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## INFORMATION AND THE MARKET FOR UNION REPRESENTATION

Matthew T. Bodie\*

*In its oversight of union representation elections, the National Labor Relations Board seeks to create “laboratory conditions” to determine “the uninhibited desires” of employees. Despite its comprehensive regulation of union and employer campaign conduct, the Board fails to insure that employees get basic information relating to their decision. This Article proposes a new paradigm for the representation decision: that of a purchase of representation services. This “purchase of services” model demonstrates that the market for union representation lacks the standard features required under economic theory to drive information into the marketplace. The resulting information deficiencies may render employees poorly equipped to make their representation decision.*

### INTRODUCTION

In 2006 unions represented roughly 8.7 million private-sector employees.<sup>1</sup> Although a substantial number, the percentage of private-sector employees who are represented by unions has been steadily and seemingly inexorably falling.<sup>2</sup> The pressure of continued losses has driven union leaders to make organizing – namely, the recruiting of new members – their top priority. In 1995, the AFL-CIO elected John Sweeney on a platform of increased outreach and renewed

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<sup>1</sup> U.S. Dep’t of Labor, Bureau of Labor Statistics, News Release, Union Membership in 2006, Table 3, January 25, 2007, *available at*: <http://www.bls.gov/news.release/union2.t03.htm> [hereinafter 2007 BLS News Release].

<sup>2</sup> At their peak in the 1950s, unions represented more than a third of the workforce. MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 (1987); LEO TROY & NEIL SHEFLIN, *UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE & FINANCE DIRECTORY* app. A at A-1 (1985). By 1983, only a fifth of the workforce was unionized; now, only twelve percent are union members. 2007 BLS News Release, *supra* note 1.

organizing efforts.<sup>3</sup> His tenure has been marked by a greater devotion to organizing efforts.<sup>4</sup> Despite these efforts, union membership continued to decline. By 2005, there was sufficient disenchantment with Sweeney's efforts that several of the biggest unions in America, including the Service Employees International Union (SEIU) and the Teamsters, left the AFL-CIO and formed a new coalition specifically focused on organizing efforts.<sup>5</sup>

In many ways, union organizing difficulties resemble the problems faced generally by businesses in service industries. Organizing entails union agents working to bring a group of employees under the union's representational aegis. In essence, they are attempting to sell employees on the benefits that union representation will bring. Unlike other services, however, union representation must be chosen collectively by employees as a unit.

The National Labor Relations Act (NLRA) provides the legal framework for private-sector employees to choose whether to have this collective representation. Under the NLRA, a majority vote determines whether the employees will or will not have a labor organization<sup>6</sup> as their representative at the bargaining table.<sup>7</sup> Although the vote is a collective process, each employee must make an individual choice – through a secret ballot – as to whether she wants such representation. The National Labor Relations Board has famously likened the representation election process to “a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”<sup>8</sup>

The Board has spent nearly sixty years refining the conditions of this laboratory. Countless Board decisions have parsed what an employer may predict about the effects of unionization; what the employer may promise to its employees during the pre-election “campaign” period; what unions may promise to prospective members; and what effects a misrepresentation will have on the parties. What is notable for its absence, however, is the lack of any requirements that certain information be disclosed to employees. Instead, the Board's primary concern has been curtailing certain types of information that it deems to have a coercive or otherwise adulterating influence. The Board implicitly assumes that the campaign between the union (in favor of its election

<sup>3</sup> Marion Crain & Ken Matheney, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1784-85 (2001).

<sup>4</sup> *Id.* at 1785 (“Since Sweeney's ascendance to the presidency . . . , the AFL-CIO has made significant progress in revitalizing itself through a renewed commitment to organizing.”).

<sup>5</sup> George Raine, *Dissident Unions Put the Focus on Organizing*, S.F. CHRON., July 31, 2005, at E1.

<sup>6</sup> The Act defines a “labor organization” as “any organization of any kind . . . in which employee participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (2000).

<sup>7</sup> *Id.* § 159.

<sup>8</sup> *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

petition) and the employer (presumably opposed to the election petition) will generate sufficient information for the employees to make an informed and rational decision.

This article challenges that assumption. In evaluating the regulation of the representation campaign, both the Board and the majority of commentators have based that their analyses of representation elections on the model of a laboratory or, in quite a contrast, a political campaign.<sup>9</sup> Instead of seeing the representation election as the end result of a political campaign, or a scientific experiment conducted in the lab, the election should be treated as a collective economic decision about whether to engage in a certain kind of activity. It is, in fact, a choice to “purchase” union representation services. Viewed in this manner, it becomes clear that the actors in the “market” – namely, unions and employers – may not always provide the information necessary for employees to make rational decisions about union representation.

In Part I, the article considers the current regulatory framework for representation elections. It discusses the two paradigms that have influenced election regulation: the scientific laboratory and the political election. It then explores important academic commentary that has suggested new approaches to this framework. Part II describes why the choice for union representation should be viewed as an economic decision, rather than a collective political decision or a scientific experiment. Part III discusses reasons to suspect that employees are not getting the information they need to make rational economic decisions about union representation. Part IV concludes with initial thoughts on addressing the information problems in the market for union representation.

#### PART I: REGULATING THE REPRESENTATION ELECTION

Under the system established by the NLRA, the representation process begins with a petition – filed by employees, a labor organization, or an employer – avowing that a group of employees wish to be represented by a particular labor organization. The petition proposes a particular “bargaining unit” of employees – namely, a group of employees that are deemed to share

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<sup>9</sup> See, e.g., Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 68 (1964) (“[R]epresentation elections are closely akin to political contests.”); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 497 (1993) (noting that “election rules bear the stamp of an analogy between political representation and labor representation”).

collective interests in the terms and conditions of employment.<sup>10</sup> The petition is generally accompanied by evidence that employees support an election to determine the labor organization's status. At least thirty percent of the employees in the proposed bargaining unit must support an election before the Board will process the petition further.<sup>11</sup> Pre-election hearings will be held if the employer or employees wish to challenge the appropriateness of the bargaining unit proposed by the petition.<sup>12</sup>

If the Board determines that the unit is appropriate, it will move ahead with a secret ballot election.<sup>13</sup> If a majority of the employees casting ballots vote in favor of representation, the labor organization is certified as the collective bargaining representative for all of the employees in the unit.<sup>14</sup> Although dissenting employees are not forced to join the union, they may be forced to pay a pro rata share of the collective representation costs incurred on their behalf.<sup>15</sup> Employers or unions can challenge the results of the election based on the eligibility of certain voters or conduct that improperly influenced the election.<sup>16</sup> The Board then conducts an investigation, which may include a hearing for the collection of evidence.<sup>17</sup> The Director then either certifies the election results or voids the results and orders a new election. These orders can be appealed to the five-member Board and then to a United States Circuit Court of Appeals.

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<sup>10</sup> See *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966) (citing *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964)). A bargaining unit can consist of a small number of employees with a particular job description, or it can be all of an employer's employees.

<sup>11</sup> See 29 C.F.R. § 101.18(a) (2006).

<sup>12</sup> *Id.* § 101.20(a). At the end of the hearing, the Board's Regional Director will issue a decision about the appropriateness of the bargaining unit. *Id.* § 101.21(a). The parties may ask the Board to review this decision. *Id.* § 101.21(d). However, the Board has the final say; the pre-election ruling is not reviewable prior to the election. If the employer wishes to challenge the appropriateness of the Board's ruling after the union has won the election, it must refuse to negotiate with the union. The subsequent unfair labor practice proceedings then provide an opportunity for court review. See *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940) (holding that Board's orders in election certification proceedings were not final orders subject to judicial review); MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 299-300 (5th ed. 2003) (discussing the process for employer judicial review).

<sup>13</sup> *Id.* § 101.21.

<sup>14</sup> See 29 U.S.C. § 159(a) (2000).

<sup>15</sup> 29 U.S.C. § 158(a)(3) (2000) (permitting employers to require union membership as a condition of employment); *NLRB v. General Motors Corp.*, 373 U.S. 734, 744-45 (1963) (permitting "agency shop" agreements whereby unions charge non-members for the costs of collective representation).

<sup>16</sup> 29 C.F.R. § 102.69(a) (2006).

<sup>17</sup> *Id.* § 102.69(c), (e).

The NLRA itself does not provide many specifics on regulating the election process. The 1935 Wagner Act<sup>18</sup> only provided that the Board designate a representative selected by a majority of the unit employees.<sup>19</sup> Initially, the Board deemed evidence of employee sentiment presented at a hearing sufficient to certify a union as representative.<sup>20</sup> However, by 1939 the Board had decided to require secret ballot elections to determine the will of the majority.<sup>21</sup> This change was codified in the 1947 Taft-Hartley amendments, which provide that if a question of representation exists, the Board “shall direct an election by secret ballot and shall certify the results thereof.”<sup>22</sup> Beyond the need for a secret ballot, the NLRA says little about the election or the regulation of the period prior to the election known as the “campaign period.”

Thus, the regulation of the election process was largely left to the Board to implement. What exactly could be said, and what could not be said? What would be the ramifications of prohibited conduct? The Board has felt the pull of two competing concerns in this area: a concern to protect employees from undue influence, and a concern to let interested parties speak their mind. It was clear that under § 8(a)(1) of the NLRA, employers could not “interfere with, restrain, or coerce” employees who were exercising rights protected under § 7 of the Act. If an employer’s campaign activities rose to the level of a § 8(a)(1) violation, they were undoubtedly prohibited. But what about campaign activity that might intimidate or coerce employees, but did not violate § 8(a)(1)? Congress had chosen to carve out a fairly big chunk of such conduct for protection through § 8(c) of the NLRA. According to § 8(c), “the expression of any views, argument, or opinion” could not be deemed to an unfair labor practice “if such expression contain[ed] no threat of reprisal or force or promise of benefit.”<sup>23</sup> However, in *General Shoe Corp.*, the Board established that conduct protected by § 8(c) could nevertheless be grounds for setting aside an election. The Board rejected the claim that § 8(c) prohibited the Board from relying on conduct other than an unfair labor practice to overturn an election.<sup>24</sup> Since the text of § 8(c) only spoke to the definition of an unfair labor practice, the Board did not view it as a limitation on the grounds for overturning an election. Overturning an election was not akin to an unfair labor practice.

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<sup>18</sup> The NLRA was created by the Wagner Act and has since been amended, most notably by the 1947 Taft-Hartley Act.

<sup>19</sup> See Becker *supra* note CB1, at 507.

<sup>20</sup> *Id.* (noting that for the Board’s first five years roughly a quarter of all unions were certified as representative without an election).

<sup>21</sup> *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939).

<sup>22</sup> 29 U.S.C. § 159(c) (2000).

<sup>23</sup> 29 U.S.C. § 158(c) (2000).

<sup>24</sup> *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

Having established a broad range of potential regulation, the Board has embarked on a circuitous journey of campaign regulation. As noted above, however, the twin concerns of freedom from coercion and freedom of expression have marked the Board's path. Each concern has become manifest in paradigms used by the Board in making their regulatory policies: the paradigms of laboratory conditions and political elections. These two paradigms are considered more specifically below.

#### *A. The Laboratory Conditions Model*

In *General Shoe Corp.*, the Board established that "[i]n election proceedings, it is the Board's duty to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees."<sup>25</sup> As noted above, *General Shoe* made it clear that unfair labor practices would not be the sole grounds for overturning an election. The case was not merely about the statutory application of § 8(c) in the election context, however. It set forth a standard, a model, even a philosophy, about how to regulate the representation campaign. The metaphor is one of scientific process: a "laboratory" for an "experiment" with "conditions as nearly ideal as possible" to determine the "uninhibited desires" of employees. In deciding whether to invalidate an election, the Board stated that "our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative."<sup>26</sup>

The laboratory conditions model has led to policies designed to prevent undue influences on employees. Three of these policies – prohibitions against coercion, promises or grants of benefits, and inflammatory appeals – are discussed below.

*1. Coercion.* The Board's prohibitions against employer coercion in the election context build on § 8(a)(1) of the Act, which makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of [their collective bargaining] rights."<sup>27</sup> Any effort to compel the employee to vote a certain way is deemed not only an infringement on the laboratory conditions but also a trespass against employees' protected rights. Although threats of physical violence are certainly prohibited, the more common concern is threats of economic coercion by the employer. An employer may not threaten to fire employees or change their working

<sup>25</sup> *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

<sup>26</sup> *Id.* at 126 (quoting P.D. Gwaltney, 74 N.L.R.B. 371 (1947)). This sentiment is probably based on the Act's Findings and Policies Section, which states that one of the declared policies of the Act is to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." 29 U.S.C. § 151 (2000).

<sup>27</sup> *Id.* § 158(a)(1).

conditions if they support the union.<sup>28</sup> A threat to close a plant because of union activity is also prohibited.<sup>29</sup>

However, the line becomes fuzzier when an employer is trying to convince employees of the negative consequences of union representation. The employer is permitted to inform employees about the employer's views on unionization, and unionization may in fact lead to certain events that would make it more likely for the employer to close a plant, perhaps out of economic necessity. Such information would be important, perhaps critical, to an employee's representation decision. But an employer could easily frame threats and other coercion as campaign "predictions." Because the employer has the ultimate control over the fate of the plant, the employer's prediction looks more like a threat. Thus, any regulation in this area must balance the free speech rights of the employer with the rights of employees to be free from economic coercion.

The Supreme Court broadly demarcated the boundaries of threat and prediction in *NLRB v. Gissel Packing Co.*<sup>30</sup> The Court held that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit."<sup>31</sup> An employer may even make a prediction about the impact unionization would have on the company. However, such a prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."<sup>32</sup> Any hint that the "prediction" is instead a statement about what an employer might do solely on its own initiative would render such a prediction impermissible.

In practice, the difference between permissible predictions and unlawful threats has often rested on "fine distinctions."<sup>33</sup> Generally, an employer is allowed to make purely objective statements about what has happened in other unionized companies or what the employer's customers have stated with regard to the effects of unionization.<sup>34</sup> However, any interpretation of such "facts" that casts unionization in a negative light is apt to turn the prediction into coercion. The Board and the U.S. Circuit Courts have often differed on where this line is

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<sup>28</sup> See *E.W. Grobbel Sons*, 322 N.L.R.B. 304 (1996) (holding that a discontinuance of benefits was an unlawful reprisal).

<sup>29</sup> However, the employer may in fact shut down the plant after the election. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965).

<sup>30</sup> 395 U.S. 575 (1969).

<sup>31</sup> *Id.* at 618.

<sup>32</sup> *Id.*

<sup>33</sup> PATRICK HARDIN & JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 131 (4th ed. 2001).

<sup>34</sup> *Id.* at 130-31.



to be drawn. For example, in *DTR Industries*, the Board found that an employer violated § 8(a)(1) through its pre-election letter which stated “our business would automatically be reduced if the union wins the election.”<sup>35</sup> However, the Sixth Circuit refused enforcement, finding the letter to be a permissible prediction based on objective fact.<sup>36</sup>

The Board has also found predictions about the futility of union organizing are generally impermissible threats. The Board reads such predictions as threats to engage in bad-faith bargaining and therefore threats to engage in illegal activity.<sup>37</sup> However, employers are permitted to describe their own rights and remedies under the NLRA, even if such descriptions paint a gloomy picture of unionization. For example, in what might be characterized as the “bargaining from scratch” argument, employers may tell employees that they are not required to agree to anything when bargaining with the union, and that they have as much a right to ask for wage and benefit reductions as the union has to ask for increases.<sup>38</sup> However, an employer may not use this assessment as a threat to bargain in bad faith or a threat to reduce benefits illegally prior to bargaining.<sup>39</sup> Similarly, an employer may offer an opinion about the possibility of union-called strikes, and may note that it has the right to permanently replace employees who go out on strike. Predictions of violence are also prohibited if depicted as the inevitable consequence of unionization. However, the Board has upheld an employer’s right to state during a campaign that the union might send someone out to break employees’ legs in order to collect dues.<sup>40</sup>

Ultimately, there is no clear line between impermissible threats and permissible campaign rhetoric. The Board has emphasized the need to look at the totality of the circumstances in figuring out where employer campaign conduct falls. If the overall campaign has had a tendency to threaten employees with possible violations of their collective rights, then the Board will find a § 8(a)(1) violation and overturn the election. However, such determinations, based as they are on a multi-factor contextual test, will be subject to indeterminacy and uncertainty. As such, they threaten either to under-deter coercive threats or over-deter the provision of information that may be material to the employees’ decision.

2. *Promises and Grants of Benefits.* In keeping with its efforts to protect the “uninhibited desires” of employees, the NLRA also prohibits bribery. The

<sup>35</sup> *DTR Industries, Inc.*, 311 N.L.R.B. 833 (1993), *enforcement denied*, 39 F.3d 106 (6<sup>th</sup> Cir. 1994).

<sup>36</sup> *DTR Industries, Inc., v. NLRB*, 39 F.3d 106, 115 (6<sup>th</sup> Cir. 1994).

<sup>37</sup> *See, e.g.*, *American Greetings Corp.*, 146 N.L.R.B. 1440, 1445 n.4 (1964).

<sup>38</sup> *See Fern Terrace Lodge of Bowling Green*, 297 N.L.R.B. 8 (1989).

<sup>39</sup> *See, e.g.*, *Golden Eagle Spotting Co.*, 319 N.L.R.B. 64 (1995); *Advo Systems*, 297 N.L.R.B. 926 (1990).

<sup>40</sup> *Sears Roebuck & Co.*, 305 N.L.R.B. 193 (1991).

employer may not promise to better employees' terms and conditions in exchange for support of or opposition to the union. In a famous passage, the Supreme Court described the rationale for the prohibition this way:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged.<sup>41</sup>

The Board and the courts have interpreted § 8(a)(1) to prohibit suspiciously-timed benefits even when no strings are explicitly attached. In order to provide its employees with improved terms of employment during the course of the representation campaign, the employer must show that its actions were motivated by factors other than the campaign.<sup>42</sup> Clear evidence that the employer had been planning such an improvement before notice of the campaign will allow the employer to proceed. But if the benefit is discretionary, and the employer's decision not dictated by its previous behavior, the Board may very well find an implicit attempt to interfere with the campaign. So too may efforts by an employer to solicit or remedy employee grievances be deemed impermissible interference.<sup>43</sup> The Board has determined that suggestion boxes and employee hotlines may amount to an implied promise to remedy employee grievances and thereby would be impermissible under § 8(a)(1).<sup>44</sup> However, it should also be noted that any efforts to scale back on benefits that would have otherwise been granted (absent the campaign) would also be a § 8(a)(1) violation. Thus, employers must tread carefully in this area: they may be liable for both decisions to grant benefits and decisions not to grant benefits, depending on the circumstances.

Union promises about securing certain terms and conditions have been held to be permissible, since employees, in the Board's view, recognize that such promises are "dependent on contingencies beyond the Union's control."<sup>45</sup> However, unions are not permitted to offer tangible, valuable benefits to employees in the context of a representation campaign. Elections have been invalidated after union gifts of life insurance coverage,<sup>46</sup> jackets,<sup>47</sup> hats and

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<sup>41</sup> NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

<sup>42</sup> American Sunroof Corp., 248 N.L.R.B. 748 (1980), *enforced in part*, 667 F.2d 20 (6th Cir. 1981).

<sup>43</sup> *See, e.g.*, Bell Halter, Inc., 276 N.L.R.B. 1208 (1985).

<sup>44</sup> *See* Torbitt & Castleman, Inc., 320 N.L.R.B. 907 (1996).

<sup>45</sup> Smith Co., 192 N.L.R.B. 1098, 1101 (1971).

<sup>46</sup> Wagner Elec. Corp., 167 N.L.R.B. 532 (1967).

<sup>47</sup> Owens-Illinois, Inc., 271 N.L.R.B. 1235 (1984).

shirts,<sup>48</sup> and alcoholic drinks.<sup>49</sup> Here, too, however, there has been indeterminacy. One court ruled that a union's promise to hold "the biggest party in the history of Texas" if it won was an impermissible inducement,<sup>50</sup> while another held that a promise of a victory dinner dance was not objectionable.<sup>51</sup> The Board and the courts have also wrestled over the permissibility of union lawsuits against employers on behalf of employees in the midst of a representation campaign.<sup>52</sup>

Union offers to waive employee initiation fees have received sustained scrutiny from the Board and the courts. The basic principle was established in *NLRB v. Savair Manufacturing Co.*,<sup>53</sup> which held that unions cannot offer to waive initiation fees for employees who sign authorization cards before an election.<sup>54</sup> The Court held that such a practice would allow the union to "buy endorsements and paint a false portrait of employee support during its election campaign."<sup>55</sup> However, the Court's ruling did allow for the waiver of initiation fees more generally: specifically, the waiver had to be open "not only to those who have signed up with the union before an election but also those who join after the election."<sup>56</sup> As a result, the Board and circuit courts have been left to parse exactly what a union may say in conveying the waiver during the campaign. The Board and the Seventh Circuit found the union's waiver unobjectionable when it stated that it "usually does not charge an Initiation Fee" until some time after the election, despite the "usually."<sup>57</sup> However, when a union offered to waive fees only to "charter members" without explaining the term,<sup>58</sup> or said that fees would be waived for "anyone joining now, during this campaign,"<sup>59</sup> such promises were held to violate laboratory principles. The Board permits unions to clarify or correct objectionable waiver offers but holds them to a fairly high standard of clarity.<sup>60</sup>

<sup>48</sup> *NLRB v. Shrader's, Inc.*, 928 F.2d 194 (6th Cir. 1991).

<sup>49</sup> *Revco D.S. v. NLRB*, 830 F.2d 70 (6th Cir. 1987).

<sup>50</sup> *Trencor, Inc. v. NLRB*, 110 F.3d 268, 272 (5th Cir. 1997).

<sup>51</sup> *NLRB v. L & J Equipment Co.*, 745 F.2d 224 (3d Cir. 1984).

<sup>52</sup> *See, e.g., Nestle Ice Cream v. NLRB*, 46 F.3d 578, 584 (6<sup>th</sup> Cir. 1995) (concluding that union lawsuit on behalf of employees for overtime pay was an impermissible bribe).

<sup>53</sup> 414 U.S. 270 (1973).

<sup>54</sup> *Id.* at 277.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 272 n.4.

<sup>57</sup> *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7<sup>th</sup> Cir. 1977), *enforcing* 225 N.L.R.B. 971 (1976).

<sup>58</sup> *Inland Shoe Mfg. Co.*, 211 N.L.R.B. 724 (1974).

<sup>59</sup> *Crane Co.*, 225 N.L.R.B. 657 (1976).

<sup>60</sup> *See, e.g., Claxton Mfg. Co.*, 258 N.L.R.B. 417 (1981) (holding that letter promising no initiation fees "as of this day" was too ambiguous to clarify earlier impermissible waiver offer). An interesting twist on the *Savair* line of cases involves one union's requirement that a majority of employees prepay a reduced initiation fee and one month's dues in order for the union to file

3. *Inflammatory appeals.* As part of the laboratory conditions doctrine, the Board prohibits appeals to racial prejudice or pride that it deems too “inflammatory” for the campaign. The seminal case in this area is *Sewell Manufacturing Co.*,<sup>61</sup> in which the employer appealed to racial prejudice in its anti-union campaign efforts. The employer linked the union to unrelated desegregation efforts and used a picture of a white union official dancing with a black woman in its campaign literature.<sup>62</sup> The Board found such conduct to be grounds for a new election. According to the Board, racial appeals were only permissible if they were truthful, germane to the election, and not overly inflammatory.<sup>63</sup>

The *Sewell* standard has resulted in a hodge-podge of rulings that, as in other areas, lack the clarity and coherence necessary for uniform application. The Board has generally applied a more lenient standard to appeals of racial pride and solidarity; indeed, such appeals may be a legitimate part of an effort to improve terms of pay and working conditions.<sup>64</sup> However, the U.S. Courts of Appeal have been less forgiving and have clashed with the Board about such campaign tactics.<sup>65</sup> The Board has also generally held that appeals to racial prejudice have to be “sustained” in order to meet the prohibited threshold, causing further disagreement. Here too circuit courts have been more willing to overturn elections based on racist remarks despite the Board’s willingness to tolerate limited instantiations of such behavior.<sup>66</sup> The vague standards,

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an election petition. *Aladdin Hotel Corp.*, 229 N.L.R.B. 499 (1977). If the union lost the election, the prepaid amounts were forfeit to the union in order to pay for the costs of the campaign. If the union won the election, it opened up the reduced initiation fees to all employees for a period of time after the election. The Board, in a 3-2 decision, upheld the policy, finding that it offered the reduced initiation fee before and after the election. *Id.* at 500. In dissent, two members argued that the lock-in and forfeiture provisions would interfere with employees freedom of choice. *Id.* at 501-02 (Members Penello and Walther, dissenting). The Ninth Circuit declined to enforce the Board’s order after finding the union’s letter to be ambiguous as to the timing of the waiver offer. *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978).

<sup>61</sup> 138 N.L.R.B. 66 (1962).

<sup>62</sup> *Id.* at 67.

<sup>63</sup> *Id.* at 71-72.

<sup>64</sup> *See, e.g.*, *Baltimore Luggage Co.*, 162 N.L.R.B. 1230, 1233-34 (1967) (noting that appeals to racial unity may be “directed at undoing disadvantages historically imposed” and may be a way to “unify groups of employees by focusing group attention on common problems”).

<sup>65</sup> *See, e.g.*, *NLRB v. Schapiro & Whitehouse*, 356 F.2d 675 (4th Cir. 1966) (refusing to enforce bargaining order because of appeals to racial pride); *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994) (denying enforcement of a bargaining order based on the union’s use of a letter by a Japanese businessman which allegedly inflamed racial tensions); *Case Farms v. NLRB*, 128 F.3d 841, 850 (4th Cir. 1991) (Willams, J., concurring in judgment) (expressing “concern with the Board’s apparent disregard for the decisions of the Circuit Courts” in matters of concerning inflammatory racial appeals).

<sup>66</sup> *See, e.g.*, *M&M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987); *NLRB v. Eurodrive*, 724 F.2d 556 (6th Cir. 1984); *NLRB v. Triplex Mfg. Co.*, 701 F.2d 703 (7th Cir. 1983). *Cf.*

combined with the concern that legitimate speech may be prohibited, have led to calls for reform of this doctrine.<sup>67</sup>

### *B. The Political Election Model*

In resolving representation campaign questions, the Board uses the laboratory conditions model as its express paradigm.<sup>68</sup> However, courts and commentators have pointed to another paradigm that also influences the Board's approach: that of a political campaign. This is no accident. Supporters of the Wagner Act, including Senator Wagner himself, used the metaphor of "workplace democracy" in their rhetoric.<sup>69</sup> Linking unionization to such American ideals as democracy, representation, and freedom of choice served to rebut concerns that the Wagner Act violated free-market principles and was therefore anti-American.<sup>70</sup> As a result, the notion of political democracy, not a clinical laboratory, served as the foundation for the Act. The Act itself highlights this in its preamble, which describes the Act as "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."<sup>71</sup>

The rhetorical emphasis on workplace democracy carried over into the procedural specifics. Just as representatives are elected through secret ballot elections, so would workers select their representatives. The NLRA initially provided that employees would choose their representatives through secret ballot elections or "any other suitable method to ascertain [sic] such

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Clearwater Transport, Inc. v. NLRB, 133 F.3d 1004, 1010 (7<sup>th</sup> Cir. 1998) (voicing a "strong objection" to the NLRB's "seemingly casual reading" of past precedent in such cases).

<sup>67</sup> See, e.g., Shepard Tissue, Inc., 326 NLRB 369, 369-73 (1998) (Gould, Chairman, concurring) (arguing for a new approach to the *Sewell* doctrine).

<sup>68</sup> The "FLB-NLRB" database on Westlaw, which includes NLRB administrative law judge decisions from 1990, Board decisions from 1935, and related federal court decisions, finds 852 decisions using the term "laboratory conditions."

<sup>69</sup> For example, Senator Wagner stated during Congressional hearings, "That is just the very purpose of this legislation, to provide industrial democracy." National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 642 (1935) [hereinafter 1935 NLRA Senate Hearings] (statement of Harvey J. Kelly, American Newspaper Publishers Association), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1617, 2028. See also 79 CONG. REC. 9691 (1935) (statement of Rep. Withrow), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, *supra*, at 3132 (noting that "self-government through fairly chosen representatives" was an "inherent" American right); Senator Robert F. Wagner, Address Before the National Democratic Forum (May 8, 1937), quoted in Leon H. Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT: AFTER TEN YEARS 5, 13 (Louis G. Silverberg ed., 1945) ("[T]here can be no more democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote.").

<sup>70</sup> Becker, *supra* note CB1, at 496.

<sup>71</sup> 29 U.S.C. § 151 (2000).

representatives.”<sup>72</sup> Even though the Wagner Act did not originally provide for the secret ballot election as the sole means of establishing an employee representative, Wagner assumed such elections in defending the Act during the hearings.<sup>73</sup> The Taft-Hartley Act eventually codified the secret ballot as the sole means of selection.<sup>74</sup>

Courts and commentators have latched on to the political campaign as the salient analog to the union election campaign. In its review of election procedures and employer speech, the Supreme Court has characterized the employee’s choice as the equivalent of a political election.<sup>75</sup> Moreover, numerous commentators have either made the comparison directly<sup>76</sup> or noted the comparison made by others.<sup>77</sup> The undercurrent of this analogy is most likely responsible for some of the contradictions and anomalies we see in Board regulation of the election campaign. Below I discuss three examples of policies that seem to derive their justification from the political election analogy: the employer as “candidate,” misrepresentations, and information regulation and disclosure.

*1. Employer as Candidate.* In a political election, two or more candidates compete against each other to win a particular position. If only one candidate is running, the election is uncontested. The union election thus runs into a particularly thorny problem if it is to be analogized to a political election: there is generally only one union seeking to represent the employees.

This dissonance has been resolved by treating the employer as a party to and, in some ways, as a competing candidate to the union in the election. The

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<sup>72</sup> Original NLRA § 9(c), 49 Stat. at 453.

<sup>73</sup> 1935 NLRA Senate Hearings, *supra* note NLRAH, at 642 (statement of Harvey J. Kelly, American Newspaper Publishers Association), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note NLRAH, at 1617, 2028 (“[A]s to ... representation of the workers you cannot have any more genuine democracy than this. We say under Government supervision let the workers themselves ... go into a booth and secretly vote, as they do for their political representatives in a secret ballot, to select their choice.” (Senator Wagner speaking)).

<sup>74</sup> 29 U.S.C. § 159(c) (2000).

<sup>75</sup> *See, e.g.*, NLRB v. A.J. Tower Co., 329 U.S. 324, 331 (1946) (comparing the process for challenging ineligible voters under Board rules to the process used in political elections); Thomas v. Collins, 323 U.S. 516, 546 (1945) (Jackson, J., concurring) (“The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation.”).

<sup>76</sup> *See, e.g.*, Bok, *supra* note DB1, at 68 (“[R]epresentation elections are closely akin to political contests.”); Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB’s Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204, 206 n.11 (2002) (“In this way, representation elections mirror political elections.”).

<sup>77</sup> Becker, *supra* note CB1, at 497 (noting that “election rules bear the stamp of an analogy between political representation and labor representation”); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 415 (1995) (noting that representation elections have been “reconceptualized as analogous to political elections”).

Board has always treated employers as parties to an election: they can file representation petitions, file objections to bargaining unit, the eligibility of voters, and the conduct of the campaign. Employers are permitted, along with union representatives, to place an observer at the polls to monitor the election.<sup>78</sup> In addition, the Board has permitted the employer to campaign vigorously against the union in the manner akin to a candidate. After passage of the Wagner Act, the Board initially prohibited employers from campaigning against the union.<sup>79</sup> As the Board noted, “An election is not a contest between a labor organization and the employer of the employees being polled, and participation by an employer in a preelection campaign as if he were a contestant is an interference with the employees’ rights . . . .”<sup>80</sup> However, as one commentator has noted, “the creation of an electoral contest in which one party could campaign while the other had to remain silent contradicted traditional notions of political freedom.”<sup>81</sup> The employer’s ability to campaign was characterized as a First Amendment issue – the right of the employer to free speech. In 1945, the Supreme Court sustained the union’s rights of speech against state interference and then went on to establish that both unions and employers had parallel rights of speech.<sup>82</sup> The Taft-Hartley Act codified this notion of an employer’s free-speech rights in § 8(c) of the Act.<sup>83</sup>

The notion of the employer as the competing candidate against the union has become ingrained in our view of the representation campaign. It has been used to support the notion of greater employer involvement in the campaign, and greater freedom by the employer to express its views.<sup>84</sup> Other commentators have attacked the notion that the employer deserves a voice in the process, pointing to the irrelevance of the employer’s views and the likelihood of coercion.<sup>85</sup> Nevertheless, the role of the employer in the process

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<sup>78</sup> *Southern S.S. Co. v. NLRB*, 23 N.L.R.B. 26, 31 n.3a (1940), *enforced*, 120 F.2d 505 (3d Cir. 1941), *enforcement denied on other grounds*, 316 U.S. 31 (1942).

<sup>79</sup> *See, e.g.*, *American Tube Bending Co.*, 44 N.L.R.B. 121, 133-34 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.).

<sup>80</sup> *Id.* at 132.

<sup>81</sup> Becker, *supra* note CB1, at 541.

<sup>82</sup> *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945).

<sup>83</sup> 29 U.S.C. § 158(c) (2000).

<sup>84</sup> Commentators have, for example, argued in favor of retaining the election, as opposed to card-check certification, based on the employer’s interest in having its views heard during the campaign. GETMAN ET AL., *supra* note JG1, at 136 (“The concept that each party should have a roughly equal opportunity to persuade the voters is fundamental to the democratic process.”). *See also* Larsen-Bright, *supra* note SLB1, at 242-43 (arguing that the laboratory conditions doctrine unconstitutionally infringes on an employer’s right to free speech).

<sup>85</sup> *See* Becker, *supra* note CB1, at 577-601 (arguing the political election analogy is misplaced and allows employer coercion); Story, *supra* note AS1, 436-55 (arguing that employer speech is inherently coercive and should be regulated in the interest of greater employee freedom); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation*

is clearly fixed and seems best explained by the analogy to the political election.

2. *Misrepresentations.* The Board's overall approach to misrepresentations has been consistent – consistently uninterested. The Board has never wavered from its position that misrepresentations *per se* are not prohibited during the election campaign. As the Board noted, “exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside an election.”<sup>86</sup> The Board stated: “absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by employees.”<sup>87</sup> Thus, unlike the strict rules of truthfulness in such contexts as the corporate proxy contest,<sup>88</sup> the Board has taken a relatively relaxed approach to misrepresentations throughout its history.

However, the Board has oscillated at the fringes. From 1962 to 1977, the Board prohibited a subset of misrepresentations that it felt had a particularly nefarious effect on the representation campaign. The rule, established in *Hollywood Ceramics Co.*,<sup>89</sup> stated:

[A]n election should be set aside only where there has been a misrepresentation or other campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.<sup>90</sup>

Although *Hollywood Ceramics* did prohibit some forms of misrepresentation, its scope was rather limited. The election would be upheld if the misrepresentation concerned an unimportant matter *or* had no significant impact *or* was made at a time that allowed for effective rebuttal or correction. A misrepresentation would also be insufficient to overturn the election if it was so exaggerated as to be unbelievable or if employees had sufficient information already to permit them to evaluate the misrepresentation properly.<sup>91</sup>

The Board overruled *Hollywood Ceramics* in its 1977 *Shopping Kart* decision.<sup>92</sup> Noting that the *Hollywood Ceramics* rule had been criticized for its

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*Elections*, 112 YALE L.J. 2415, 2453-62 (2003) (arguing for stronger prohibitions on employer speech to better protect employee freedom of speech).

<sup>86</sup> *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 226 n.6 (1962).

<sup>87</sup> *Id.* at 223.

<sup>88</sup> See SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (2006).

<sup>89</sup> 140 N.L.R.B. 221 (1962).

<sup>90</sup> *Id.* at 224.

<sup>91</sup> *Id.*

<sup>92</sup> *Shopping Kart Food Market*, 228 N.L.R.B. 1311 (1977).



vagueness and indeterminacy, the Board argued that such attention to campaign propaganda was unnecessary. In fact, it argued that “Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.”<sup>93</sup> To hold otherwise would be to countenance “a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties.”<sup>94</sup> A year later, the Board reversed course, and a three-member majority in *General Knit of California* returned to the *Hollywood Ceramics* standard.<sup>95</sup> Four years later, however, the hands-off policy of *Shopping Kart* was yet again reinstated by a three-member Board majority in *Midland National Life Insurance Co.*<sup>96</sup> After reviewing the history of the Board’s treatment of misrepresentations,<sup>97</sup> the *Midland* majority argued in favor of the bright-line, no-policing standard, citing the “many difficulties attending the *Hollywood Ceramics* rule,” as well as the need for “the certainty and finality of election results.”<sup>98</sup>

The decision in *Midland* remains the law. Some circuit courts, however, have been rather grumbling in their acceptance of the *Midland* standard. In *NLRB v. New Columbus Nursing Home*,<sup>99</sup> the First Circuit endorsed the Board’s holding below, but noted that “we do not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations.”<sup>100</sup> Noting that the Board had “a duty to provide reasonably for the employees’ unhampered freedom of choice,” the court held that a strict adherence to *Midland* might, in some cases, constitute legal error.<sup>101</sup> Similarly, the Sixth Circuit has held that “[t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.”<sup>102</sup> The Sixth

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<sup>93</sup> *Id.* at 1313.

<sup>94</sup> *Id.* However, one member of the majority wrote in concurrence that she would set aside an election if there had been an “egregious mistake of fact.” *Id.* at 1314 (Murphy, Chair., concurring).

<sup>95</sup> *General Knit of California*, 239 N.L.R.B. 619 (1978).

<sup>96</sup> *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

<sup>97</sup> *Id.* at 129-30.

<sup>98</sup> *Id.* at 131. The majority did make clear that the Board still would overturn election in instances “where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”

<sup>99</sup> *NLRB v. New Columbus Nursing Home*, 720 F.2d 726 (1st Cir. 1983).

<sup>100</sup> *Id.* at 729.

<sup>101</sup> *Id.* (citation and quotations omitted). In concurrence, Judge Bailey Aldrich wrote: “*Midland* seems to be burning down the barn to get rid of the rats; an abnegation of the Board’s recognized duty to ensure a fair and free choice of bargaining.”

<sup>102</sup> *Van Dorn Plastics Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984).

Circuit continues to apply this standard to misrepresentation cases.<sup>103</sup> While other circuit courts have adopted the *Midland* standard,<sup>104</sup> a number of circuit courts, including ones in circuits that have adopted it, have not yet decided whether to “fully support” the standard.<sup>105</sup>

3. *Information Regulation and Disclosure.* Despite the finely-grained regulation of what cannot be said during the representation campaign, the Board has done little to require information disclosure from the parties. There are no affirmative disclosure requirements on the part of employers or unions to provide certain kinds of information to employees. In *Florida Mining & Materials Corp.*, the Board rejected the employer's efforts to impose an “affirmative disclosure” requirement on the pre-election process.<sup>106</sup> In that case, the union failed to reveal to the employees that the day before the election, it had been placed under temporary trusteeship by the international union. The employer sought to overturn the election based on the union's failure to disclose. The authority of the Board to impose such a rule was not questioned; however, the Board refused to do so based on its concerns about the administrative burden it would cause. The Fifth Circuit found that the Board had not abused its discretion.<sup>107</sup>

The only instance of such required disclosure is not information that must be disclosed to employees, but rather information that the employer must disclose to the petitioning union. In *Excelsior Underwear, Inc.*,<sup>108</sup> the Board required employers to provide the union with the names and addresses of employees in the unit.<sup>109</sup> This information is required within seven days of the approval of an election agreement; the union need not request it.<sup>110</sup> The *Excelsior* requirement gives the union the ability to send materials and other

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<sup>103</sup> See *NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945, 963-66 (6th Cir. May 19, 2000); *NLRB v. Hub Plastics, Inc.*, 52 F.3d 608, 611-13 (6th Cir. May 08, 1995).

<sup>104</sup> *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 883-84 (D.C. Cir. 1988); *State Bank of India v. NLRB*, 808 F.2d 526, 538-39 (7th Cir. 1986); *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983); *NLRB v. Yellow Transp. Co.*, 709 F.2d 1342 (9th Cir. 1983).

<sup>105</sup> *Trencor Inc. v. NLRB*, 110 F.3d 268, 276 (5<sup>th</sup> Cir. 1997) (holding that it was “unnecessary to determine the full scope of this court’s support for the *Midland* doctrine”). See also *NLRB v. Dave Transportation Co.*, 1999 WL 196545, at \*1 n.1 (9<sup>th</sup> Cir. April 1, 1999) (unpublished) (noting that they need not decide whether an exception to *Midland* is warranted); *St. Margaret Memorial Hosp. v. NLRB*, 991 F.2d 1146, 1158 (3d Cir. 1993) (noting in dicta that the *Midland* rule might not be sufficient in all cases); *NLRB v. Affiliated Midwest Hospital*, 789 F.2d 524, 528 n.3 (7th Cir. 1986) (noting that it need not reach the issue of whether the circuit should recognize an exception to *Midland*).

<sup>106</sup> *Florida Mining & Materials Corp.*, 198 N.L.R.B. 601, *enfd* 481 F.2d 65 (5th Cir. 1973).

<sup>107</sup> *Id.*

<sup>108</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

<sup>109</sup> *Id.* at 1239-40.

<sup>110</sup> *Id.*

communications to the employees at their home address. Unions have taken advantage of the lists for this purpose.<sup>111</sup>

Although the *Excelsior* decision facilitates greater information disclosure, the Board and the courts have otherwise failed to pursue this goal. There is no structured forum in which the union is given a chance to make its case to employees. If the union wishes to speak with employees, it must do so off-site and outside of working hours. An employer, by contrast, can require employees to attend a meeting in which it presents an anti-union case. Such meetings, known as “captive audience speeches,” give employers a much better opportunity to make their case to employees.<sup>112</sup>

Union access to employees even in public places can be restricted by the employer. In *Lechmere, Inc. v. NLRB*,<sup>113</sup> the Supreme Court held that employers could prohibit all non-employee solicitation and distribution, including union solicitation, on its retail parking lot. The Court ruled that the employer’s property rights trumped the union’s right to access unless the union could show that the employees could not be reached by other means. The burden of proving such lack of access was a “heavy one,” as there was a presumption that the employees could be reached unless they actually lived on the employer’s property.<sup>114</sup> A recent Board decision has extended *Lechmere* to

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<sup>111</sup> In their empirical study of thirty-one union representation elections, Getman, Goldberg and Herman found that employers sent written materials to employees in twenty-six of those elections, while union sent written materials in twenty-five. JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 90 (1976). In these elections, 92 percent of employees reported receiving employer material, while 85 percent reported receiving union material. *Id.* Addressing changes in communication technology, one commentator has proposed that unions be given private employee email addresses as part of the *Excelsior* disclosure. G. Micah Wissinger, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331, 342-43 (2003).

<sup>112</sup> See Story, *supra* note AS1, at 415 (noting the “obvious point that allowing employers to hold such meetings, especially absent an opportunity for the union to do likewise, gives employers a strong advantage over unions”). In their study of 31 union representation elections, Professors Getman, Goldberg, and Herman found that employers held captive-audience meetings in 28 of those elections, making such meetings more frequent than the distribution of written materials. GETMAN ET AL., *supra* note JG1, at 90-92. Employee attendance at such meetings was high. *Id.* Although unions held off-site meetings in many of the 31 elections, a much smaller percentage of employees reported attending such meetings. *Id.* The authors note that those employees who did attend union meetings were much more likely to be union adherents. *Id.*

<sup>113</sup> 502 U.S. 527 (1992).

<sup>114</sup> *Id.* at 535, 540. This Board and the courts have permitted union access on employer property for employees working at a remote lumber camp, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948); in a company town, *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); and at a fish cannery, *Chugach Alaska Fisheries*, 295 N.L.R.B. 44 (1989).

allow a grocery store to prohibit nonemployee union organizers from using the snack bar in its store.<sup>115</sup>

Employers are allowed considerable leeway in restricting the flow of information between employees. Although employees are able to solicit their fellow workers on the job, employers can restrict such solicitations to non-working hours.<sup>116</sup> Moreover, the employer may limit employees to oral solicitations in working areas.<sup>117</sup> The employer can forbid the distribution of literature in working areas due to the threat of litter and disruption of productive order.<sup>118</sup> Such a prohibition must apply to all such distributions, and it must be applied neutrally.<sup>119</sup> An employer can also extend non-discriminatory literature prohibitions to company bulletin boards<sup>120</sup> and even computer screen savers.<sup>121</sup> An employer also has the right to prohibit solicitations, including union solicitations, on its own internal e-mail, as long as it does so non-discriminatorily.<sup>122</sup>

Such lack of interest in getting information to employees is understandable under the political model, which allows the parties to generate all of the necessary information through their campaigns. But it does not comport with the laboratory conditions model, where information would play a critical role in establishing the conditions for a fair and reasoned choice.

### *C. Critiques of the Two Models*

The two models of a scientific laboratory and a political election have found an uneasy coexistence in Board and court jurisprudence. Commentators have criticized the dichotomy and generally have supported one model over the other – either implicitly or explicitly. On one side, critics of the laboratory conditions model have argued that the exacting standard results in too much litigation over incidents that are unlikely to have any effect on the ultimate outcome. On the other side, critics of the political election model note that the hands-off approach gives too much power and input to employers, who exploit their position to coerce the electorate.

#### *1. The Critique of the Laboratory Model: The Problem of Bureaucratic Obstruction*

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<sup>115</sup> Farm Fresh, 326 N.L.R.B. 997 (1998). For criticism of the *Lechmere* decision, see Cynthia L. Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305 (1994).

<sup>116</sup> Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

<sup>117</sup> Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962).

<sup>118</sup> *Id.*

<sup>119</sup> Marathon LeTourneau Co. v. NLRB, 699 F.2d 248 (5th Cir. 1983).

<sup>120</sup> Honeywell, Inc., 262 N.L.R.B. 1402 (1982).

<sup>121</sup> St. Joseph's Hospital, 337 N.L.R.B. 94 (2001).

<sup>122</sup> E. I. Du Pont De Nemours & Co., 311 N.L.R.B. 893, 919 (1993).

Critics of the laboratory conditions model have argued that it is well-intentioned but ultimately impossible to enforce. In his standard-setting article on union representation campaigns, Derek Bok focused his attention on the “instability” and “[i]nconsistencies” of the Board’s laboratory conditions doctrine.<sup>123</sup> Bok felt that the inconsistencies reflected “a deeper uncertainty regarding the nature of the election process itself.”<sup>124</sup> He claimed that if the Board’s only guiding principle was to keep employee free from undue interference, the Board’s regulatory approach would continue to be incoherent and unstable.<sup>125</sup> Instead, Bok argued that the Board should focus on a broader set of “legitimate interests” held by the parties involved.<sup>126</sup>

Bok agreed with the Board that there is a strong interest in protecting employees’ freedom of choice.<sup>127</sup> He believed that in actuality, however, there was little role for law in making the union representation choice more rational. Bok arrived at this conclusion by breaking down an employee’s union representation decision into three questions: (1) Are conditions within the plant satisfactory? (2) To what extent can the union improve on these conditions? (3) Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes, or bitterness within the plant?<sup>128</sup> While Bok noted that employees may be “best equipped” to answer the first question of the three, studies showed that employees misconceive the nature of their problems and may transfer concerns about other issues into an irrational focus on wages.<sup>129</sup> As to the second question, Bok believed that the employee would be “hard pressed to decide to what extent a union can improve upon the situation.”<sup>130</sup> He discussed how claims by the union about improvements at

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<sup>123</sup> Bok, *supra* note DB1, at 39.

<sup>124</sup> *Id.* at 40.

<sup>125</sup> *Id.* at 43, 45.

<sup>126</sup> *Id.* at 43.

<sup>127</sup> Bok described “freedom of choice” as follows.

We may assume that one basic purpose of an election is to permit the voters to make as rational, and hence as accurate, a decision as they can concerning the issue before them. In the context of a representation election, a rational decision implies that employees have access to relevant information, that they use this data to determine the possible consequences of selecting or rejecting the union, and that they appraise these possibilities in light of their own values and desires to determine whether a vote for the union promises to promote or impair their interests.

*Id.* at 46.

<sup>128</sup> *Id.* at 49.

<sup>129</sup> *Id.* (citing BURLEIGH B. GARDNER & DAVID G. MOORE, HUMAN RELATIONS IN INDUSTRY (4th ed. 1964); F.J. ROETHLISBERGER & WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER (1939)).

<sup>130</sup> Bok, *supra* note DB1, at 49.

other companies would be rebutted by the employer in ways that employees would be “in a poor position to resolve.”<sup>131</sup> Regarding the third question, Bok argued that employees would be “particularly handicapped” in resolving this issue, as the answer depended on resolving a series of sub-issues for which there would often be “little evidence beyond partisan statements of employers and organizers and the anecdotal accounts of associates . . . .”<sup>132</sup>

Bok thus made clear that he believed informational difficulties stood in the way of employees making rational representation decisions. As he noted, employees generally have little direct, personal information about the union, and there is little such information or analysis in the media and other independent sources.<sup>133</sup> Given the lack of information on critical questions, Bok argued that employees were not making rational economic decisions by sifting the evidence. Instead, they were basing their votes on irrelevant factors such as: the skillfulness of the union’s organizing strategy, the employer’s response to the organizing drive, the “likability” of both union and employer representatives, the opinions of certain “key employees” within the plant, community opinion of unions generally, and the background and past experiences of each employee.<sup>134</sup> But ultimately, Bok concluded there was no rational economic calculus behind these elections. If employees were not using the campaign to get important information about their choice, then the need to maintain its pristine intellectual conditions is less important as well.

Bok saw empirical support for his views in *Union Representation Elections: Law and Reality* by Julius Getman, Stephen Goldberg, and Jeanne Herman.<sup>135</sup> The book essentially summarized a large-scale empirical investigation into the decisions made during a union representation election. In a study remarkable for its breadth as well as for the administrative hurdles it overcame,<sup>136</sup> the authors examined thirty-one union representation elections between 1972 and 1973.<sup>137</sup> The authors orchestrated interviews of 1,239 employees who participated in these elections.<sup>138</sup> The interviews were conducted in two waves; first, as soon as possible after the NLRB directed an election to take place, and then again after the election.<sup>139</sup> In the first wave,

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<sup>131</sup> *Id.* at 50.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 50.

<sup>134</sup> *Id.* at 51.

<sup>135</sup> See GETMAN ET AL., *supra* note JG1, at xi-xiii (foreword by Derek Bok).

<sup>136</sup> In order to get employees’ names and contact information for use in the study, the authors had to file a Freedom of Information Act claim against the Board. *Id.* at 36-37. The Board refused to provide the information until compelled by a federal court of appeals. *Id.*; Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

<sup>137</sup> *Id.* at 33.

<sup>138</sup> *Id.* at 33.

<sup>139</sup> *Id.*

interviewers sought to assess the employee's pre-campaign sentiments about union representation, their own working conditions, and how they intended to vote.<sup>140</sup> In the second wave, employees were asked how and why they voted as well as what they remembered from the representation campaign.<sup>141</sup> The authors then analyzed the results to determine what factors went into employees' voting decisions, including the effects of employer and union campaign efforts.

The headline for the study is that the votes of 81 percent of the employees could be predicted from their pre-campaign attitudes about their job and about unions.<sup>142</sup> The study also found that employees who had an intent to vote a particular way prior to the campaign generally ended up voting that way: 94 percent of employees intending to vote for the company did so, as did 82 percent of those intending to vote for the union.<sup>143</sup> The authors were able to predict the outcome of 29 out of the 31 elections based on how employees intended to vote.<sup>144</sup> They thus argue that these results disprove the Board's assumption that free choice is fragile and employees will be significantly influenced by the campaign.<sup>145</sup> This conclusion was supported by the study's findings that employees remembered only a small percentage of issues from the campaign and, therefore, were "not generally attentive to the campaign."<sup>146</sup> Interestingly, the authors state the following about employee "rationality" with regard to the campaign:

The fact that employees do not pay close attention to the campaign does not mean that the voting decision is irrational. An employee who votes consistently with his pre-campaign attitudes is acting in a wholly rational manner. His choice, to be sure, may not be reasoned in the sense in which the Board contemplates – based on a careful weighing of the campaign arguments put forth by each party – but that does not make it any less rational.<sup>147</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 62.

<sup>143</sup> *Id.* at 64.

<sup>144</sup> *Id.*

<sup>145</sup> However, the authors also admit that 19 percent of employees were initially undecided (six percent) or voted contrary to their original intent (13 percent), and that the votes of this 19 percent were necessary for victory in nine out of the 31 elections. *Id.* at 103. Of these groups, 76 percent of the switchers and 68 percent of the undecided voters ended up voting for the company. *Id.* at 111.

<sup>146</sup> *Id.* at 140.

<sup>147</sup> *Id.* at 143.

The study also specifically examined the effects of unlawful employer campaigning on representation election results. It found that employers had engaged in unlawful campaigning in 22 out of the 31 elections.<sup>148</sup> In nine of those elections, the employer committed campaign violations serious enough to warrant a bargaining order.<sup>149</sup> Despite this high level of misconduct, however, the study found generally no correlation between voting behavior and this illegal activity. While noting that employees who signed union cards did in fact vote in significantly higher numbers against the union in elections marred by unlawful campaigning, the authors detected no such effects on employees who were undecided, employees who intended to vote for the union, or employees whose prior attitudes predicted a union vote.<sup>150</sup> Even the firing of union supporters did not result in a significant change in voting behavior.<sup>151</sup>

Given these findings, Getman, Goldberg and Herman argue that the Board should drastically cut back on its regulation of representation elections. Campaign speech, according to the authors, “should be as free of governmental restraint as speech in political elections.”<sup>152</sup> Grants of benefits should be allowed.<sup>153</sup> Bargaining orders should be rare, as the election result, even if tainted, is likely to reflect the wishes of employees.<sup>154</sup> However, the authors do moderate from this “hands-off” model in several instances. They recommend harsher penalties, such as treble damages, for illegal discharges during the campaign.<sup>155</sup> In addition, they argue in favor of equal opportunities for unions and employers to address the workers during work time on employer premises. Noting the employer’s significant advantage in communicating with employees, the authors argue that “an employer who holds campaign meetings on working time and premises should be required to allow the union (or unions) to hold such meetings on working time and premises.”<sup>156</sup> Comparing the election again to the political process, the authors state: “It is fundamental to the democratic process that each party should have a roughly equal opportunity to communicate with the electorate, regardless of the effectiveness of that communication.”<sup>157</sup>

Getman, Goldberg, and Herman’s study was primarily criticized for its failure to blame employer coercion for the decreasing rate of private-employee

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<sup>148</sup> *Id.* at 111-13.

<sup>149</sup> *Id.* at 113.

<sup>150</sup> *Id.* at 115-16.

<sup>151</sup> *Id.* at 125-26.

<sup>152</sup> *Id.* at 150.

<sup>153</sup> *Id.* at 151.

<sup>154</sup> *Id.* at 153-56.

<sup>155</sup> *Id.* at 155-56. This suggestion seems at odds with their earlier dismissal of the effects of such discharges.

<sup>156</sup> *Id.* at 157.

<sup>157</sup> *Id.*



unionization.<sup>158</sup> As commentators pointed out, many of the statistics heralded by the authors as proof of campaign irrelevance could be read much more ambiguously.<sup>159</sup> In fact, according to one reading of the study's data, the study shows that unions would have won 46% to 47% of elections if they had been entirely free from illegal behavior, and 3% to 10% if the employers had campaigned at the highest level of illegality shown in the study.<sup>160</sup> More generally, critics of the study have leveled the same attacks as they do against the political election model more generally: they claim it fails to account sufficiently for the insidious effects of employer coercion.

## *2. The Critique of the Political Election Model: The Problem of Employer Coercion*

In contrast to Bok, Getman, and others who discount the effects of the representation campaign, other commentators criticize federal labor policy for its failure to contain the campaign's effects. In his article on reforming the representation election,<sup>161</sup> Paul Weiler argued that the steady decline in union representation results in substantial part from a marked increase in employer coercion and illegal tactics directed at union campaigns and supporters.<sup>162</sup> To prove this point, Weiler relied on statistics about two general trends. First, Weiler noted that the rate of union victories in representation campaigns dropped from 74% in 1950 to 48% in 1980.<sup>163</sup> At the same time, the number of unfair labor practice claims filed against employers rose from 4,472 claims in 1950 to 31,281 claims in 1980, with the percentage of meritorious claims rising slightly.<sup>164</sup> Putting these two trends together, Weiler argued that the decrease in union representation is correlated with the increase in employer unfair labor practices. For further proof, Weiler compared the U.S. data with Canadian data. Canada had roughly three times the rate of increasing union density from

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<sup>158</sup> See, e.g., Patricia Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181, 1182 (1976); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782 (1983).

<sup>159</sup> Eames, *supra* note PE1, at 1183-87; Weiler, *supra* note PW1, at 1782-86.

<sup>160</sup> *Id.* at 1786. In making this assertion, Weiler relied on an unpublished Ph.D. dissertation by William Dickens. See *id.* (citing William Dickens, *Union Representation Elections: Campaign and Vote* (1980)). Dickens' dissertation was published in edited form as William Dickens, *The Effects of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983). Getman and Goldberg, along with a new co-author, responded to Weiler's article as well as the Dickens' analysis in Stephen B. Goldberg, Julius G. Getman & Jeanne M. Brett, *The Relationship between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U. L. REV. 721 (1984).

<sup>161</sup> Weiler, *supra* note PW1.

<sup>162</sup> *Id.* at 1773-74.

<sup>163</sup> *Id.* at 1776.

<sup>164</sup> *Id.* at 1780.

new union certifications, as well as one-sixth the number of discriminatory discharge complaints per election.<sup>165</sup>

According to Weiler, weak remedies for unfair labor practices, combined with lengthy delays in the representation and remediation process, encouraged an atmosphere of employer coercion and lawbreaking. In order to stem the tide of this illegal campaigning, Weiler argued not for greater penalties, but instead for the elimination of the campaign process itself. Instead of a two-month campaign between initial filing and actual election, Weiler advocated for an “instant” (five days or less) election.<sup>166</sup> Such a brief period would prevent employers from sustaining prolonged campaign offenses replete with unfair labor practices and other tactics of intimidation.<sup>167</sup>

Weiler acknowledged that the purpose of a union representation system is “to nurture and protect employee freedom of choice with respect to collective bargaining.”<sup>168</sup> However, Weiler argued that the U.S. model overplays the significance of the union to employees by treating the union as “a quasi-governmental authority over the employees.”<sup>169</sup> By allowing the employer to participate in the campaign during a substantial period of time, the NLRA had in effect stated that “the employer is legitimately entitled to play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats.”<sup>170</sup> As Weiler argued, this is strange – the union is seeking to represent employees in their relationship with the employer, in a context in which employees and employers often have adverse interests.<sup>171</sup> A more apt analogy, according to Weiler, would be allowing foreign governments to have a role in our political campaigns.<sup>172</sup> If anything, this is too weak; perhaps a better analogy would be allowing your spouse to have a say in who you hire as your divorce attorney.

Weiler did recognize “one final defense” for proponents of the current system: namely, the election campaign as “an aid to informed employee choice.”<sup>173</sup> The employer serves as a proxy supporter for those employees who do not support the union and provides them with resources, arguments, and

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<sup>165</sup> *Id.* at 1817. In 1980, the annual increase in union density produced by newly certified units was 0.24% in the United States, compared with 0.72% in Ontario and 0.84% in British Columbia. The ratio of discriminatory discharges to per representation campaign was 2.5 in the United States, but only 0.4 in Ontario and 0.1 in British Columbia. *Id.*

<sup>166</sup> *Id.* at 1770, 1820-22.

<sup>167</sup> *Id.* at 1812.

<sup>168</sup> *Id.* at 1808.

<sup>169</sup> *Id.* at 1809.

<sup>170</sup> *Id.* at 1813.

<sup>171</sup> *Id.* at 1813.

<sup>172</sup> *Id.* at 1814.

<sup>173</sup> *Id.* at 1815.

organization.<sup>174</sup> Weiler was not persuaded, however, based on his analysis of the costs and benefits to such a system. He believed that the employer had a fair opportunity to make its case prior to the representation election; that U.S. workers were not unsophisticated about unions; and that employers would have a chance to make their case about working conditions during negotiations with the union.<sup>175</sup> Weiler concluded: “The contribution made by the election campaign to the enlightenment of the employees is marginal at best.”<sup>176</sup>

Other commentators agree that the political model has “subverted labor’s right to representation.”<sup>177</sup> Delving into Wagner Act legislative history as well as early Board decisions, Craig Becker developed how the democratic political campaign had become the “legitimizing metaphor” for the Wagner Act and collective bargaining more generally.<sup>178</sup> However, early Board decisions had not required a secret-ballot election in determining representation and, more importantly, had held that the employer had no role to play in the campaign process.<sup>179</sup> It was not until the Supreme Court and the Taft-Hartley Act intervened that the Board was required to have secret-ballot elections and to allow the employer the right to present its case.<sup>180</sup>

Once the electoral model was imposed on the representation campaign, the Board’s regulation of the process vacillated between a *laissez-faire* political model and the much stricter laboratory conditions model.<sup>181</sup> The laboratory conditions model is thus seen as a response to the employer’s new role: in order to restrain the effects of employer participation, the Board needed to lay down strict requirements on electioneering. Commentators have criticized Board regulations based on the dissonance between these concepts.<sup>182</sup> But as Becker pointed out, the political analogy itself is inapt. Employers are not competing against unions in a neutral election, but rather are attempting to influence an election in an arena where they hold ultimate power.<sup>183</sup> The answer, according to Becker, is not to embrace the freewheeling regulation of the political model but rather to get rid of the political analogy and its trappings.<sup>184</sup> Becker’s

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1815-16.

<sup>176</sup> *Id.* at 1816.

<sup>177</sup> Becker, *supra* note CB1, at 497.

<sup>178</sup> *Id.* at 501-23.

<sup>179</sup> *Id.* at 535-40 (discussing American Tube Bending Co., 44 N.L.R.B. 121 (1942), enforcement denied, 134 F.2d 993 (2d Cir.)).

<sup>180</sup> 29 U.S.C. §§ 128(c), 129; Thomas v. Collins, 323 U.S. 516 (1945).

<sup>181</sup> Becker, *supra* note CB1, at 547-48.

<sup>182</sup> GETMAN ET AL., *supra* note JG1, at 157; Bok, *supra* note DB1, at 68.

<sup>183</sup> Becker, *supra* note CB1, at 523-47.

<sup>184</sup> *Id.* at 577-85.

prescription is to strip employers of “any legally cognizable interest in their employees’ election of representatives.”<sup>185</sup>

What exactly would this mean? Becker did not propose that employers must remain neutral during representation campaigns. Instead, he argued that employers should not have any official role in the election process. Thus, employers would have no grounds to contest the unit or otherwise participate in representation hearings.<sup>186</sup> Employers would not have the right to challenge elections or voters, and thus would not have the right to place observers at the polls.<sup>187</sup> More generally, campaign rules would attempt to prevent employers from “exploiting their singular economic power to persuade employees.”<sup>188</sup> Thus, employers would not be permitted to host any “captive audience” campaign presentations.<sup>189</sup> They would be bound to follow the rules on solicitation and distribution that they laid down for union representatives.<sup>190</sup> Although Becker’s proposal thus seems to allow for employer speech as long as similar opportunities are offered to the union, he did state that “[i]t is but a short step to the realization that all employer speech to employees during working hours, at the workplace, is speech to a captive audience.”<sup>191</sup>

Becker’s rhetoric is firmly set against any participation by the employer in representation campaigns. But his proposed solution allows employers to continue to have a role in the election process, albeit a non-legally-sanctioned one. Like the critics of the laboratory conditions model, he is not willing to commit to the logical extension that his ideas would require. The reason, perhaps, is that both sets of critics are missing the critical role that campaigns and employers play, albeit imperfectly, in providing information to employees about their representation decision.

## PART II: THE UNION REPRESENTATION ELECTION AS A PURCHASE OF SERVICES

In considering the regulation of the union representation election, the Board, courts, and commentators have vacillated between the paradigms of scientific laboratory and political election. These wildly disparate frameworks have led to incoherence in representation campaign regulation. Moreover, these frameworks represent a deep disagreement over the nature of the election itself. Proponents of the political model believe that the NLRB has swamped a

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<sup>185</sup> *Id.* at 500.

<sup>186</sup> *Id.* at 586-87.

<sup>187</sup> *Id.* at 586.

<sup>188</sup> *Id.* at 592.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 600.

balanced and democratic process with a flood of complicated regulations. Believing that most employees have already made up their minds, they argue for a hands-off approach to the campaign. Their reforms focus on cutting down red tape in order to secure election results more quickly and enable participants to settle in to the post-election reality. Proponents of the laboratory-conditions approach argue that employer coercion and disapproval are what swamp employees during the election campaign. For them, participation in representation campaigns allows employers to cow their employees through legal and illegal means. Although some acknowledge a role for the representation campaign, they generally believe that employers' roles in those campaigns should be greatly reduced or even eliminated.

There is a simpler and more elegant paradigm to apply. The union representation election is, at root, a decision to purchase group representation services. Employees are agreeing to pay the union in return for the services that the union provides. Because of the nature of the services, the decision cannot be made individually. Thus, the election is used to determine whether most employees desire to purchase these services.

This seemingly straightforward concept has not taken root in the jurisprudence or the literature surrounding the representation election. However, it provides the best paradigm for the election and its concomitant campaign, and pieces of it have shone through in some discussions in the past. This part further develops why the "purchase of services" paradigm is most applicable.

#### *A. The Services*

Employees choose unions because of the services they provide. The services offered relate to representation of a group of employees in their negotiations with an employer. The union is the sole representative of the employees in bargaining over terms and conditions of employment.<sup>192</sup> It manages the strategy of negotiations, strikes, lockouts, and other weapons of "economic warfare."<sup>193</sup> Once a contract has been negotiated, the union administers the agreement and, if the agreement includes arbitration, represents individual employees in grievances against the employer. By electing the union

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<sup>192</sup> In some industries, most notably professional sports, unions negotiate basic framework agreements, and individual players are able to negotiate individual terms and conditions (often through agents).

<sup>193</sup> The metaphor of "economic warfare" has often been used in discussing the union-employer relationship. *See, e.g.*, *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 530 (1979) ("... Congress intended to forbid state regulation of economic warfare between labor and management, even though it was clear that none of the regulated conduct on either side was covered by the federal statute.").

as their representative, employees have essentially designated the union as their representative in exchange for the payment of dues.

The most analogous service would be representation of individual employees in their negotiations with an employer – a sports or entertainment agent, for example. However, representation by a union has several important differences. First, an agent represents employees on an individualized basis. The union represents a collection of employees – all of the employees within a designated bargaining unit. Second, employees who vote against the union must still pay for the representation services they provide (except in right-to-work states).<sup>194</sup> Individual employees, on the other hand, have individualized agreements and thus have sole control over the decision. Third, the NLRA gives the union certain statutory rights as the employee’s collective bargaining representative. The employer must, for example, bargain with the union over any changes to mandatory terms and conditions of employment.<sup>195</sup> Individual agents, on the other hand, generally work within the common-law contractual framework and have no special rights, outside those negotiated between the employer and the employee or, in some cases, the employer and a union.

Despite these differences, the purpose of unions and individual agents remains much the same – to secure better terms and conditions of employment for their workers. Thus, an economically rational decision to vote for or against a union would be based on whether the employee expects that the union will, in fact, improve terms and conditions.<sup>196</sup> Legal commentators have recognized this conclusion, even as they fail to apply its ramifications. For example, Derek Bok wrote that the union representation decision rests on into three questions: (1) Are conditions within the plant satisfactory? (2) To what extent can the union improve on these conditions? (3) Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes, or bitterness within the plant?<sup>197</sup> These questions simply break down the overall utility

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<sup>194</sup> NLRB v. General Motors Corp., 373 U.S. 734, 744-45 (1963) (permitting “agency shop” agreements whereby unions charge non-members for the costs of collective representation). *But see* National Labor Relations Act § 14(b), 29 U.S.C. § 164 (2006) (permitting states to outlaw union security clauses); U.S. Dep’t of Labor, State Right-to-Work Laws and Constitutional Amendments in Effect as of January 1, 2005 With Year of Passage, <http://www.dol.gov/esa/programs/whd/state/righttowork.htm> (citing states with “right to work” laws).

<sup>195</sup> 29 U.S.C. § 158(a)(5) (2000).

<sup>196</sup> Or, put more precisely, “If the expected utility from [the employees’] job becoming a union job is higher than from it not becoming a union job, then they will vote for the union.” Henry S. Farber & Daniel H. Saks, *Why Workers Want Unions: The Role of Relative Wages and Job Characteristics*, 88 J. POL. ECON. 349, 351 (1980). Of course, different employees will have different perspectives on the potential costs and benefits of unionization. *See id.* at 367 (noting that individual employees vote for or against unionization “as if the effect of unionization on earnings is to raise average earnings and lower its dispersion”).

<sup>197</sup> Bok, *supra* note DB1., at 49.

question. On the other side, Paul Weiler agrees that employees will make a judgment about the value that the union brings to the table. However, he believes that the best time for employees to make that judgment is during contract negotiations, after the union has already been chosen.<sup>198</sup>

Instead of being trumpeted or refuted, the purchase-of-services paradigm has instead been largely ignored. The laboratory conditions model focuses on the “uninhibited desires” of employees, either for or against unionization,<sup>199</sup> but treats this desire as an essence to be distilled. It is hard to say what this essence would be, other than a desire to secure the union’s representation services. The political election paradigm treats the decision as a choice between the employer and the union as to who will govern in the workplace. But the employer retains ultimate power over the workplace in any event; if the union wins, it simply secures certain representational rights.<sup>200</sup> Thus, the political election paradigm misrepresents the true nature of the choice.

Perhaps the best counterargument to the purchase-of-services paradigm is the notion that the union is merely a collection of employees who joined together to exercise their communal rights in bargaining with the employer. But this model represents only the smallest fraction of union representation under the Act. Although occasionally a group of employees will form a “labor organization” amongst themselves, the overwhelming majority of unions are outside organizations that seek to represent employees at a variety of different employers. Unions are independent institutions with their own set of internal procedures, leadership, and employees. They generally have complete discretion in handling negotiations with employers. A union may even execute a collective bargaining agreement without any approval by the represented employees.<sup>201</sup> The union is the employees’ representative; it is not a representation of them.

In fact, the appeal of unions is that they have the ability to get more for employees than the employees would get on their own. Part of this may stem from a union’s ability to represent a large group

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<sup>198</sup> Weiler, *supra* note PW1, at 1811 (“Rather than decide on the basis of easily made promises in a representation campaign that takes place months before serious negotiations begin, the employees can see what their employer actually offers at the bargaining table, compare these offers with what their union demands, and then make up their minds whether to take the risks and make the sacrifices necessary to achieve a favorable collective agreement.”).

<sup>199</sup> *General Shoe*, 77 N.L.R.B. at 127.

<sup>200</sup> See 79 CONG. REC. 9682 (1935) (remarks of Rep. Griswold), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note NLRAH, at 3109 (noting under the Wagner Act, employees would not “control anything except the selection of [their] representatives”); Becker, *supra* note CB1, at 581 (“The union election vests labor’s representative with no sovereignty in the workplace. It is on this point – the legal authority of the union to govern – that the analogy between industrial and political democracy is most tenuous.”).

<sup>201</sup> Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 810 (1984).

of employees across companies and thus control the labor supply in a particular region and industry. Also important, however, is the union's ability to represent all of the employees in a particular group at a particular employer with one (solitary) voice.<sup>202</sup> The union's prowess in conducting the negotiations, including its knowledge of the law and its ability to be informed about the industry practices, also contributes value to the employees. These services are what lead to the resulting better terms and conditions that successful unions secure for their employees.

Finally, the notion that union members are only paying "dues" may also contribute to the idea of union as a voluntary association of workers pursuing mutual gain. But dues are simply individual payments for the costs of the services that are being provided. Employees represented by a union are not forced to join the union if they do not wish to. But all covered employees must pay for the costs of the services that the union provides.<sup>203</sup> Congress permitted a union to charge nonmembers on the theory that nonmembers would be essentially free riding on the union's services if payments were not made.<sup>204</sup> In the *Beck* decision, the Supreme Court chose to differentiate between different components of the dues, and ruled that non-members need not pay the union for services that are not directly related to collective bargaining services.<sup>205</sup> This somewhat cabined view of union representation helps make the point that represented employees are paying for a service – that of union representation.<sup>206</sup>

### *B. The Providers*

Another factor in our conceptualization of the employee-union relationship is the nature of the union itself. The NLRA has a fairly broad definition of a "labor organization": it is "any organization of any kind, or any agency or

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<sup>202</sup> As one economist has noted: "The strike is by far the most important source of union power, and the union is now virtually the sole organizer of strikes." ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 31 (1962).

<sup>203</sup> *NLRB v. General Motors Corp.*, 373 U.S. 734, 744-45 (1963) (permitting "agency shop" agreements whereby unions charge non-members for the costs of collective representation).

<sup>204</sup> *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954) ("Thus Congress recognized the validity of unions' concerns about 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.").

<sup>205</sup> *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988) (holding that the NLRA "authorizes the exaction of only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" (quotations omitted)).

<sup>206</sup> Of course, one might also argue that businesses in service industries are permitted to use their funds for lobbying and political activity, even if individual purchasers of those services may not wish to subsidize such activity. Thus, the "purchase-of-services" model might counsel against the Court's holding in *Beck*.



employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>207</sup> Theoretically, under the NLRA a labor union could take a variety of forms: for-profit corporation, nonprofit corporation, partnership, LLC, voluntary association, or even sole proprietorship. However, unions representing employees under the NLRA are almost always nonprofit associations.

There seem to be three functional reasons for this phenomenon. First, the Clayton Act provides antitrust exemption for those labor organizations “instituted for the purposed of mutual help, and not having capital stock or conducted for profit.”<sup>208</sup> This exemption thus excludes for-profit unions. Second, nonprofit status affords tax benefits.<sup>209</sup> Third, the requirements of the Labor-Management Reporting and Disclosure Act would be difficult to meet for organizations other than nonprofit associations. Under the LMRDA, unions must give their members “equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings.”<sup>210</sup> Dues can only be increased through a vote by the majority of the membership.<sup>211</sup> Unions must file extensive reports with the Department of Labor regarding assets, liabilities, salaries, and other proprietary information.<sup>212</sup> In addition, the LMRDA imposes strict fiduciary duty requirements on union officers and employees.<sup>213</sup> It would be difficult to construct a for-profit organization that could meet these regulatory requirements. And the definition of labor organization under the LMRDA is also fairly broad, meaning that almost all unions representing employees under the NLRA must meet the LMRDA’s requirements.<sup>214</sup>

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<sup>207</sup> 29 U.S.C. § 152(5) (2000). The Board will also disqualify a union from acting as a labor organization if it suffers from a conflict of interest. *See, e.g.*, *St. John’s Hosp. & Health Ctr.*, 264 N.L.R.B. 990 (1982) (disqualifying a union that provided ancillary employment referral services); *Sierra Vista Hosp.*, 241 N.L.R.B. 631 (1979) (disqualifying a union for including supervisors in policy-making positions).

<sup>208</sup> Clayton Act, § 6, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 17).

<sup>209</sup> 26 U.S.C. § 501(c)(5) (2000).

<sup>210</sup> 29 U.S.C. § 411(a)(1) (2000).

<sup>211</sup> *Id.* at § 411(a)(3).

<sup>212</sup> *Id.* at § 431.

<sup>213</sup> *Id.* at § 501 (requiring, inter alia, that union agents “to hold [the union’s] money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder”).

<sup>214</sup> *Id.* at 402(i), (j).

Because of their organizational form, unions may not be conceptualized as players in the commercial realm. But they provide representation services in return for payment. In this regard, they are similar to other nonprofit organizations that provide services for a market price: so-called “commercial” nonprofits.<sup>215</sup> Like many hospitals, day care centers, and nursing homes, unions are “nonprofits that receive no significant amount of donations, but derive their income almost exclusively from prices charged for private goods and service they deliver to paying customers.”<sup>216</sup> The rationales provided for the nonprofit form in the commercial context generally relate to the nature of the product and customers. As Henry Hansmann has argued, “nonprofit firms commonly arise where customers are in a peculiarly poor position to determine, with reasonable cost and effort, the quality or the quantity of the services they receive from a firm.”<sup>217</sup> As will be discussed below, employees are in a particularly poor position to judge the quality of union representation services prior to securing those services.<sup>218</sup> Moreover, like colleges and nursing homes, unions generally provide services in which the customer becomes “locked in” for a period of time.<sup>219</sup>

It may seem strange that the members of the union are also its customers. But this organizational form is not unique. Customer-owned enterprises are common in many industries.<sup>220</sup> In addition, unions bear a close resemblance – in their organizational form – to for-profit public corporations.<sup>221</sup> Stockholders in a public company can be likened to members, in that they vote for the leadership that manages the organization from day to day. Both members and stockholders are the “citizens” of the polity that can vote in or vote out those who run the organization. At the same time, stockholders are also likened to customers for purposes of the securities laws; they are provided with a vast array of consumer protections, such as mandatory disclosure and antifraud causes of action.<sup>222</sup> The notion that stockholders control the organization but also look to the organization for financial rewards finds common ground with the perspective of union members.

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<sup>215</sup> HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 234 (1996).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 228.

<sup>218</sup> See Part III.A *infra*.

<sup>219</sup> See Part III.E *infra* (discussing the difficulty of the union decertification process); HANSMANN, *supra* note HH1, at 234 (noting customer lock-in as a reason for preferring a nonprofit service provider).

<sup>220</sup> See *id.* at 149-223 (discussing customer-owned cooperatives in the areas of wholesale and supply firms, utilities, clubs, and housing cooperatives).

<sup>221</sup> Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 374-76.

<sup>222</sup> See Securities Act of 1933; Securities Exchange Act of 1934 (as amended).

Without the antitrust, tax, and LMRDA provisions which make the nonprofit form a necessity, unions might find that a for-profit organizational form would better serve their organizational needs.<sup>223</sup> However, even as nonprofits, unions fit comfortably within the collection of commercial nonprofits that provide services to paying customers and may even make a profit.<sup>224</sup>

### C. The Decision to Purchase

The “purchase of services” paradigm may also encounter difficulty in considering the method of the purchase. Unlike an individual consumer decision, employees can only purchase union representation services by a majority vote. If a majority of employees vote in favor of union representation, all employees receive those services and must pay the cost of those services. If a majority of employees vote against union representation, then none of the employees can enjoy the benefits of that representation. Since most consumer transactions can be made individually and voluntarily, the notion of workers being compelled to pay for services they do not want cuts against the notion of employees as consumers. Moreover, the notion that the decision is made by an election is also anathema to the usual purchase of services. Elections are decisions about institutional leadership; purchases are decisions about personal needs and preferences.

The odd structure of the purchasing decision, however, can be accounted for by the nature of the service being purchased. The services are not individualized services, but rather are provided to the group. Payment by all those who enjoy the services is necessary in order to prevent free-riding. But that necessitates that some employees may be forced to pay for services they do not want. Of course, that occurs every day in consumer transactions: service providers may not provide the exact services that individual consumers want, and consumers may end up paying for services they would choose not to take.<sup>225</sup> Other service providers, such as neighborhood associations, also

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<sup>223</sup> See Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 516-17 (arguing that the Clayton Act and the LMRDA should be amended to allow for-profit unions). Henry Hansmann argues more generally that many commercial nonprofits may also be efficiently reorganized as for-profits. HANSMANN, *supra* note HH1, at 234-35 (arguing that nonprofits offer a “crude form of consumer protection” that may not be sufficient to justify the other inefficiencies of the nonprofit organizational form).

<sup>224</sup> Nonprofits are only constrained from distributing their profits to persons who exercise control over the firm. This constraint may explain the types of corruption demonstrated by certain union leadership. See Estreicher, *supra* note SE1, at 512-13 (noting that union leaders may plow profits into excessive amenities, office buildings, perks, and salaries).

<sup>225</sup> For example, cable television purchasers can only buy certain packages with a pre-set selection of television channels. As a result, they may end up paying for channels they would otherwise choose not to take. In addition, home purchasers may often have to pay dues to

impose mandatory fees on those who receive services, even if individual customers would choose to reject those services. The key elements are that: (a) the services can only be provided to a group, and (b) there needs to be some mechanism for allowing the group to choose those services, even if some group members might disagree.

An election is one possible mechanism for making that choice. However, on its face, the consumer model would seem to favor a system of card-check certification. If a majority of employees choose to have union representation, there should be no need for an election: the majority has already expressed its will. The election, however, is designed to protect employees against coercion, specifically union coercion, and is also designed to provide information to employees about their decision.

Since the generation of information is a key justification for the representation election, it is surprising that the Board, courts, and commentators have generally overlooked its importance. Indeed, there are reasons to believe that the union representation decision is particularly in need of oversight with respect to the information that employees have in making their decision. The information problems in the market for union representation raise particular concerns about the economic rationality and efficiency of those decisions.

### PART III: INFORMATION DEFICIENCIES IN THE MARKET FOR UNION REPRESENTATION

Rational decisions to exchange goods or services – in other words, trade – are the key mechanisms to improving our individual and societal welfare.<sup>226</sup> Contracts are the legal mechanism for enforcing trades in our economic system. According to economic theory, contracts should be enforced because of their Pareto optimality: they increase the utility of all of the parties to the exchange.<sup>227</sup> Of course, there can be contractual winners and losers; many

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nonprofit neighborhood associations, whether they would independently choose to or not. See Sarah Max, *Hate Your Homeowners Association?*, CNN Money, April 22, 2004, at: <http://money.cnn.com/2004/03/09/pf/yourhome/homeownersassociation/index.htm> (“Homeowners are obligated to pay [association] dues – which can be anything from \$100 to \$10,000 a year, depending on the neighborhood and its amenities.”).

<sup>226</sup> The stereotypical beginning to every microeconomics course is the discussion of utility involving two people each with a large supply of one good. One may have peanut butter, for example, and the other grape jam. The professor demonstrates how each party will be better off if they trade some of their good for some of the other party’s good. For example, if Jack has ten jars of peanut butter and trades three of his jars for three jars of Jane’s jam, both Jack and Jane will be better off.

<sup>227</sup> See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD.

contracts are about hedging risk, and one party may end up regretting the decision to contract after the fact. But when the contract is created, both parties agree to it (per economic doctrine) because they believe it increases their net present utility.

However, for contractual exchanges to be Pareto optimal, they must use the proper data, or “perfect information.”<sup>228</sup> If the data is faulty, the results will be faulty, no matter how logical the decisionmaker.<sup>229</sup> To what extent do we simply trust parties to gather information for themselves? The common law of contract has long struggled with how to manage information in the bargaining process. From the beginning courts have prohibited fraud – *i.e.*, misrepresentations about information material to the contract. However, the definition of “fraud” has long extended to omissions in disclosure as well as affirmative misrepresentations, as the famous case of *Laidlaw v. Organ*<sup>230</sup> attests. Many scholars have attempted to provide a theoretical basis for determining when parties to a contract negotiation have a duty to disclose material information.<sup>231</sup> Although one might say that, in the absence of a fiduciary relationship, there is no common law requirement to disclose, this is an overstatement.<sup>232</sup> In fact, in a number of instances, courts have required parties to disclose information, or they will risk rescission or even liability for fraud.<sup>233</sup>

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283, 284 (1995) (“In the area of contract law, the efficiency argument concludes that courts should enforce all voluntary contracts that do not produce negative externalities, regardless of their distributive consequences. If a contract is voluntary, then it presumptively improves the well-being of both parties.”).

<sup>228</sup> See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 87 (1994) (defining perfect information as “all relevant information about the market including the price and quality of the product”); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 881 (2003) (“Without accurate information about the quality and especially the price of any good, no person can minimize their opportunity costs, since they cannot compare the value of that product to their next best option. Thus, in a policymaking system of private decisionmaking, where individuals act without accurate cost information, there is no policymaking at all, rather just the random and often tragic outcomes of market anarchy.”).

<sup>229</sup> Or, as the saying goes, “garbage in, garbage out.” See Webopedia, *garbage in, garbage out*, available at: [http://www.webopedia.com/TERM/g/garbage\\_in\\_garbage\\_out.html](http://www.webopedia.com/TERM/g/garbage_in_garbage_out.html).

<sup>230</sup> 15 U.S. 178 (1817). At issue in *Laidlaw* was a contract for the sale of tobacco made at the close of the War of 1812. The buyer knew that the war had ended and, with that, the British blockade that had reduced the value of tobacco. The Supreme Court ruled that while there was no requirement for the buyer to disclose the information, he had a duty not to “impose upon” the buyer if the failure to answer the question was misleading. *Id.* at 194.

<sup>231</sup> Kimberly D. Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories* 91 VA. L. REV. 1795, 1796 (2005) (noting that “[d]ozens of law reviews” have dealt with this “hotly debated question[.]”).

<sup>232</sup> *Id.*

<sup>233</sup> See RESTATEMENT OF CONTRACTS (SECOND) § 161 (listing four general exceptions).

To a large extent, however, the common law of contractual disclosure has been superseded by a variety of statutory schemes that endeavor to regulate information in the context of particular markets. A variety of consumer protection laws focus in part on providing information about critical aspects of the product.<sup>234</sup> The Food & Drug Administration requires extensive labeling on prepackaged food products in order to inform the public about ingredients, calories, and fat content.<sup>235</sup> The Truth in Lending Act requires the disclosure of interest rates in understandable terms.<sup>236</sup> Perhaps most famously, the Securities Act of 1933<sup>237</sup> and the Securities Exchange Act of 1934<sup>238</sup> instituted a sweeping program of regulation based primarily on required disclosure. These statutes are designed to empower the consumer to make efficient decisions by having the proper information.<sup>239</sup>

Surprisingly, however, concerns about consumer information have not been raised about the choice for union representation. One might think that the presence of relevant information would be critical under the laboratory conditions model. But the model has been used primarily to keep problematic information out, rather than making sure the proper information gets in. The political election model assumes that the two “parties” will generate the information between themselves that is sufficient for the employees to make their decision.

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<sup>234</sup> For example, the federal Moss-Magnuson Warranty Act requires disclosure about warranties on consumer products. See Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 610 (“The basic goal of the Magnuson-Moss Warranty Act is to improve the warranty information available to consumers by providing for full disclosure of all written warranty terms in a clear and concise manner.”).

<sup>235</sup> See 21 U.S.C. §§ 371(a), 393(b)(2)(A) (2000); 21 C.F.R. § 101.9 (2006); U.S. Food and Drug Administration, What FDA Regulates, available at: <http://www.fda.gov/comments/regs.html>. For discussion of a particular change in the regulations, see Food & Drug Admin., Food Labeling: *Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims*, 68 Fed. Reg. 41434 (July 11, 2003).

<sup>236</sup> Peterson, *supra* note CP1, at 880 (“The most important requirements of the Truth in Lending provisions centered around the disclosure of the cost of credit based on standard uniform requirements set out by the act and by the Federal Reserve Board.”). See also Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL’Y 199, 212-16 (2005) (discussing TILA policies).

<sup>237</sup> 15 U.S.C. §§ 77a – 77aa (2000).

<sup>238</sup> 15 U.S.C. §§ 78a – 78mm (2000).

<sup>239</sup> See, e.g., Peterson, *supra* note CP1, at 883 (“Unlike interest rate caps and other control devices, disclosure regulation – at least in theory – increases the freedom of consumers through giving the opportunity to open one’s own eyes. With a uniform method of learning the costs and characteristics of credit contracts, debtors can determine which credit contracts are in their best interests.”).

Yet there are strong reasons to believe that consumers do not get the appropriate information about the pros and cons of union representation in the context of the campaign. These reasons are discussed more fully below.

#### A. *Information Asymmetry.*

As noted above, the basic common law contractual paradigm assumes that parties to a contract will obtain their own information. Although the common law prohibits fraud and requires truthful disclosure in response to questioning, there is no general duty to disclose information. In limited circumstances, such as the sale of a home, courts require disclosure of known defects.<sup>240</sup> For the most part, however, requiring disclosure of information more generally is seen as dampening the incentive to find this information in the first place.<sup>241</sup>

Moreover, in most cases the market will provide incentives for participants to disclose information voluntarily. Consumers will not buy a product unless they know something about it. If a seller fails to disclose sufficient information, consumers will demand the information; those sellers that provide it will sell more products.<sup>242</sup> Sellers have an incentive to provide enough information so that buyers can identify their product and judge for themselves whether they want the product and at what cost.<sup>243</sup>

Of course, it may be possible for a market to fail to provide such information on its own. For reasons discussed further below, market participants may have incentives to reveal insufficient information about the product, leading eventually to market failure. One of the most famous examples of such a situation is the market for used cars as modeled by George Akerlof.<sup>244</sup> As described by Akerlof, the sellers of used cars have much more information about the true quality of the car than do buyers. Moreover, it is difficult to correct this information asymmetry, given the inability of most buyers to determine quality or to trust a seller's purported information

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<sup>240</sup> See, e.g., *Hill v. Jones*, 725 P.2d 1115, 1119 (Ariz. 1986) (requiring the seller to disclose material facts about a home when such facts are not readily observable and not known to the buyer (citing *Johnson v. Davis*, 480 So.2d 625, 629 (Fla. 1985)).

<sup>241</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 111 (6th ed. 2003).

<sup>242</sup> We may need information to get us interested in contracting in the first place. Of course, advertising is to some extent hype and persuasion, but it is also information. See, e.g., CARLTON & PERLOFF, *supra* note CP1, at 602-04 (discussing the difference between informational advertising and persuasive advertising).

<sup>243</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 681, 714 (1984) (noting that information is generally left to the market "because of a conclusion that people who make or use a product (or test it as Consumers' Union does) will obtain enough of the gains from information to make the markets reasonably efficient").

<sup>244</sup> George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

disclosure. Under Akerlof's model, buyers will be forced to assume that a used car is a "lemon" and thus will only offer to pay the value of a lemon, regardless of the car's actual quality. Those with quality used cars will thus elect to keep their cars rather than sell them at a drastically reduced value, leaving only those with actual lemons in the market. Akerlof thus predicts that a downward spiral may result, in which "it is quite possible to have the bad driving out the not-so-bad driving out the medium driving out the no-so-good driving out the good in such a sequence of events that no market exists at all."<sup>245</sup>

The "market for lemons" problem is not confined to used cars. As Bernard Black has pointed out, securities markets are a "vivid example" of Akerlof's market for lemons; "[i]ndeed, they are a far more vivid example than [the] original example of used cars."<sup>246</sup> Black explains:

Used car buyers can observe the car, take a test drive, have a mechanic inspect the car, and ask others about their experiences with the same car model or manufacturer. By comparison, a company's shares, when the company first goes public, are like an unobservable car, produced by an unknown manufacturer, on which investors can obtain only dry, written information that they can't directly verify.<sup>247</sup>

If investors cannot verify the information they receive about a security, the market is ripe for exploitation. Knowing this, investors will treat every security as if they cannot trust the underlying facts about it. This underpricing will drive the higher quality issuers out of the market, leading to Akerlof's downward spiral which completely destroys the market.

Why is information so crucial to the securities markets? A security, particularly corporate shares, represents a property right in something that exists only as a fictional person, created through documents filed in a particular state. Shareholders generally do not run the business; they contribute capital so that others may run a profitable business and pay the shareholders the residual. A shareholder trusts the people who run the corporation – officers and directors – to act as their representatives in running the corporation so as to maximize shareholder value.<sup>248</sup> Although shareholders elect the board of directors, who

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<sup>245</sup> *Id.* at 490.

<sup>246</sup> Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 *UCLA L. REV.* 781, 786 (2001).

<sup>247</sup> *Id.*

<sup>248</sup> Directors are not strictly agents of the corporation; they are in fact more akin to elected representatives. *See, e.g., Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cunningham*, 2 Ch. 34 (Eng. C.A. 1906) (establishing the right of directors to act contrary to the wishes of a majority of shareholders as expressed through a resolution); *Continental Securities Co. v.*



in turn appoint the officers who run the corporation, this power is very difficult to exercise in a large corporation. Thus, shareholders must be able to trust directors and officers to use their money appropriately. There is a very real “agency costs” concern that lies at the heart of much corporate law today.<sup>249</sup>

Are unions subject to the “market for lemons” problem? Upon examination, they are subject to agency cost concerns similar to those of corporate shareholders. Union members trust that their union dues will be used by union officials to get them the best terms and conditions of employment possible. And similar to shareholders, union members have the right to elect these officials, although that power is similarly attenuated, especially at the national level.<sup>250</sup>

Union representation services also have the more general information asymmetries that contribute to a “market for lemons.” Unions provide services that are not transparent; they are not easy to judge before purchase.<sup>251</sup> The union promises to improve the employees’ terms and conditions of employment. How much better will the terms and conditions be? Will the negotiations proceed easily, or must a painful strike be endured? How effective will the union be in representing employees in grievance arbitrations? Are union officials paid the appropriate amount, or are they overpaid? Would they properly manage my retirement? It is very difficult to know ahead of time what the union dues will buy.<sup>252</sup> Even after purchase, it may be difficult to know the

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Belmont, 206 N.Y. 7, 16 (1912) (“[T]he directors are not ordinary agents . . . . [T]hey are trustees with the power of controlling the property . . . without hindrance.”).

<sup>249</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>250</sup> Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 367-68.

<sup>251</sup> *Id.* at 379-80. Products with unobservable qualities are sometimes described as “experience goods” – namely, goods whose “salient characteristics can only be learned after purchase, by actual use.” See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 659 (1979). Experience goods are contrasted with “search goods,” for which the consumer can establish the product’s quality prior to purchase. See, e.g., CARLTON & PERLOFF, *supra* note CP1, at 600-01. Although Schwartz and Wilde generally argue that policymakers have overstated information problems, they concede that their use of search equilibrium models sheds “relatively little light” on the question of information with respect to experience goods. Schwartz & Wilde, *supra*, at 662.

<sup>252</sup> The problem applies even after employees have joined the union. See Schwab, *supra* note SS1, at 379-80 (“Union members have even greater difficulty monitoring and evaluating their leaders. Was the last wage increase a good one? Did the leaders work hard at the bargaining table, or did they shirk? Could tougher negotiations have produced more? Are the union leaders becoming too cozy -- or too confrontational -- with management? Is the low return from the pension fund due to improper investments or bad market conditions? Are leaders earning their salaries? In short, could leaders be doing better?”).

quality of the union's negotiating abilities.<sup>253</sup> In addition, union services cannot be trial-tested before purchasing them. It takes a very costly and time consuming process and agreement by a majority of employees to purchase union representation services. And as will be discussed below,<sup>254</sup> once those services have been purchased, it is very difficult to get out of them. In voting for union representation, employees must make a leap of faith: that the money they pay to the union will be used to better their terms and conditions of employment, rather than leaving them the same or even making them worse. Like the decision to buy a stock, the purchaser needs information about the organization in order to determine whether the benefits of such a decision outweigh the costs.

But even if employees cannot easily get the necessary information by looking at the product or from past experience, won't union and employers provide the necessary information themselves? As discussed next, there are reasons to believe that the information will not be properly conveyed.

#### *B. Inverse Employer Incentives*

The market for union representation services is constructed as an election. Employees obtain representation services by voting for such services through a secret ballot election. As noted earlier,<sup>255</sup> the pre-election process is often analogized to a political campaign in which the union and the employer are running against each other. In a traditional political campaign, the parties to the election are expected to generate all the necessary information for voters to make their decision. Each candidate has an incentive to point out his or her positive features, as well as his or her opponent's negative features. Given these incentives, the voters can expect to get all positive and negative information about the candidates from the candidates' pre-election campaigns.<sup>256</sup>

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<sup>253</sup> Goods whose relative quality cannot be determined even after purchase are sometimes referred to as "credence goods." Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973).

<sup>254</sup> See *infra* Part III.E.

<sup>255</sup> See *supra* Part I.B.

<sup>256</sup> Thus, much of the debate surrounding campaign reform has been whether parties have sufficient funds to get their message out. Those in favor of campaign finance reforms generally believe that a combination of federal campaign funding and limitations on private donations are necessary to enable a level informational playing field. See, e.g., Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1047 (2005) ("[E]lectorate corruption in a campaign occurs insofar as private power employs influences that are less relevant to the choice between candidates and drives out influences that are more relevant."). However, critics believe that limitations of private campaign spending restrict free speech and curtail the flow of information. See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1061 (1998) (arguing that any limitations on spending reduce communications).

In a union representation campaign, the union is seeking, through an election, to represent a group of the employer's workers. The union thus has incentives to present itself in a positive light. Like any seller of services, the union is trying to persuade its potential customers that they should purchase its services.<sup>257</sup> Union representatives may use a variety of sales techniques that have been passed down through the centuries. But their incentives are to get employees to sign up with the union.

The union also has incentives to portray the employer in a negative light. After all, the union's services are simply representing employees in their negotiations with employers over terms and conditions of employment. The union must therefore convince employees that the employer is not giving them the best terms and conditions that it could. If a union cannot improve the employees' lot, there is no need for its services. So the union must convince employees that the union could get a better deal. In making this case, the union may bring out information about the employer that may seem negative to employees. For example, the union may argue that the employer's profit margins are extremely high. The union may argue that the employer is paying employees much less than other companies in the field pay their workers. The crux of the case is that the employer is holding back, and the employees need the union to maximize their contractual benefits.

As Craig Becker has pointed out, the employer is in some respects a third party to this transaction.<sup>258</sup> Whether I hire Jim to represent me in my negotiations with Earl is really no business of Earl's. But of course the employer often will have a strong interest in seeing the union's election petition defeated. Union representation may very well mean higher wages and better benefits for employees. It means extensive bargaining sessions with the union over the contract.<sup>259</sup> If the parties agree to a contract, the employer must inform the union of any future changes in working conditions and then bargain over those as well.<sup>260</sup> If the parties do not agree to a contract, the employer may face a strike or unfair labor practice charges for failure to bargain in good faith. For an employer looking to preserve the contractual status quo as well as its ability to act independently with regard to employees, there is a very strong interest in seeing the union defeated.

In such cases the employer will have incentives to disseminate negative information about the union. Of course, what is negative to the employer – i.e., the potential for higher wages – is not a negative for the employees. So the

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<sup>257</sup> See Estreicher, *supra* note SE1, at 515 (discussing the market for union representation services).

<sup>258</sup> See Becker, *supra* note CB1, at 498-500.

<sup>259</sup> 29 U.S.C. § 158(a)(5) (2000).

<sup>260</sup> See 29 U.S.C. § 158(d) (2000) (requiring employer to inform collective bargaining representative of changes to terms and conditions of employment).

employer will look to disseminate information about the union that is negative from an employee's perspective. For example, information about the union's past ineffectiveness, its wastefulness of union funds, and its inability to live up to its campaign promises are all useful to the anti-union employer. The employer will also have incentives to paint itself in a positive light. It will want to show that it is giving its employees the best deal it can, and that the union will not be able to get any further concessions from the employer.

However, the previous discussion assumes an employer that does not want union representation. Although all employers have some incentives to avoid unionization, due to the added time and expense imposed by bargaining, employers who have the most incentive to defeat the union are those who have the most to lose from unionization. And by extension, those employers will therefore put on the fiercest campaign. However, the employees of such employers arguably have the least need to get negative information about the union, since the union would more be likely to help them.<sup>261</sup>

The converse is also true. In those situations where the union is least likely to help employees – namely, where the union will not be all that effective in improving terms and conditions – the employer has the least incentive to wage a vigorous campaign. These incentives are most skewed when the union has favorable relations with the employer. Obviously, an employer will not disseminate negative information about an employer-dominated union. But such unions are illegal under the NLRA, and the Board has the power to disempower them (should a claim be filed).<sup>262</sup> However, other unions exist which are known to be more friendly to employers, and more apt to agree to favorable contracts, but their activities may not cross the line into illegal collusion. The existence of so-called “sweetheart” unions is an understudied but undeniable part of the union landscape.<sup>263</sup> Employers have no incentives to campaign against such unions. In fact, an employer has strong incentives to court such unions, especially if there is a possibility of a good-faith union drive down the road. As will be discussed below, with a sweetheart union an employer could lock its employees into a collective bargaining agreement for three years.<sup>264</sup>

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<sup>261</sup> In saying this I recognize that there still is a need for negative information about the union, even if the employer has a lot to lose from unionization. The union could still be corrupt or ineffective. My point is that, holding union effectiveness constant, employers have an increasing incentive to defeat the union as employee benefits from unionization (due to employer concessions) increase.

<sup>262</sup> 29 U.S.C. § 8(a)(2) (2000).

<sup>263</sup> Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 910-11 (discussing illegal sweetheart contracts).

<sup>264</sup> See Part III.E. *infra*.

True “sweetheart” deals – ones involving payoffs to union officials – are of course illegal.<sup>265</sup> But there are gradations in the relationships between employers and unions. A union may simply want to collect a standard set of dues easily, and thus will comply with most of management’s demands with little fuss. Unions that have a “friendlier” relationship with management are not necessarily pernicious, and may in fact do the best job of representing their employees. But it is nevertheless true that the better the relationship, the less likely it is that the employer will campaign against the union. The desire of the employer to provide negative information about the union is related to the employer’s fear of unionization. And because the union and the employer have conflicting interests, incentives for the employer to provide negative information about the union may be the lowest when structurally the need for such information is the highest.

### *C. Absence of Competition between Unions*

Markets depend in large part on competition within the market to provide the necessary information about the quality of goods and services.<sup>266</sup> Advertising is often centered around a comparison between one product and another, attempting to show why the advertised product is superior. In addition, sellers have incentives to provide information based on market pressure from other competitors. If other firms are revealing information about their product that consumers find useful, even if that information is mixed, an individual firm will be punished by consumers if it does not provide comparable information. If there is only one firm in the market, however, that firm will have much greater leverage in setting consumer expectations about the level of information disclosure.

If more than one union is seeking to represent a group of employees, these competing unions will have incentives to provide negative information about each other. But such elections are comparatively rare. In 2004, the NLRB handled 2,565 elections involving only one union, and 154 elections involving more than one union.<sup>267</sup> Much of this is a result of AFL-CIO guidelines restricting member unions from competing against each other. Under Article XX of the AFL-CIO Constitution, member unions are not permitted to organize or attempt to represent employees that are already represented by another AFL-

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<sup>265</sup> See 29 U.S.C. § 186 (2000) (outlawing payments from employers to unions or union officials).

<sup>266</sup> See Schwartz & Wilde, *supra* note SW1, at 668 (arguing that information regulation is not necessary in a competitive market).

<sup>267</sup> National Labor Relations Board, Sixty-Ninth Annual Report 16 (2005), available at: [http://www.NLRB.gov/NLRB/shared\\_files/brochures/Annual%20Reports/2004%20WholeAnnualReduced.pdf](http://www.NLRB.gov/NLRB/shared_files/brochures/Annual%20Reports/2004%20WholeAnnualReduced.pdf).

CIO union.<sup>268</sup> In addition, member unions cannot disseminate information as part of an organization campaign that may “adversely affect” the reputation of another member union.<sup>269</sup> These restrictions provide AFL-CIO monopolies over certain groups of employees.<sup>270</sup> Such monopolies are not subject to the general antitrust regulations, as labor unions are specifically exempted from federal antitrust laws.<sup>271</sup>

There are good reasons for Article XX and other limitations on union competition. Competition between unions wastes union resources.<sup>272</sup> Moreover, a union can more effectively utilize collective worker power if the union represents a large percentage of workers in the industry.<sup>273</sup> However, there are collateral effects to labor union’s antitrust exemption. One of those effects is that employees cannot comparison-shop between different AFL-CIO unions as long as those unions comply with Article XX.<sup>274</sup> As a result, employees do not get the kind of comparative information that a marketplace with a number of competitors would normally provide.

#### *D. Absence of Reputational Intermediaries*

Information problems may sometimes be resolved not by the parties to the contract themselves, but rather through “reputational intermediaries.”<sup>275</sup> Although critics of mandatory disclosure recognize that firms may have inadequate incentives to disclose information, they argue that the demand for information will create a market for that information.<sup>276</sup> Although the market, through interactions between sellers and buyers, is best equipped to determine

<sup>268</sup> AFL-CIO Const. art. XX, §§ 2, available at: <http://www.afl-cio.org/aboutus/thisistheafclcio/constitution/art20.cfm>.

<sup>269</sup> *Id.* § 5.

<sup>270</sup> Labor unions are permitted to monopolize employee representation under the Clayton Act. See Clayton Act, § 6, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 17).

<sup>271</sup> 15 U.S.C. § 17 (2000); see also *id.* §§ 52 & 102 (prohibiting injunctions against labor unions). In addition, some labor-employer agreements are given a nonstatutory exemption from antitrust sanctions. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

<sup>272</sup> AMERICAN FEDERATION OF LABOR, AFL-CIO NO-RAIDING AGREEMENT 5 (1954) (finding that union raids are “a drain of time and money far disproportionate to the number of employees involved”).

<sup>273</sup> Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 680 (2006).

<sup>274</sup> For a proposal to amend Article XX and increase union competition, see Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMPL. L.J. 1 (2003). For a broader argument in favor of union competition, see Pawlenko, *supra* note KP1.

<sup>275</sup> Black, *supra* note BB1, at 787.

<sup>276</sup> See, e.g., HENRY MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); George J. Bentson, *The Effectiveness and Effects of the SEC’s Accounting Disclosure Requirements*, in *ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES* 23, 24 (Henry G. Manne, ed. 1969); George Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117 (1964).

what information is necessary to disclose,<sup>277</sup> sometime sellers will not be in a position to provide trustworthy or verifiable information to potential buyers. While acknowledging that information about securities may be more difficult to verify, critics of mandatory disclosure argue that securities are not unique in this regard. According to one set of commentators, the “lemons” argument proves too much, as it is also hard to verify claims about the efficacy of toothpaste or the pricing of funeral services.<sup>278</sup> So without mandatory disclosure, it is claimed, the securities markets would not dry up; instead, issuers would use market approaches to create trustworthy information.<sup>279</sup>

How would this happen? Issuers would voluntarily disclose all of the information that investors would need in order to buy the stock at a proper price. If a company refused to disclose, investors would be justifiably wary, and the prices for their securities would drop precipitously.<sup>280</sup> However, Akerlof’s “market for lemons” thesis assumes that the information about the product is hard to verify. If there is no system in place for mandatory disclosure and governmental penalties for failing to do so, then investors may be concerned about the quality of the information they receive. And Akerlof’s downward spiral could kick in. Rather than relying on the threat of government enforcement to assure the quality of information disclosed, issuers would have to find a private way to assure investors of information quality.<sup>281</sup> This is where reputational intermediaries come in. These market players would sell their reputations as honest, impartial, and savvy investigators as a means of checking against issuer fraud. Even with our system of mandatory disclosure, our securities market still places vital tasks in the hands of reputational intermediaries. Accounting firms provide independent audits of the firm’s financial health. Investment banks provide further verification by acting as underwriters and thus vouching for the security. Attorneys comb through the issuer’s disclosures to make sure they comply with the relevant law. And research analysts pore over the disclosures and then report their impressions to clients, financial media outlets, and/or the investing public.

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<sup>277</sup> See, e.g., HOMER KRIPKE, *THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE* 119 (1979) (“A disclosure will be supplied voluntarily by issuers interested in the capital markets when there is consensus among suppliers of capital or other transactors in the capital market that this information is necessary to them for lending and investment decisions. Issuers will supply it because the alternative is to forego access to the capital markets.”).

<sup>278</sup> Easterbrook & Fischel, *supra* note EF1, at 681, 714.

<sup>279</sup> See Nicholas L. Georgakopoulos, *Why Should Disclosure Rules Subsidize Informed Traders?*, 16 INT’L REV. L. & ECON. 417, 418-19 (1996) (using the Coase theorem to argue that investors will bargain for the appropriate level of fraud-prevention measures).

<sup>280</sup> See Easterbrook & Fischel, *supra* note EF1, at 683 (“If the firm simply asked for money without disclosing the project and managers involved, . . . it would get nothing.”).

<sup>281</sup> See *id.* at 675 (discussing the use of “outsiders” to verify company financial information).

There is no denying the importance of reputational intermediaries, or “gatekeepers,”<sup>282</sup> to the proper functioning of the securities markets. Reputational intermediaries have been blamed for the failures of the 2001-2002 corporate scandals,<sup>283</sup> and the Sarbanes-Oxley Act of 2002 endeavors to shore up the ability of accountants and lawyers to serve as informational gatekeepers.<sup>284</sup> However, much of the current “reputational intermediaries” system depends on the law to require or reinforce the provision of those services.<sup>285</sup> In his blueprint for a strong securities market, Black notes that such a market needs not only reputational intermediaries but also laws regulating these intermediaries. For example, one of Black’s eighteen requirements<sup>286</sup> for controlling informational asymmetry is “[a] sophisticated accounting profession, with the skill and experience to catch at least some instances of false or misleading disclosure.”<sup>287</sup> However, Black also requires “laws that impose on accountants enough risk of liability to investors . . . so that the accountants will resist their clients’ pressure for laxer audits or more favorable disclosure.”<sup>288</sup>

<sup>282</sup> See John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid”*, 57 BUS. LAW. 1403, (2002) (defining gatekeeper in the securities regulation context as “reputational intermediaries who provide verification and certification services to investors”).

<sup>283</sup> See, e.g., FRANK PARTNOY, *INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS* (2003); Coffee, *supra* note JCC1.

<sup>284</sup> Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1189 (2003) (noting that Sarbanes-Oxley “brings into the realm of internal governance the gatekeepers that once stood outside the box, including auditors, analysts and lawyers”).

<sup>285</sup> For example, the Sarbanes-Oxley Act imposed rigorous independence requirements on accountants. See 15 U.S.C. §§ 78j-1(g) (Supp.) (creating new independence requirements); *id.* §§ 7911-7919 (establishing Public Company Accounting Oversight Board (PCAOB)). The market did not require these standards of accountants prior to Sarbanes-Oxley, and yet they are perhaps the least controversial aspects of the new law. *But cf.* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1533-37 (2005) (discussing the mixed quality of empirical evidence about the efficacy of auditor independence). Attorneys generally act as intermediaries with respect to legal mandates, including disclosure requirements. In the absence of those mandates, attorneys would only be responsible for insuring compliance with private contracts. The stock exchanges are given special privileges and responsibilities by the SEC as self-regulating organizations. 15 U.S.C. § 78(f) (2000) (providing for the registration of “national security exchanges”).

<sup>286</sup> See Black, *supra* note BB1, at 790-99.

<sup>287</sup> *Id.* at 793.

<sup>288</sup> *Id.* at 794. Such laws are necessary because reputation is not always enough. Certainly, over time investors will learn that a particular accounting firm is too superficial in its audits, or that a stock exchange fails to require the proper documentation for acceptance. But just as there can be a “lemons” market for securities, there can be a “lemons” market for those who vouch for securities. Investors cannot know precisely how well their reputational intermediaries are doing their jobs. However, slightly more forgiving accountants will be desirable to issuers, who will be looking for reputational intermediaries to put them in the best light. Thus, market forces will



Union financial disclosure is governed by the Labor-Management Reporting and Disclosure Act (LMRDA).<sup>289</sup> The Department of Labor implements the LMRDA's requirements through regulations;<sup>290</sup> these regulations were recently modified to require a greater amount of disclosure.<sup>291</sup> However, the new regulations have been criticized for not requiring unions to employ independent or outside auditors.<sup>292</sup> By allowing unions to rely on their own employees to report sensitive financial data, the LMRDA's regulations do not require an additional set of independent eyes to verify the veracity of that data. Although some large unions do use outside auditors in managing their finances, outside auditors are a general regulatory requirement for publicly-traded companies.<sup>293</sup>

Of course, LMRDA disclosure is designed for those who have already joined the union. An employer may use the union's disclosures for its own campaign purposes, often using the photocopy of the Department of Labor's form to prove its veracity.<sup>294</sup> But there is no requirement that employees receive what the union discloses to the LMRDA during the course of a union representation campaign. They may not even know of its existence. The NLRB is an independent agency and distinct from the Department of Labor, which is an executive branch agency.<sup>295</sup> Employees in the midst of a representation campaign may not know that there is information available that might be useful to their representation decision until after they are already in the organization.<sup>296</sup>

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drive accountants to be less strict, leading to less confidence from investors in their results. As Black notes: "The result is ironic: The principal role of reputational intermediaries is to vouch for disclosure quality and thereby reduce information asymmetry in securities markets. But information asymmetry in the market for reputational intermediaries limits their ability to play this role." *Id.* at 788.

<sup>289</sup> 29 U.S.C. §§ 401-531 (2000) (also known as the Landrum-Griffin Act).

<sup>290</sup> See 29 C.F.R. §§ 403.1-403.11, 408.1-408.13 (2006).

<sup>291</sup> See Labor Organization Annual Financial Reports, 68 Fed. Reg. 58,374 (Oct. 9, 2003) (codified at 29 C.F.R. §§ 403.1-403.11, 408.1-408.13 (2006)).

<sup>292</sup> See *Recent Regulation: Department of Labor Increases Union Financial Reporting Requirements*, 117 HARV. L. REV. 1734, 1734 (2004) [hereinafter *Recent Regulation*].

<sup>293</sup> *Id.* at 1739.

<sup>294</sup> See LOUIS JACKSON & ROBERT LEWIS, WINNING NLRB ELECTIONS: MANAGER'S STRATEGY AND PREVENTIVE PROGRAMS 18-19 (1972) (discussing how employers can use LMRDA disclosure in their campaign); ROGER S. KAPLAN & PHILIP B. ROSEN, RESPONDING TO UNION ORGANIZING CAMPAIGNS § 6.06 (2002) (same).

<sup>295</sup> For a discussion of the difference between independent agencies and executive branch agencies, see Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 445-51 (1996).

<sup>296</sup> In fact, the information is accessible on the Department of Labor's website. See Department of Labor, LMRDA Reporting and Public Disclosure, available at: <http://www.dol.gov/esa/regs/compliance/olms/trlo/lmrda.htm>.

In addition, there is not the vibrant financial and consumer media that exists for other products and services. According to Black, another critical institution for a vibrant securities market is “[a]n active financial press and securities analysis profession that can uncover and publicize misleading disclosure and criticize company insiders and (when appropriate) investment bankers, accountants, and lawyers.”<sup>297</sup> As Black noted:

Reputation markets require a mechanism for distributing information about the performance of companies, insiders, and reputational intermediaries. Disclosure rules help, as do reputational intermediaries’ incentives to advertise their successes. But intermediaries won’t publicize their own failures, and investors will discount competitors’ complaints because they come from a biased source. An active financial press is an important source of reporting of disclosure failures.<sup>298</sup>

The press does cover union failures and scandals, and such information is obviously relevant to the union representation decision. However, there is not the same level of coverage or sophistication that is applied to information about the securities markets. Nor is there the same sort of attention that is given to consumer products through such organizations as Consumer Reports.<sup>299</sup> There is no “Consumer Reports for Unions.” For a variety of reasons, it seems unlikely that reputational intermediaries such as “union analysts” will emerge any time soon. As AFL-CIO unions do not compete against one another, employees looking for AFL-CIO representation generally have one choice. Unlike a publicly-traded security, union representation is not sold on a fungible national market. Thus, there is not the money to be made on selling information about unions on a national scale. Additionally, potential union members would not be in a position to pay significant sums for the kind of serious analysis that stock investors enjoy. Even if they were, they still might not choose to do so given the free-rider problems inherent in obtaining the information. The information would benefit all potential employees at the firm. In fact, the purchaser would have an incentive to share it, as the purchaser still needs a majority of employees to agree with her if she wishes to prevail on the representation question. But while the benefits will accrue to all, it would be difficult to get all to agree to share in the costs. Given the free-rider concerns,

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<sup>297</sup> See Black, *supra* note BB1, at 798.

<sup>298</sup> *Id.*

<sup>299</sup> A search of the Consumer Reports website revealed no information about unions. See Consumer Reports Search Results for “Unions,” available at: <http://www.consumerreports.org/cro/search.htm?query=unions> (finding almost exclusively results about credit unions).

information that would be efficient for all to obtain might not be efficient for only one to obtain.

In sum, the role of reputational intermediaries in supplying information to other markets is not replicated in the union representation market. Their absence is yet another reason for concern about the information employees receive.

#### *E. Difficulty of Exit*

A corporate shareholder traditionally has two options if unsatisfied with the direction of the company. The shareholder can either vote for new directors or sell the shares to someone else. The alienability of shares is a critical part of bundle of shareholder rights.<sup>300</sup> The ability to get out of the investment gives shareholders an escape hatch in case they become dissatisfied down the road. In the market for union representation, the consequences of buying into the union are quite different. The most obvious difference is that the purchase of a stock gives the buyer something to resell, while a purchaser of services generally can only stop buying the services. In that sense, exit may be easier for the purchaser of services, because there is no need to find someone else to buy it from you. However, service contracts can have lengthy time periods, in which exit prior to the specified close can be quite expensive.

When a majority of employees vote in favor of a particular union during a representation election, they are choosing that union to represent them in collective bargaining. Once selected, the union serves as that representative indefinitely. In order to stop buying the union's services, employees must vote out the union through a decertification election.<sup>301</sup> As in the representation election, a decertification election will only be conducted if the petitioner can show that at least thirty percent of the employees in the bargaining unit are in favor of such an election.<sup>302</sup> The NLRB then conducts a secret ballot election and decertifies the union if a majority votes to decertify.

The decertification process is not easy; it takes time to collect signatures for the petition, hold the actual election, and then resolve any disputes over pre-election conduct. However, the statute also provides that no election can be held within a year after an election has been held.<sup>303</sup> In the representation context, the Board has extended this ban until a year after it has actually certified the union as bargaining representative.<sup>304</sup> The Board will consider any

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<sup>300</sup> See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439-40 (2001) (noting that transferable shares are one of the five "core functional features" of the corporate form).

<sup>301</sup> 29 U.S.C. § 159(c)(1)(A)(ii) (2000).

<sup>302</sup> NLRB Rules and Regs. § 102.61.

<sup>303</sup> 29 U.S.C. § 159(c)(3) (2000).

<sup>304</sup> *Brooks v. NLRB*, 348 U.S. 96 (1954).

decertification petition filed within a year of certification to be untimely.<sup>305</sup> The contract for union services therefore has at a *de jure* one-year minimum term.<sup>306</sup>

If the union and the employer agree to a contract, the Board imposes an additional “contract bar” on potential decertification elections. Under the contract-bar doctrine, employees are prohibited from filing a decertification petition during the life of a negotiated collective bargaining agreement.<sup>307</sup> Once the union and employer have agreed to terms, the employees must retain the union for the life of the contract. The contract bar lasts a maximum of three years, even if the agreement goes beyond that.<sup>308</sup> However, the agreement need not be ratified by members in order to have preclusive effect, unless the agreement by its terms requires such approval.<sup>309</sup>

Of course, if the union and employer keep negotiating agreements, making sure to have a new contract before the other one expires, the employees would never have an opportunity to decertify the union. Thus, the Board has created a thirty-day window in which decertification petitions may be filed. The Board will consider a petition timely if it is filed no more than ninety days, but no less than sixty days, before the expiration of the agreement.<sup>310</sup> The Board created the sixty-day cutoff in order to give the union a period of negotiation “free from the threat of overhanging rivalry and uncertainty.”<sup>311</sup> Although there are some exceptions to the contract-bar doctrine, they generally involve an illegal clause in the contract<sup>312</sup> or union incapacity through schism or defunctness.<sup>313</sup>

The one-year and contract-bar rules are most dangerous when there is collusion between the employer and the union. Under such circumstances the employer and the union can agree to a contract and prevent the employees from voting out the union for up to three years.<sup>314</sup> However, even when a union is merely incompetent, employees would still be stuck with a poor bargaining representative for a lengthy period of time.

<sup>305</sup> See *Chelsea Indus.*, 331 N.L.R.B. 1648 (2000).

<sup>306</sup> Since it will take some time between the filing of the petition and the decertification election, the bar is actually longer than a year. Employers are not allowed to withdraw recognition after a year based on a decertification petition presented to the employer before the year’s end. *Id.*

<sup>307</sup> See *Cind-R-Lite Co.*, 239 N.L.R.B. 1255 (1979).

<sup>308</sup> *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

<sup>309</sup> See *Stur-Dee Health Prods.*, 248 N.L.R.B. 1100 (1980); *Appalachian Shale Prod. Co.*, 121 N.L.R.B. 1160 (1958).

<sup>310</sup> See *Leonard Wholesale Meats Co.*, 136 N.L.R.B. 1000 (1962).

<sup>311</sup> *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995, 1001 (1958) (quotations omitted).

<sup>312</sup> See *HARDIN & HIGGINS*, *supra* note PHH1, at 527-29.

<sup>313</sup> See *id.* at 535-38.

<sup>314</sup> See G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”: *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 344 (1980) (recognizing that the contract-bar rule allows the employer and union to benefit from a “sweetheart” contract).

The Board does allow an alternative to decertification for removing a union from representation. An employer may refuse to bargain with a union if the union has in fact lost the support of a majority of the employees.<sup>315</sup> This standard replaced the old rule which permitted employers to cease negotiating based on a “good faith reasonable doubt” that the union had continuing majority support.<sup>316</sup> Under the new standard, an employer may cease to negotiate with the union if it can prove that the union no longer enjoys majority support.<sup>317</sup> However, this exit must operate through the employer; it is therefore unavailable in situations of employer-union collusion. Once again, we have a situation where the employer has exactly the wrong incentives for its participation in the process.

There are substantial policy reasons for making it difficult for employees to decertify a union.<sup>318</sup> However, such difficulties also impose a cost. Because of the difficulties of exit, there is a higher premium placed on employees’ ability to make the correct decision at the beginning.

#### *F. No Policing of Misrepresentation*

As discussed previously,<sup>319</sup> the Board has held that misrepresentations do not violate the Board’s “laboratory conditions” as long as such misrepresentations are not akin to forgery.<sup>320</sup> In summarizing the rationale for its policy, the Board stated:

In addition to finding [a more restrictive] rule to be unwieldy and counterproductive, we also consider it to have an unrealistic view of the ability of voters to assess misleading campaign propaganda. As is clear from an examination of our treatment of misrepresentations under the Wagner Act, the Board had long

<sup>315</sup> *Levitz Furniture of the Pacific*, 333 N.L.R.B. 717, 717 (2001).

<sup>316</sup> *See Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359 (1998).

<sup>317</sup> In order to allow for employers to determine this in the face of questions about union support, the Board allows for the employer to petition for a decertification election based on “good faith reasonable uncertainty” about the continuing majority status. *Levitz*, 333 N.L.R.B. at 717, 723. However, an employer is allowed to poll its employees if it has good faith reasonable doubt about continuing majority status. *Id.* at 723. Thus, doubt is enough to enable the employer to poll, and the poll may provide the employer with evidence that the union no longer enjoys majority support. In the alternative, uncertainty – as evidenced by employee dissatisfaction – will be sufficient to allow an employer to call an election as to the union’s continued support. *See id.* at 728-29.

<sup>318</sup> *See General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962) (discussing “the necessity to introduce insofar as our contract-bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy”).

<sup>319</sup> *See Part I.B.2 supra.*

<sup>320</sup> *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 131-32 (1982).

viewed employees as aware that parties to a campaign are seeking to achieve certain results and to promote their own goals. Employees, knowing these interests, could not help but greet the various claims made during a campaign with natural skepticism. The ‘protectionism’ propounded by the [the earlier] rule is simply not warranted. On the contrary, . . . ‘we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.’<sup>321</sup>

A hands-off policy towards the hurly-burly world of political campaigns might be an appropriate one.<sup>322</sup> However, such a stance is anathema in the world of contracts, where fraud is universally prohibited. Common law fraud prohibits deception that leads to reliance, and in some circumstances even a failure to disclose can constitute deception. However, many contractual regulatory schemes have developed stricter prohibitions against misrepresentations. In the securities context, for example, federal securities law has several express and implied causes of actions against misrepresentations.<sup>323</sup> Perhaps the most important antifraud provision is Rule 10b-5, which prohibits misrepresentations or misleading omissions in the context of the purchase or sale of a security.<sup>324</sup> Rule 10b-5 offers substantially more protection against misrepresentations than traditional common law fraud.<sup>325</sup> There has been little controversy about Rule 10b-5’s basic mission: to eliminate misrepresentations and misleading omissions in the market for securities.<sup>326</sup>

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<sup>321</sup> *Id.* at 132 (quoting *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313 (1978)).

<sup>322</sup> See Evan Richman, Note, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 670 (1998) (noting the lack of regulation for misrepresentations in the political arena).

<sup>323</sup> In addition to Rule 10b-5, which prohibits misrepresentations or omissions in connection with the purchase or sale of a security, § 11(a) of the Securities Act, *see* 15 U.S.C. § 77k(a) (2000), prohibits a false statement of a material fact in a registration statement, and § 12(a)(2) of the Act, *see id.* § 77l(a)(2), imposes liability for a false statement of material fact in a prospectus.

<sup>324</sup> 17 C.F.R. § 240.10b-5 (2006).

<sup>325</sup> See Matthew T. Bodie, *Aligning Incentives with Equity: Employee Stock Options and Rule 10b-5*, 88 IOWA L. REV. 539, 595-96 (2003).

<sup>326</sup> Commentators on both sides of the mandatory disclosure debate agree that securities markets need strong antifraud protection. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 486-89 (5th ed. 1998) (arguing that many aspects of securities regulation may impede the flow of information to investors, but noting that investors should be protected from fraud); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 130 (“A critical adjunct to my proposal of disclosure choice is that issuers in public offerings would be subject to a mandatory antifraud standard—namely, Rule 10b-5 liability.”). Cf. Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 390 (1991)

Thus, unlike pretty much any other product market, there is no check against fraud in the market for union representation services, except in the very narrowest of circumstances. This failure to police against fraud is yet another reason for concern about the quality of information available to employees.

### G. Lack of Public Confidence

The percentage of private employees represented by unions has steadily declined from the 1950s up until this year.<sup>327</sup> These declines come in the face of polls showing overall public support for unions. For example, recent polls show that a majority of the public approve of labor unions and believe that unions are good for the economy.<sup>328</sup> However, there is some evidence of concerns about union competence.<sup>329</sup> According to one public poll, seventy-one percent agreed that the government ought to do more to protect union members from corrupt union officials.<sup>330</sup> Certainly, images of union corruption have inundated the public since the 1950s. The 1957-1958 Senate hearings on union corruption, chaired by Senator John McClellan and staffed by Robert Kennedy, brought to light many instances of union corruption, including ties with organized crime.<sup>331</sup> Episodes of malfeasance by union officials continue. Congress, courts, and commentators have struggled with the best methods of curtail such corruption and have resorted to such extraordinary measures as forced judicial trusteeships with no set time limits.<sup>332</sup> While the federal government has had significant success in removing organized crime from certain unions,<sup>333</sup> the shadow remains. And in the popular media, shows such

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("The social value of preventing fraud in the sale of securities is too clear to require elaboration.").

<sup>327</sup> See BLS News Release, *supra* note 1.

<sup>328</sup> See, e.g., Heather Mason Kiefer, Public Remains Positive About Labor Unions, Sept. 13, 2005, available at: <http://poll.gallup.com/content/default.aspx?ci=12751> (showing that 58 percent approve of labor unions and 54 percent believe that unions are good for the U.S. economy); John Zogby et al., Nationwide Attitudes Toward Unions, Feb. 26, 2004, available at: [http://psrf.org/info/Nationwide\\_Attitudes\\_Toward\\_Unions\\_2004.pdf](http://psrf.org/info/Nationwide_Attitudes_Toward_Unions_2004.pdf) (public poll finding that 63 percent approve of labor unions).

<sup>329</sup> SEIU President Andy Stern recently opined that "unions have an image of being old, not effective, in some cases not looking like the new work force. So we have an image problem." Kris Maher, *Are Unions Relevant?*, WALL ST. J., Jan. 22, 2007 at R5 (interview with Andrew Stern).

<sup>330</sup> Zogby et al., *supra* note JZ1, at 15.

<sup>331</sup> Michael J. Nelson, Note, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 GEO. MASON L. REV. 527, 532-37 (2000).

<sup>332</sup> For an in-depth discussion of two such trusteeships, see Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689 (1991)

<sup>333</sup> Jim Jacobs has extensively discussed the federal government's role in eliminating mob influence from unions extensively. See, e.g., JAMES B. JACOBS, *MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* (2005); James B. Jacobs et al., *The RICO*

as “The Sopranos” portray unions as mere vessels for mafia control of certain industries.<sup>334</sup>

In the capital markets, mandatory disclosure has been called upon to shore up public confidence in securities. The need for public confidence was touted as a key purpose for the New Deal securities legislation<sup>335</sup> and has been cited repeatedly as justification for further mandatory disclosure.<sup>336</sup> The Sarbanes-Oxley Act was perhaps in large part an effort to restore investor confidence after the shocks of 2001 and 2002.<sup>337</sup> Although some commentators have criticized the lack of empirical support for this justification,<sup>338</sup> there is no question that market confidence encourages investment in equities.<sup>339</sup> In fact, the system of public securities regulation could be considered a government subsidy to investors and issuers. By taking steps to insure the integrity of the markets, the government saves investors and issuers enforcement costs that they would otherwise bear. Our securities market would not be as strong without this system of public intervention.<sup>340</sup>

Mandatory disclosure will not prevent fraud; the securities markets amply demonstrate that. But mandatory disclosure creates a market environment that is richer in information and less susceptible to breed the most overt kinds of fraud. Such an environment will help boost public confidence in the market itself. Just as mandatory disclosure has been employed to improve public confidence in the securities markets, it may be useful in boosting public confidence in the market for union representation.

#### PART IV: PRELIMINARY THOUGHTS ON ADDRESSING THE INFORMATION GAP

Given the rampant information difficulties in the market for union representation, it makes sense to consider ways in which those difficulties may

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*Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419 (2004); James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229 (2003).

<sup>334</sup> *The Sopranos* (HBO broadcast, 1999-2006).

<sup>335</sup> Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 51 (1983).

<sup>336</sup> Easterbrook & Fischel, *supra* note EF1, at 692 (“The justification most commonly offered for mandatory disclosure rules is that they are necessary to ‘preserve confidence’ in the capital markets.”).

<sup>337</sup> Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 470 (2003) (stating that the August 2002 financial statement certifications required under Sarbanes-Oxley helped convince investors that firms as a whole were not dishonest or poorly-run).

<sup>338</sup> *Id.* at 693.

<sup>339</sup> *Id.*

<sup>340</sup> See Black, *supra* note BB1, at 782-85.



be resolved. The traditional answer would be to force the information out into the market through a system of required disclosure. Systems of mandatory disclosure, however, are not a panacea: they create costs and may change market dynamics in inefficient ways. Below is a preliminary discussion of possible approaches to the information problems in the market for union representation.

#### A. Required Disclosure

As noted earlier,<sup>341</sup> the Board has focused primarily on the exclusion of certain kinds of information or speech from the representation campaign; it has not made efforts to insure the inclusion of relevant information. The only instance of required disclosure is that employers must provide the union with the names and addresses of employees in the unit once the election petition has been filed.<sup>342</sup> In explaining why it was requiring this information, the Board noted:

. . . [W]e regard it as the Board's function to conduct elections . . . that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede free and reasoned choice. Among the factors that undoubtedly tend to impede such choice is a *lack of information* with respect to one of the choices available.<sup>343</sup>

Despite the Board's recognition that a lack of information impedes free and reasoned choice, it has done little to address the problem.

The most obvious solution to information deficiencies would be a system of mandatory disclosure. Such a system would directly force out material information into the marketplace. However, there are significant concerns about the efficacy of such a system, as well as its costs. Below I address some of the more prominent issues raised by mandatory disclosure.

1. *The exact nature of the information problem.* A system of mandatory disclosure must be designed to address the specific information problems the disclosure is designed to address. This article has discussed a number of difficulties in the market for union representation: information asymmetry, conflicts of interest, lack of competition, lack of reputational intermediaries, difficulty of exit, lack of fraud protection. Each problem creates a different set of informational problems. The conflict of interest problem, for example, relates to a specific set of union-employer relationships in which the union has

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<sup>341</sup> Part I.B.3 *supra*.

<sup>342</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-40 (1966).

<sup>343</sup> *Id.* at 1240 (emphasis added) (quotations and citations omitted).

been captured, to some degree, by the employer. Smaller, non-AFL-CIO unions are more likely to fit this profile. The lack of competition, on the other hand, relates to a problem that is most exacerbated when only AFL-CIO unions serve a particular community of employees. Any consideration of regulations would have to disentangle these different problems.

In addition, it is important to keep an eye the collateral effects the regulation would have. The overall problem is lack of information leading to (potentially) irrational decisions. But dealing with this problem could have effects on other issues. For example, greater disclosure requirements could lead to fewer employees choosing unionization. On the other hand, if union disclosure were coupled with required employer disclosure, a card-check certification systems could become more popular.<sup>344</sup> Depending on one's ultimate policy preferences, the costs and benefits of regulation with regard to information problems may be outweighed by the costs and benefits such regulation creates for unionization and industry overall. But the effects of any system must be considered in its entirety, and the effects of certain policies (such as disclosure) could be balanced by reforms in other areas (such as card-check certification).

2. *Existing disclosure regimes.* One consideration when contemplating creating a system of disclosure is the fact that, for certain types of union-related information, the Board could piggyback on top of the existing regime of disclosure under the Labor-Management Reporting and Disclosure Act (LMRDA). LMRDA requires extensive union reporting on union finances, employee and officer pay, and dues.<sup>345</sup> This information is available for public use and now can be found on the web. But employees in the midst of a representation campaign are not directed to this information. The Board may be able to use the already-available pool of disclosed information in shaping their new disclosure regime. In addition, if policymakers wanted to consider a disclosure regime for employers, such a regime could draw upon the extensive system of securities regulation required of public companies.

3. *Informational overload and the marginal employee.* Information overload has been a regular concern in the realm of information disclosure. Commentators regularly note that too much information can be the equivalent of no information. More damagingly, information overload may drown out information that would otherwise be accessible.<sup>346</sup> In crafting an information disclosure regime, commentators would need to be sure not make the information accessible and understandable, or risk conducting a fruitless exercise.

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<sup>344</sup> See Part II.C.

<sup>345</sup> See Part III.D.

<sup>346</sup> See Edwards, *supra* note ME1, at 229-34; Paredes, *supra* note TP1, at 444-49.

At the same time, some commentators contend that the problem of information overload has been exaggerated.<sup>347</sup> Given the importance of the marginal consumer in shaping the market, additional information may be effective even if only one consumer avails herself of it. In the context of the representation campaign, the marginal employee makes the difference as to whether the employees choose the services or not. Thus, the marginal employee is perhaps even more critical to the market for union representation than in a traditional consumer market.

One might envision a much more active Board which served as a repository for information about the campaign and took steps to make sure employees received that information. For example, the SEC plays such a role with corporate disclosure: its EDGAR system offers free and simple access to millions of corporate documents regarding IPOs, annual statements, and proxy contests.<sup>348</sup> The Board could offer two levels of information: one short form given to all employees, and a database available to all but used only by a small group. This bifurcation might insure the optimal level of information dispersion among employees. This is but one option that should be considered in addressing information problems.<sup>349</sup>

#### *B. Information and the Neutrality Agreement*

This article has focused on the concerns about information deficiencies in the market for representation services. In considering this market, it is important to note that private neutrality agreements are an increasingly popular way for unions to sign up new members. The neutrality agreement is a contract between a union and an employer in which the employer agrees to remain neutral while the union endeavors to win the support of a majority of employees. Such agreements come with a range of procedures. The simplest of these agreements only requires employer neutrality during the campaign, with the union then having to succeed in a Board-run election to obtain representation. However, some neutrality agreements also require the employer to recognize the union if it obtains signatures on representation cards from a majority of employees. This process is known as a card-check certification.

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<sup>347</sup> See, e.g., Schwartz & Wilde, *supra* note SW1, at 675-76.

<sup>348</sup> See SEC Filing & Forms (EDGAR), available at: <http://www.sec.gov/edgar.shtml>.

<sup>349</sup> A focus on information disclosure would also change the Board's approach in less obvious ways. For example, the Board's General Counsel is encouraging the Board to hold that an employer and a union may not agree to terms and conditions of employment prior to the union's certification as representative, even if this agreement is conditional on a showing of majority support. See Jonathan P. Hiatt & Craig Becker, *At Age 70, Should the Wagner Act Be Retired?: A Response to Professor Dannin*, 26 BERKELEY J. EMPL. & LAB. L. 293, 301 (2005). However, such agreements provide employees with a true sense of the consequences of unionization. As one set of commentators noted, "[s]uch prerecognition bargaining allows an informed choice by both employers and employees." *Id.* at 303.

Card-check certification essentially allows the parties to opt out of the NLRB's representation policies. Unions began negotiating neutrality agreements in the 1970s and their popularity has substantially increased.<sup>350</sup>

The attraction of neutrality agreements for unions is clear. A recent study of such agreements found that when they included a card check provision, the union secured representation of the employees seventy-eight percent of the time.<sup>351</sup> It is less clear why employers would agree to them. In many cases, the employer has a preexisting relationship with the union as to other employees, and it can negotiate a neutrality agreement in the context of a larger series of negotiations.<sup>352</sup> The most prominent neutrality agreements include ones in the auto and telecommunications industries, which have a high union density.<sup>353</sup> Unions have also had some success in securing neutrality agreements through corporate campaigns.<sup>354</sup> Some state and local government agencies now require or encourage employers to sign neutrality agreements in order to be eligible for governmental contracts.<sup>355</sup> In Las Vegas, the Hotel and Restaurant Employees (HERE) and the Service Employees International Union (SEIU) have successfully used these tools to obtain neutrality agreements with high profile employers.<sup>356</sup>

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<sup>350</sup> James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 829-30 (2005) (asserting that “[a]s a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation”). Despite this claim, however, Brudney does not contend that unions obtain more of their members through certification agreements than through Board elections.

<sup>351</sup> Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 52 (2001).

<sup>352</sup> Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES (R. Block et al. eds., 2006); 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, 387-89 (2001).

<sup>353</sup> See, e.g., Rick Haglund, *Union Foes Declare War on Neutrality Agreements*, GRAND RAPIDS PRESS, Feb. 20, 2005, at G5 (discussing neutrality agreement within the automobile industry); Matt Richtel, *In Wireless World, Cingular Bucks the Antiunion Trend*, N.Y. TIMES, Feb. 21, 2006, at C1 (discussing neutrality agreements at Cingular and SBC Communications).

<sup>354</sup> Eric Heubeck, *New Organizing Methods: Card Check and Neutrality Agreements* (Nov. 29, 1999), available at: <http://www.enterstageright.com/archive/articles/1299unorg.htm> (discussing various corporate campaigns).

<sup>355</sup> See Brudney, *supra* note JB1, at 838 & n.85 (discussing laws, resolutions, or executive orders in California, New Jersey, Milwaukee, and San Jose); Hartley, *supra* note RH1, at 392-95.

<sup>356</sup> Steven Greenhouse, *Local 226, “The Culinary” Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22; Labor Research Association, *Employer Neutrality and Card Check Recognition Get Results* (October 1999), available at: <http://www.laborresearch.org/story2.php/67>.

Despite their increasing popularity, it is difficult to say how pervasive neutrality agreements may eventually become. Employers who oppose unionization will not sign them voluntarily, and to this point unions have only been able to apply pressure in a limited spectrum of special circumstances. In addition, Congress has considered legislation to prohibit employer recognition based on a card-check majority.<sup>357</sup> Although it seems unlikely that such a prohibition would pass, the most recent bill did garner fifty-seven co-sponsors. Finally, it is unclear whether the NLRB will accord deference to the results of a card-check certification mandated by a neutrality agreement. In a recent order, the Board granted review of a case involving the application of the “recognition bar” doctrine in the context of a neutrality agreement.<sup>358</sup> The Board has traditionally recognized that “voluntary recognition of a union in good faith based on demonstrated majority status will bar a [decertification or competing representation] petition for a reasonable period of time.”<sup>359</sup> However, the majority in *Dana* distinguished the traditional rule by noting that such precedent “is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer, while in both of the instant cases, an agreement was reached between the union and the employer before authorization cards, evidencing the majority status, were obtained.”<sup>360</sup> Although it only granted review on the issue and as yet has made no final determination, the order still generated a strong dissent.<sup>361</sup> If the Board ultimately disallows the recognition bar in the card-check neutrality agreement context, then employers and employees will be free to file decertification petitions soon after the employer has recognized the union through the card-check process.<sup>362</sup>

The strongest argument against neutrality agreement is the potential impairment of employee free choice. Anti-union organizations and commentators have criticized neutrality agreements as opportunities for union

<sup>357</sup> See Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. § 3 (2004); H.R. 4636, 107th Cong. § 2 (2002).

<sup>358</sup> *Dana Corp.*, 341 N.L.R.B. 1283 (2004).

<sup>359</sup> See *id.* at 1284 (Liebman & Walsh, Mems., dissenting) (citing *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966); *Sound Contractors Assn.*, 162 N.L.R.B. 364 (1966)).

<sup>360</sup> *Id.* at 1283.

<sup>361</sup> See *id.* at 1284-87 (Liebman & Walsh, Mems., dissenting). See also Hiatt & Becker, *supra* note HB1, at 300 (arguing that removal of the recognition bar would be “the most radical and legally unfounded decision in [the Board’s] history”).

<sup>362</sup> However, it may be possible for union to enforce neutrality agreements through mandatory arbitration, which in turn would be enforced by federal courts under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). See *UAW v. Dana Corp.*, 278 F.3d 548, 550 (6th Cir. 2002); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 406 (6th Cir. 1998); *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 568 (2d Cir. 1993). Arbitrators generally have flexibility in crafting remedies for neutrality breaches. See *AK Steel Corp.*, 163 F.3d at 410.

intimidation and misinformation to carry the day.<sup>363</sup> Critics of card-check neutrality agreements have cited the lack of a “fully informed electorate”<sup>364</sup> under such agreements as well as the need for employees to “hear[] views on as many sides of the issue as possible.”<sup>365</sup> The NLRB itself echoed these concerns when it said that “the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation.”<sup>366</sup>

Given the concern about informed employee choice, neutrality agreements may in fact have a greater need for some system of information disclosure than representation elections. Looking at the parties’ incentives, employers will be more likely to sign neutrality or card-check agreements when they are less afraid of the consequences of unionization. And without the pre-election campaign, there is no official time for employees as a group to consider their collective decision. Taking steps to insure employees have the appropriate information may take much of the teeth out of these neutrality-agreement critiques. Thus, in evaluating information regulation in the context of the representation election, policymakers should consider the potential for applying those regulations in the context of neutrality agreements as well. Required disclosure for card check certifications may alleviate many of the concerns raised by such procedures while preserving the features that make them attractive to unions and academic commentators.

#### CONCLUSION

The Board, courts, and academic commentators have (with good reason) focused on employer coercion and administrative delay as key concerns in the regulation of the union representation election. However, the critical role of information – information necessary to make an efficient representation decision – has been neglected. This article argues for a new paradigm in considering the representation election: the purchase of services. In applying

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<sup>363</sup> See, e.g., *Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. On Workforce Prots. Of the House Comm. On Educ. & the Workforce, 107th Cong. 100 (2002) [hereinafter 2002 House Hearings]* (statement of Charles I. Cohen on Oct. 8, 2002) (arguing that the “ultimate goal” of a card-check neutrality agreement is “obtaining representation status without a full informed electorate and without a secret ballot election”); Union Free America, *Neutrality Agreements and Card Check Elections*, available at: [http://www.unionfreeamerica.com/neutrality\\_cardcheck.htm](http://www.unionfreeamerica.com/neutrality_cardcheck.htm) (“The long and short of it is that union authorization cards signed by a majority of employees are not a reliable indication of whether they really want union representation. The unions know this. That’s why they want card check elections instead of secret ballot elections.”).

<sup>364</sup> 2002 House Hearings, *supra* note HH2002, at 100 (statement of Charles I. Cohen).

<sup>365</sup> *Id.* at 105 (statement of Daniel Yager).

<sup>366</sup> *Dana Corp.*, 341 N.L.R.B. 1283, 1283 (2004).

this paradigm, we must determine whether employees making representation decisions have the information necessary to make informed and rational economic decisions. There are many reasons to believe that the market fails to provide this information, especially in cases where it would be most critical. Considering these failures, it is worthwhile to explore ways of dealing with this information gap.