing on to the Principles is that it took the threat of unionization to make the employer *honest*. Or it could signal that the employer and union are able to agree on things contractually, so maybe employees could envision life under a collective-bargaining agreement as an improvement. Such signals would increase the likelihood of unions winning more elections. Clearly, more empirical research on the UAW's experience with the Principles is warranted, if not urgently needed, in order to increase the chances that this proposal is taken seriously—something that could be critical as a means of reforming labor law without political loggerheads.

A more interesting question is whether the Principles are applicable to other areas of employment and, ultimately, other areas of law. We believe that in the employment context, the adoption of a Principles-like standard could lead to a more efficient and humane work environment beneficial to employers, employees, taxpayers, and an overburdened

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269. See, e.g., Clegg, *supra* note 53, at 311; John R. Commons, *Institutional Economics*, 26 AM. ECON. REV. 237, 247 (1936).

judicial system. Perhaps the only ones who would not benefit would be labor and employment lawyers.

An examination of the nonunionized private sector reveals that the law alone incentivizes management to behave in ways that are risk averse because the floor of behavior the law creates makes exceeding the minimum inadvisable. In fact, there are situations in which enlightened human-resource procedures exceed the law's protections, but they put the employer at risk for legal action and are therefore discouraged or avoided in spite of their clear benefits. For example, in sexual-harassment law, employment policies that make it easier for employees to report harassment (such as 1-800 reporting numbers) *increase* the likelihood of employer exposure to liability.<sup>270</sup> Some wage-and-hour laws prohibit employees and employers from agreeing to things that might be mutually beneficial without being exploitive, such as longer work days in exchange for time off, tip pooling, and modifying exempt and nonexempt statuses.<sup>271</sup> There are situations in which both employees and employers would like to create their own work rules but are prohibited by law from doing so.<sup>272</sup> We contend that employers who agree to the Principles should be able to enter into contracts with the employees that benefit all concerned. Thus, instead of enforcing laws drafted with the most unethical employers in mind, why not let ethical employers establish contracts with employees that are fair and benefit both?

In the 1930s, labor and management were enemies. Each side thought it needed weapons to ensure peace. Today, the enemy is neither labor nor management. Instead, increased global competition, diminishing natural resources, environmental concerns, and sustaining a high standard of living are what both labor and capital must battle. Perhaps the Authors are overly optimistic, but one way to win this battle may be to have the former enemies stop trying to manipulate the law, and instead be guided by ethics, in order to compete with their real rivals. The hope is that affording parties the opportunity to succeed in this way will create an avenue to test whether we are overly optimistic. The costs of finding out are low, and the rewards could be significant.

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270. David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1294 (2001) (arguing that providing reporting mechanisms makes employees more likely to report harassment, making it harder for employers to satisfy their duty of care).

271. *See* 29 U.S.C. § 213 (2010).

272. *Id.*