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INFORMATION AND THE MARKET FOR UNION REPRESENTATION

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INTRODUCTION

IN 2006 unions represented roughly 8.7 million private-sector employees.¹ Although a substantial number, the percentage of private-sector employees who are represented by unions has been steadily and seemingly inexorably falling.² The pressure of

¹ Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members in 2006 tbl.3 (Jan. 25, 2007), available at <http://www.bls.gov/news.release/union2.t03.htm>.

² At their peak in the 1950s, unions represented more than a third of the private and nonagricultural workforce. Michael Goldfield, *The Decline of Organized Labor in the United States* 10 tbl.1 (1987); Leo Troy & Neil Sheflin, U.S. Union Sourcebook: Membership, Finances, Structure, Directory app. A at A-1 (1985). By 1983, only one-fifth of the total workforce was unionized; today, only twelve percent of all employees are union members. Press Release, U.S. Dep't of Labor, *supra* note 1, at 1.

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 organizing efforts.³ His tenure has been marked by a greater devotion to expanding the union ranks.⁴ Despite these efforts, union membership continued to decline. By 2005, there was sufficient disenchantment with Sweeney's administration 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.⁵

The National Labor Relations Act ("NLRA") provides the legal framework for private-sector employees to choose whether to have this collective representation.⁶ Under the NLRA, a majority vote determines whether the employees will or will not have a labor organization⁷ as their representative at the bargaining table.⁸ 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 ("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."⁹

The Board has spent nearly sixty years refining the conditions of this laboratory. Countless Board decisions have parsed what an

³ Marion Crain & Ken Matheney, *Labor's Identity Crisis*, 89 Cal. L. Rev. 1767, 1784–85 (2001).

⁴ *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.").

⁵ George Raine, *Dissident Unions Put the Focus on Organizing*, S.F. Chron., July 31, 2005, at E1; see also Andy Stern, *A Country That Works: Getting America Back on Track* 86–98 (2006) (discussing his perspective on the founding of the Change to Win Federation).

⁶ 29 U.S.C. §§ 151–169 (2000).

⁷ The Act defines a "labor organization" as "any organization of any kind . . . 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." 29 U.S.C. § 152(5).

⁸ *Id.* § 159.

⁹ *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

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 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 will challenge that assumption. In evaluating the regulation of the representation campaign, both the Board and the majority of commentators have based their analyses on the model of a laboratory or, in quite a contrast, a political campaign.¹⁰ Instead of seeing the representation election as the end result of a political campaign, or a scientific experiment conducted in a 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 will consider the current regulatory framework for representation elections. It will discuss the two paradigms that have influenced election regulation: the scientific laboratory and the political election. It will then explore important academic commentary that has suggested new approaches to this framework. Part II will describe why the choice for union representation should be viewed as an economic decision, rather

¹⁰ See, e.g., 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”); 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.”).

than as a collective political decision or a scientific experiment. Part III will discuss reasons to suspect that employees are not getting the information they need to make rational economic decisions about union representation. Part IV will conclude with initial thoughts on addressing the information problems in the market for union representation.

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 collective interests in the terms and conditions of employment.¹¹ 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.¹² Pre-election hearings will be held if the employer or employees wish to challenge the appropriateness of the bargaining unit proposed by the petition.¹³

¹¹ 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.

¹² See 29 C.F.R. § 101.18(a) (2006).

¹³ *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)–(b). 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 *Boire v. Greyhound Corp.*, 376 U.S. 473, 476–79 (1964) (holding that Board’s orders in election certification proceedings were not final orders subject to judicial review); *Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 409 (1940) (same); Michael C. Harper et al., *Labor Law: Cases, Materials, and Problems* 299–300 (5th ed. 2003) (discussing the process for employer judicial review).

If the Board determines that the unit is appropriate, it will move ahead with a secret-ballot election.¹⁴ 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.¹⁵ 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.¹⁶ Employers or unions can challenge the results of the election based on the eligibility of certain voters or conduct that improperly influenced the election.¹⁷ The Board then conducts an investigation, which may include a hearing for the collection of evidence.¹⁸ 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.¹⁹

The NLRA itself does not provide many specifics on regulating the election process. The 1935 Wagner Act²⁰ only provided that the Board designate a representative selected by a majority of the unit employees.²¹ Initially, the Board deemed evidence of employee sentiment presented at a hearing sufficient to certify a union as representative.²² However, by 1939 the Board had decided to require secret ballot elections to determine the will of the majority.²³ 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

¹⁴ 29 C.F.R. § 101.21.

¹⁵ See 29 U.S.C. § 159(a) (2000).

¹⁶ Id. § 158(a)(3) (permitting employers to require union membership as a condition of employment); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744–45 (1963) (permitting “agency shop” agreements whereby unions charge nonmembers for the costs of collective representation).

¹⁷ 29 C.F.R. § 102.69(a).

¹⁸ Id. § 102.69(c), (d), (e).

¹⁹ 29 U.S.C. § 160(c), (e), (f).

²⁰ The NLRA was created by the Wagner Act and has since been amended, most notably by the 1947 Taft-Hartley Act. Arthur L. Stern, Annotation, *The Labor Management Relations (Taft-Hartley) Act, 1947, and its Effect on the National Labor Relations (Wagner) Act*, 173 A.L.R. 1401, 1402–03 (1948).

²¹ See Becker, *supra* note 10, at 507.

²² Id. (noting that for the Board’s first five years roughly a quarter of all unions were certified as representative without an election).

²³ *Cudahy Packing Co.*, 13 N.L.R.B. 526, 531–32 (1939).

certify the results thereof.”²⁴ 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. 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 Section 8(a)(1) of the NLRA, employers could not “interfere with, restrain, or coerce” employees who were exercising rights protected under Section 7 of the Act.²⁵ If an employer’s campaign activities rose to the level of a Section 8(a)(1) violation, they were prohibited. But, what about campaign activity that might intimidate or coerce employees but did not violate Section 8(a)(1)? Congress had chosen to carve out a fairly big chunk of such conduct for protection through Section 8(c) of the NLRA. According to Section 8(c), “the express[ion] of any views, argument, or opinion” could not be deemed to be an unfair labor practice “if such expression contain[ed] no threat of reprisal or force or promise of benefit.”²⁶ In *General Shoe Corp.*, however, the Board established that conduct protected by Section 8(c) could nevertheless be grounds for setting aside an election.²⁷ The Board rejected the claim that Section 8(c) prohibited the Board from relying on conduct other than an unfair labor practice to overturn an election.²⁸ Since the text of Section 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.

Having given itself expansive powers from the start, the Board has thence embarked on an ambitious and continuing effort to oversee the election campaign. 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

²⁴ 29 U.S.C. § 159(c).

²⁵ *Id.* § 158(a)(1).

²⁶ *Id.* § 158(c).

²⁷ 77 N.L.R.B. 124, 126–27 (1948).

²⁸ *Id.*

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 function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”²⁹ As noted above, *General Shoe* made it clear that unfair labor practices would not be the sole grounds for overturning an election. The case, however, was not merely about the statutory application of Section 8(c) in the election context. 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.”³⁰

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 Section 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.”³¹ Any effort to compel the employee to vote a certain way

²⁹ Id. at 127.

³⁰ 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).

³¹ 29 U.S.C. § 158(a)(1).

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 conditions if they support the union.³² A threat to close a plant because of union activity is also prohibited.³³

The line becomes fuzzier, however, 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. This includes the freedom to tell employees that 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, an employer's prediction can look 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.*³⁴ 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.'"³⁵ An employer may even make a prediction about the impact unionization would have on the company; however, such a

³² See *E.W. Grobbel Sons, Inc.*, 322 N.L.R.B. 304, 305 (1996) (holding that a discontinuance of benefits was an unlawful reprisal), enforcement denied on other grounds, 149 F.3d 1183 (6th Cir. 1998).

³³ The employer may, however, shut down the plant after the election, if such a decision was reached without union animus. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965); cf. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981) (holding that the employer need not bargain with the union over such a decision).

³⁴ 395 U.S. 575 (1969).

³⁵ *Id.* at 618 (quoting 29 U.S.C. § 158(c)).

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.”³⁶ 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.”³⁷ 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.³⁸ But 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 should be drawn. For example, in *DTR Industries, Inc.*, the Board found that an employer violated Section 8(a)(1) through its pre-election letter which stated “our business would automatically be reduced if the union wins the election.”³⁹ The U.S. Court of Appeals for the Sixth Circuit, however, refused enforcement, finding that the letter was a permissible prediction based on objective fact.⁴⁰

The Board has also consistently found predictions about the futility of union organizing to be impermissible threats. The Board reads such predictions as threats to engage in bad-faith bargaining and therefore threats to engage in illegal activity.⁴¹ Employers, however, 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

³⁶ *Id.*

³⁷ 1 *The Developing Labor Law* 131 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001).

³⁸ *Id.* at 131–32.

³⁹ 311 N.L.R.B. 833, 833 (1993), enforcement denied, 39 F.3d 106 (6th Cir. 1994).

⁴⁰ *DTR Indus., Inc. v. NLRB*, 39 F.3d 106, 114–15 (6th Cir. 1994).

⁴¹ See, e.g., *American Greetings Corp.*, 146 N.L.R.B. 1440, 1445 n.4 (1964).

ask for wage and benefit reductions as the union has to ask for increases.⁴² An employer may not, however, use this assessment as a threat to bargain in bad faith or as a threat to reduce benefits illegally prior to bargaining.⁴³ Similarly, an employer may offer an opinion about the possibility of the union calling a strike 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. But, 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.⁴⁴

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 Section 8(a)(1) violation and overturn the election. Such determinations, however, based as they are on a multi-factor contextual test, will be subject to indeterminacy and uncertainty. As such, they threaten either to underdeter coercive threats or overdeter 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 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

⁴² See *Fern Terrace Lodge of Bowling Green, Inc.*, 297 N.L.R.B. 8, 8 (1989).

⁴³ See, e.g., *Golden Eagle Spotting Co.*, 319 N.L.R.B. 64, 74-75 (1995); *Advo Sys., Inc.*, 297 N.L.R.B. 926, 927 (1990).

⁴⁴ *Sears, Roebuck & Co.*, 305 N.L.R.B. 193, 193-94 (1991).

conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.⁴⁵

The Board and the courts have interpreted Section 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.⁴⁶ 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.⁴⁷ 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 Section 8(a)(1).⁴⁸ It should also be noted, however, that any efforts to scale back on benefits that would have otherwise been granted (absent the campaign) would also be a Section 8(a)(1) violation. Thus, employers must tread carefully in this area. Depending on the circumstances, they may be liable for both decisions to grant benefits and decisions not to grant benefits.

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."⁴⁹ Unions are not, however, 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,⁵⁰

⁴⁵ *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

⁴⁶ *American Sunroof Corp.*, 248 N.L.R.B. 748, 748 (1980), enforced in part, 667 F.2d 20 (6th Cir. 1981).

⁴⁷ See, e.g., *Bell Halter, Inc.*, 276 N.L.R.B. 1208, 1215-16 (1985).

⁴⁸ See *Torbitt & Castleman, Inc.*, 320 N.L.R.B. 907, 909-10 (1996).

⁴⁹ *Smith Co.*, 192 N.L.R.B. 1098, 1101 (1971).

⁵⁰ *Wagner Elec. Corp.*, 167 N.L.R.B. 532, 533 (1967).

jackets,⁵¹ hats and shirts,⁵² and alcoholic drinks.⁵³ Here, too, 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,⁵⁴ while another held that a promise of a victory dinner dance was not objectionable.⁵⁵ 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.⁵⁶

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.*,⁵⁷ which held that unions cannot offer to waive initiation fees for employees who sign authorization cards before an election.⁵⁸ 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."⁵⁹ The Court's ruling, however, 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."⁶⁰ 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 have found a union's waiver unobjectionable when it stated that it "usually does not charge an Initiation Fee" until some time after the election.⁶¹ However, when a union offered to waive fees only to "charter members" without explaining the term,⁶² or said that fees

⁵¹ *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235, 1235-36 (1984).

⁵² *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 196-98 (6th Cir. 1991).

⁵³ *NLRB v. Labor Servs., Inc.*, 721 F.2d 13, 17 (1st Cir. 1983).

⁵⁴ *Trencor, Inc. v. NLRB*, 110 F.3d 268, 272 (5th Cir. 1997).

⁵⁵ *NLRB v. L&J Equip. Co.*, 745 F.2d 224, 227 (3d Cir. 1984).

⁵⁶ See, e.g., *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995) (holding that union lawsuit on behalf of employees for overtime pay was an impermissible bribe).

⁵⁷ 414 U.S. 270 (1973).

⁵⁸ *Id.* at 277.

⁵⁹ *Id.*

⁶⁰ *Id.* at 272 n.4.

⁶¹ *Certain-Teed Prods. Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977), enforcing 225 N.L.R.B. 971 (1976).

⁶² *Inland Shoe Mfg. Co.*, 211 N.L.R.B. 724, 725 (1974).

would be waived for “anyone joining now during this campaign,”⁶³ such promises were held to violate laboratory principles. The Board does permit unions to clarify or correct objectionable waiver offers but holds them to a fairly high standard of clarity.⁶⁴

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.*,⁶⁵ 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.⁶⁶ 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.⁶⁷

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

⁶³ *Crane Co.*, 225 N.L.R.B. 657, 659 (1976).

⁶⁴ See, e.g., *Claxton Mfg. Co.*, 258 N.L.R.B. 417, 417 (1981) (holding that a 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 an election petition. See *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 the employees’ freedom of choice. *Id.* at 501–02 (Penello and Walther, Members, dissenting). The Ninth Circuit declined to enforce the Board’s order, holding that the union’s letter was ambiguous as to the timing of the waiver offer. *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978).

⁶⁵ 138 N.L.R.B. 66 (1962).

⁶⁶ *Id.* at 67.

⁶⁷ *Id.* at 71–72.

of pay and working conditions.⁶⁸ The U.S. courts of appeal, however, have been less forgiving and have clashed with the Board about such campaign tactics.⁶⁹ The Board has also generally held that appeals to racial prejudice have to be “sustained” in order to meet the prohibited threshold. 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.⁷⁰ The vague standards, combined with the concern that legitimate speech may be prohibited, have led to calls for reform of this doctrine.⁷¹

B. The Political Election Model

In resolving representation campaign questions, the Board uses the laboratory conditions model as its express paradigm. 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.⁷² Linking unionization to such

⁶⁸ See, e.g., *Balt. 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”).

⁶⁹ See, e.g., *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 that allegedly inflamed racial tensions); *Case Farms, Inc. v. NLRB*, 128 F.3d 841, 850 (4th Cir. 1991) (Williams, J., concurring in judgment) (expressing “concern with the Board’s apparent disregard for the decisions of the Circuit Courts” in matters concerning inflammatory racial appeals); *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675, 679 (4th Cir. 1966) (refusing to enforce bargaining order because of appeals to racial pride).

⁷⁰ See, e.g., *M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1574 (11th Cir. 1987); *NLRB v. Eurodrive, Inc.*, 724 F.2d 556, 560 (6th Cir. 1984); *NLRB v. Katz*, 701 F.2d 703, 708 (7th Cir. 1983); cf. *Clearwater Transport, Inc. v. NLRB*, 133 F.3d 1004, 1010 (7th Cir. 1998) (voicing a “strong objection” to the NLRB’s “seemingly casual reading” of past precedent in such cases).

⁷¹ See, e.g., *Shepard Tissue, Inc.*, 326 N.L.R.B. 369, 369–73 (1998) (Gould, Chairman, concurring) (arguing for a new approach to the *Sewell* doctrine).

⁷² 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 Subcomm. on Education and Labor, 74th Cong. 642 (1935) (statement of Harvey J. Kelly, American Newspaper Publishers Association), *reprinted in* 2 National Labor Relations Board, Legislative History of

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.⁷³ 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.”⁷⁴

This 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 representatives.”⁷⁵ Even though the Wagner Act did not originally provide for the secret ballot election as the sole means of establishing an employee representative, Senator Wagner assumed such elections in defending the Act during the hearings.⁷⁶ The Taft-Hartley Act eventually codified the secret ballot as the sole means of selection.⁷⁷

Courts and commentators have latched on to the political campaign as the salient analog to the union election campaign. In

the National Labor Relations Act, 1935, at 1617, 2028 (1985) [hereinafter 1935 NLRA Senate Hearings]; see also 79 Cong. Rec. 9691 (1935) (statement of Rep. Withrow), *reprinted in* 1935 NLRA Senate Hearings, *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 no more be democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote.”).

⁷³ See Becker, *supra* note 10, at 496.

⁷⁴ 29 U.S.C. § 151 (2000).

⁷⁵ Pub. L. No. 74-198, § 9(c), 49 Stat. 449, 453 (1935).

⁷⁶ 1935 NLRA Senate Hearings, *supra* note 72, at 642 (statement of Harvey J. Kelly, American Newspaper Publishers Association) (“[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)).

⁷⁷ See 29 U.S.C. § 159(c).

its review of election procedures and employer speech, the Supreme Court has characterized the employee's choice as the equivalent of a political election.⁷⁸ Moreover, numerous commentators have either made the comparison directly⁷⁹ or noted the comparison made by others.⁸⁰ 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 Board has always treated employers as parties to an election. They can file representation petitions as well as objections to the bargaining unit, the eligibility of voters, and the conduct of the campaign.⁸¹ Employers are also permitted, along

⁷⁸ 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.").

⁷⁹ See, e.g., Bok, *supra* note 10, 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.").

⁸⁰ Becker, *supra* note 10, 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, 363 (1995) (noting that representation elections have been "reconceptualized as analogous to political elections").

⁸¹ 29 U.S.C. § 159(c)(2); 29 C.F.R. § 102.69(a) (2006).

with union representatives, to place an observer at the polls to monitor the election.⁸² 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.⁸³ 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”⁸⁴ However, as one commentator has noted, “[T]he creation of an electoral contest in which one party could campaign while the other had to remain silent contradicted traditional notions of political freedom.”⁸⁵ 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.⁸⁶ The Taft-Hartley Act codified this notion of an employer’s free-speech rights in Section 8(c) of the Act.⁸⁷

The notion of the employer as the competing candidate against the union has become ingrained in the contemporary view of the representation campaign. It has been used to support the notions of greater employer involvement in the campaign and greater freedom by the employer to express its views.⁸⁸ Other commentators have attacked the notion that the employer deserves

⁸² See *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).

⁸³ See, e.g., *Am. Tube Bending Co.*, 44 N.L.R.B. 121, 133–34 (1942), enforcement denied, 134 F.2d 993 (2d Cir. 1943).

⁸⁴ *Id.* at 132 (quoting *Sunbeam Elec. Mfg. Co.*, 41 N.L.R.B. 469, 488 (1942)).

⁸⁵ *Becker*, *supra* note 10, at 541.

⁸⁶ *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945).

⁸⁷ 29 U.S.C. § 158(c).

⁸⁸ 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. See Julius G. Getman et al., *Union Representation Elections: Law and Reality* 136 (1976) (“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 79, at 242–43 (arguing that the laboratory conditions doctrine unconstitutionally infringes on an employer’s right to free speech).

a voice in the process, pointing to the irrelevance of the employer's views and the likelihood of coercion.⁸⁹ Nevertheless, the role of the employer in the process 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. The Board has explicitly stated that “exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside elections.”⁹⁰ The Board has also made clear that “absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees.”⁹¹ Thus, unlike the strict rules of truthfulness that apply in some other contexts,⁹² the Board has taken a relatively relaxed approach to misrepresentations throughout its history.

The Board has, however, 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.*, stated:

[A]n election should be set aside only where there has been a misrepresentation or other similar 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,

⁸⁹ See Becker, *supra* note 10, at 577–601 (arguing the political election analogy is misplaced and allows employer coercion); Story, *supra* note 80, at 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 Elections, 112 *Yale L.J.* 2415, 2453–62 (2003) (arguing for stronger prohibitions on employer speech to better protect employee freedom of speech).

⁹⁰ *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 n.6 (1962).

⁹¹ *Id.* at 223.

⁹² One example is in the area of corporate proxy fights. See SEC Rule 14a-9, 17 C.F.R. § 240.14a-9(a) (2007).

may reasonably be expected to have a significant impact on the election.⁹³

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.⁹⁴ A misrepresentation would also be insufficient to overturn the election if it was so exaggerated as to be unbelievable or if employees already had sufficient information to permit them to evaluate the misrepresentation properly.⁹⁵

The Board overruled *Hollywood Ceramics* in its 1977 *Shopping Kart Food Market, Inc.* decision.⁹⁶ Noting that the *Hollywood Ceramics* rule had been criticized for its vagueness and indeterminacy, the Board argued that such attention to campaign propaganda was unnecessary. Specifically, the Board argued that its 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.”⁹⁷ 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.”⁹⁸ A year later, the Board reversed course, and a three-member majority in *General Knit of California, Inc.* returned to the *Hollywood Ceramics* standard.⁹⁹ 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.*¹⁰⁰ After reviewing the history of the Board’s treatment of misrepresentations,¹⁰¹ the *Midland* majority argued in favor of the

⁹³ 140 N.L.R.B. at 224.

⁹⁴ *Id.* at 224–25.

⁹⁵ *Id.* at 224.

⁹⁶ 228 N.L.R.B. 1311, 1313 (1977).

⁹⁷ *Id.*

⁹⁸ *Id.* One member of the majority, however, did write in concurrence that she would set aside an election if there had been an “egregious mistake of fact.” *Id.* at 1314 (Murphy, Chairman, concurring).

⁹⁹ 239 N.L.R.B. 619, 620 (1978).

¹⁰⁰ 263 N.L.R.B. 127, 132 (1982).

¹⁰¹ *Id.* at 129–30.

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.”¹⁰²

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*, the First Circuit endorsed the Board’s holding below, but noted that it did “not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations.”¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵ The Sixth Circuit continues to apply this standard to misrepresentation cases.¹⁰⁶ While other circuit courts have adopted the *Midland* standard,¹⁰⁷ a number of circuit courts, including courts in circuits that have explicitly adopted *Midland*, have not yet decided whether they “approve fully” of the standard.¹⁰⁸

¹⁰² 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.” Id. at 133.

¹⁰³ 720 F.2d 726, 729 (1st Cir. 1983).

¹⁰⁴ Id. (internal 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.” Id. at 730 (Aldrich, J., concurring).

¹⁰⁵ *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984).

¹⁰⁶ See, e.g., *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 963–66 (6th Cir. 2000); *NLRB v. Hub Plastics, Inc.*, 52 F.3d 608, 611–13 (6th Cir. 1995).

¹⁰⁷ See *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, 1343 (9th Cir. 1983).

¹⁰⁸ See *Trencor, Inc. v. NLRB*, 110 F.3d 268, 275 (5th Cir. 1997) (holding that it was “unnecessary to decide the full scope of this court’s support of the *Midland* doctrine”); see also *NLRB v. Dave Transp. Servs., Inc.*, No. 97-71274, 1999 WL 196545, at *1 n.1 (9th Cir. Apr. 1, 1999) (noting that they need not decide whether an exception to *Midland* is warranted); *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d

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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ The Fifth Circuit found that the Board had not abused its discretion.¹¹²

The only instance of such required disclosure does not involve information that must be disclosed to employees, but rather information that the employer must disclose to the petitioning union. In *Excelsior Underwear, Inc.*, the Board required employers to provide the union with the names and addresses of employees in the unit.¹¹³ Under the *Excelsior* rule, this information must be produced within seven days of the approval of an election agreement; the union need not request it.¹¹⁴ The *Excelsior* requirement gives the union the ability to send materials and other

1146, 1158 (3d Cir. 1993) (noting in dicta that the *Midland* rule might not be sufficient in all cases); *NLRB v. Affiliated Midwest Hosp.*, 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*).

¹⁰⁹ *Fla. Mining & Materials Corp. v. NLRB*, 481 F.2d 65, 69 (5th Cir. 1973), enforcing *Fla. Mining & Materials Corp.*, 198 N.L.R.B. 601, 603 (1972) (ordering the employer to bargain).

¹¹⁰ *Id.* at 66.

¹¹¹ *Id.* at 69.

¹¹² *Id.* at 69–70.

¹¹³ 156 N.L.R.B. 1236, 1239–40 (1966).

¹¹⁴ *Id.* at 1239.

communications to the employees at their home addresses. Unions have taken advantage of the lists for this purpose.¹¹⁵

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.¹¹⁶ Such meetings, known as “captive audience speeches,” give employers a much better opportunity to make their case to employees.¹¹⁷

Union access to employees even in public places can be restricted by the employer. In *Lechmere, Inc. v. NLRB*, the Supreme Court held that employers could prohibit all nonemployee solicitation and distribution, including union solicitation, on its retail parking lot.¹¹⁸ 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

¹¹⁵ 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 unions sent written materials in twenty-five. Getman et al., *supra* note 88, at 90. In these elections, ninety-two percent of employees reported receiving employer material, while eighty-five 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. See 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).

¹¹⁶ *Peerless Plywood Co.*, 107 N.L.R.B. 427, 428–29 (1953) (allowing required attendance at employer anti-union assembly, as long as such an assembly is not within twenty-four hours of an election).

¹¹⁷ See Story, *supra* note 80, 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 thirty-one union representation elections, Getman, Goldberg, and Herman found that employers held captive-audience meetings in twenty-eight of those elections, making such meetings more frequent than the distribution of written materials. Getman et al., *supra* note 88, at 90–92. Employee attendance at such meetings was high. *Id.* at 91–92. Although unions held off-site meetings in many of the thirty-one elections, a much smaller percentage of employees reported attending such meetings. *Id.* at 92. The authors note that those employees who did attend union meetings were much more likely to be union adherents. *Id.*

¹¹⁸ 502 U.S. 527, 529, 541 (1992).

reached by other means.¹¹⁹ 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.¹²⁰ A recent Board decision has extended *Lechmere* to allow a grocery store to prohibit nonemployee union organizers from using the snack bar in its store.¹²¹

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 nonworking hours.¹²² Moreover, the employer may limit employees to oral solicitations in working areas.¹²³ The employer can forbid the distribution of literature in working areas due to the threat of litter and disruption of productive order.¹²⁴ An employer can extend nondiscriminatory literature prohibitions to company bulletin boards,¹²⁵ and it also has the right to prohibit solicitations, including union solicitations, on its own internal e-mail, as long as it does so nondiscriminatorily.¹²⁶

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.

¹¹⁹ *Id.* at 533–34.

¹²⁰ *Id.* at 535, 539–40. The Board and the courts have permitted union access to employer property for employees working at a remote lumber camp, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 148, 152 (6th Cir. 1948); in a company town, *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 227–33 (1949); and at a fish cannery, *Chugach Alaska Fisheries, Inc.*, 295 N.L.R.B. 44, 44–45 (1989).

¹²¹ *Farm Fresh, Inc.*, 326 N.L.R.B. 997, 1000 (1998). For criticism of the *Lechmere* decision, see Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 *Stan. L. Rev.* 305 (1994).

¹²² See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 796, 805 (1945).

¹²³ See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 616, 621 (1962).

¹²⁴ *Id.* at 621. Such a prohibition must apply to all such distributions, and it must be applied neutrally. See *Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 255–56 (5th Cir. 1983).

¹²⁵ See *Honeywell, Inc.*, 262 N.L.R.B. 1402, 1402 (1982). The nondiscrimination rule for bulletin boards may also apply to computer screen savers. See *St. Joseph’s Hosp.*, 337 N.L.R.B. 94, 94 (2001) (reserving judgment on the issue of whether a screen saver is more akin to a bulletin board or a union button).

¹²⁶ See *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 919 (1993).

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

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, Professor Derek Bok focused his attention on the “instability” and “[i]nconsistencies” of the Board’s laboratory conditions doctrine.¹²⁷ Bok felt that these inconsistencies reflected “a deeper uncertainty regarding the nature of the election process itself.”¹²⁸ He claimed that if the Board’s only guiding principle was to keep employees free from undue interference, the Board’s regulatory approach would continue to be incoherent and unstable.¹²⁹ Instead, Bok argued that the Board should focus on a broader set of “legitimate interests” held by the parties involved.¹³⁰

Bok agreed with the Board that there is a strong interest in protecting employees’ freedom of choice.¹³¹ He believed that in

¹²⁷ Bok, *supra* note 10, at 39.

¹²⁸ *Id.* at 40.

¹²⁹ *Id.* at 43, 45.

¹³⁰ *Id.* at 43.

¹³¹ Bok described “free 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 the 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

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?¹³² 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.¹³³ 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."¹³⁴ He discussed how claims by the union about improvements at other companies would be rebutted by the employer in ways that employees would be "in a poor position to resolve."¹³⁵ 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 subissues for which there would often be "little evidence beyond partisan statements of employers and organizers and the anecdotal accounts of associates."¹³⁶

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 or in other independent sources.¹³⁷ Given the lack of information on critical questions, Bok argued that employees were not making rational economic

own values and desires to determine whether a vote for the union promises to promote or impair their interests.

Id. at 46.

¹³² Id. at 49.

¹³³ Id. (citing Burleigh B. Gardner & David G. Moore, *Human Relations in Industry* (rev. ed. 1950); F.J. Roethlisberger & William J. Dickson, *Management and the Worker* (1939)).

¹³⁴ Id.

¹³⁵ Id. at 50.

¹³⁶ Id.

¹³⁷ Id.

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.¹³⁸ Bok ultimately concluded that there was no rational economic calculus behind these elections. But if employees are not using the campaign to get important information about their choice, then the need to maintain its pristine intellectual conditions seems less important.

Bok saw empirical support for his views in *Union Representation Elections: Law and Reality* by Professors Julius Getman, Stephen Goldberg, and Jeanne Herman.¹³⁹ 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,¹⁴⁰ the authors examined thirty-one union representation elections between 1972 and 1973.¹⁴¹ The authors orchestrated interviews of 1239 employees who participated in these elections.¹⁴² The interviews were conducted in two waves. A first round of interviews was conducted as soon as possible after the NLRB directed an election to take place; employees were then interviewed a second time after the election.¹⁴³ In the first wave, interviewers sought to assess employees' pre-campaign sentiments about union representation, their own working conditions, and how they intended to vote.¹⁴⁴ In the second wave, employees were asked how and why they voted as well as what they remembered from the representation campaign.¹⁴⁵ The authors then analyzed the

¹³⁸ Id. at 51.

¹³⁹ See Bok, Foreword to Getman et al., supra note 88, at xi–xiii.

¹⁴⁰ 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. Getman et al., supra note 88, at 36–37. The Board refused to provide the information until compelled by a federal court of appeals. Id.; see also Getman v. NLRB, 450 F.2d 670, 680 (D.C. Cir. 1971).

¹⁴¹ Getman et al., supra note 88, at 33.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

results to determine what factors went into employees' voting decisions, including the effects of employer and union campaign efforts.

The headline for the study was that the votes of eighty-one percent of the employees could be predicted from their pre-campaign attitudes about their job and about unions.¹⁴⁶ 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: ninety-four percent of employees intending to vote for the company did so, as did eighty-two percent of those intending to vote for the union.¹⁴⁷ The authors were able to predict the outcome of twenty-nine out of the thirty-one elections based on how employees intended to vote.¹⁴⁸ They thus argue that these results disprove the Board's assumptions that free choice is fragile and that employees will be significantly influenced by the campaign.¹⁴⁹ This conclusion was supported by the study's findings that employees remembered only a small percentage of issues from the campaign and were, therefore, "not generally attentive to the campaign."¹⁵⁰ Interestingly, the authors were undiscouraged by this finding:

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 the less rational.¹⁵¹

¹⁴⁶ Id. at 62.

¹⁴⁷ Id. at 64.

¹⁴⁸ Id.

¹⁴⁹ However, the authors also admit that nineteen percent of employees were initially undecided (six percent) or voted contrary to their original intent (thirteen percent) and that the votes of this nineteen percent were necessary for victory in nine out of the thirty-one elections. Id. at 103. Of these groups, seventy-six percent of the switchers and sixty-eight percent of the undecided voters ended up voting for the company. Id. at 111.

¹⁵⁰ Id. at 140.

¹⁵¹ 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 twenty-two out of the thirty-one elections.¹⁵² In nine of those elections, the employer committed campaign violations serious enough to warrant a bargaining order.¹⁵³ 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.¹⁵⁴ Even the firing of union supporters did not result in a significant change in voting behavior.¹⁵⁵

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.”¹⁵⁶ Grants of benefits should be allowed.¹⁵⁷ Bargaining orders should be rare, since the election result, even if tainted, is likely to reflect the wishes of employees.¹⁵⁸ The authors do, however, moderate their hands-off model in several instances. They recommend harsher penalties, such as treble damages, for illegal discharges during the campaign.¹⁵⁹ 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

¹⁵² Id. at 111–13.

¹⁵³ Id. at 113.

¹⁵⁴ Id. at 115–16.

¹⁵⁵ Id. at 125–26.

¹⁵⁶ Id. at 150.

¹⁵⁷ Id. at 151.

¹⁵⁸ Id. at 153–56.

¹⁵⁹ Id. at 155–56. This suggestion seems at odds with their earlier dismissal of the effects of such discharges.

working time and premises.”¹⁶⁰ 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.”¹⁶¹

Getman, Goldberg, and Herman’s study was primarily criticized for its failure to blame employer coercion for the decreasing rate of private-employee unionization.¹⁶² As commentators pointed out, many of the statistics heralded by the authors as proof of campaign irrelevance could be read much more ambiguously.¹⁶³ According to one reading of the study’s data, the study shows that unions would have won between forty-six and forty-seven percent of elections if they had been entirely free from illegal behavior, and three to ten percent if the employers had campaigned at the highest level of illegality shown in the study.¹⁶⁴ More generally, critics of the study have leveled the same attacks as they have used against the political election model more generally: they claim it fails to account sufficiently for the insidious effects of employer coercion.¹⁶⁵

¹⁶⁰ *Id.* at 157.

¹⁶¹ *Id.*

¹⁶² 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, 1783 (1983).

¹⁶³ See Eames, *supra* note 162, at 1183–87; Weiler, *supra* note 162, at 1782–86.

¹⁶⁴ Weiler, *supra* note 162, 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* (Oct. 1980) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology)). Dickens’s dissertation was published in edited form as William T. Dickens, *The Effects of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 *Indus. & Lab. Rel. Rev.* 560, 560 (1983). Getman, Goldberg, and Brett responded to Weiler’s article and Dickens’s 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, 722–23 (1984).

¹⁶⁵ See, e.g., Eames, *supra* note 162, at 1189–90 (arguing that all employer coercion—not just that prohibited by §§ 8(a)(1) and 8(a)(3) of the Act—has an impact on employees).

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, Professor 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.¹⁶⁶ 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 seventy-four percent in 1950 to forty-eight percent in 1980.¹⁶⁷ At the same time, the number of unfair labor practice claims filed against employers rose from 4472 claims in 1950 to 31,281 claims in 1980, with the percentage of meritorious claims rising slightly.¹⁶⁸ Putting these two trends together, Weiler argued that the decrease in union representation is correlated with the increase in unfair labor practices by employers.¹⁶⁹ For further proof, Weiler compared the U.S. data with Canadian data. Canada had roughly three times the rate of increasing union density from new union certifications, as well as one-sixth the number of discriminatory discharge complaints per election.¹⁷⁰

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

¹⁶⁶ Weiler, *supra* note 162, at 1772–74.

¹⁶⁷ *Id.* at 1776.

¹⁶⁸ *Id.* at 1780.

¹⁶⁹ *Id.*

¹⁷⁰ *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 representation campaigns was 2.5 in the United States, but only 0.4 in Ontario and 0.1 in British Columbia. *Id.*

advocated for an “instant” (five days or less) election.¹⁷¹ Such a brief period would prevent employers from sustaining prolonged campaign offenses replete with unfair labor practices and other intimidation tactics.¹⁷²

Weiler acknowledged that the purpose of a union representation system is “to nurture and protect employee freedom of choice with respect to collective bargaining.”¹⁷³ 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.”¹⁷⁴ 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.”¹⁷⁵ 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.¹⁷⁶ A more apt analogy, according to Weiler, would be allowing foreign governments to have a role in our political campaigns.¹⁷⁷ If anything, this is too weak; perhaps a better analogy would be allowing your spouse to have a say in whom 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.”¹⁷⁸ The employer serves as a proxy supporter for those employees who do not support the union and provides them with resources, arguments, and organization.¹⁷⁹ Weiler was not persuaded, however, based on his analysis of the costs and benefits of 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,

¹⁷¹ Id. at 1770, 1812.

¹⁷² Id. at 1812.

¹⁷³ Id. at 1808.

¹⁷⁴ Id. at 1809.

¹⁷⁵ Id. at 1813.

¹⁷⁶ Id.

¹⁷⁷ Id. at 1814.

¹⁷⁸ Id. at 1815.

¹⁷⁹ Id.

and that employers would have a chance to make their case about working conditions during negotiations with the union.¹⁸⁰ Weiler concluded: “[t]he contribution made by the election campaign to the enlightenment of the employees is marginal at best.”¹⁸¹

Other commentators agree that the political model has “subverted labor’s right to representation.”¹⁸² Delving into Wagner Act legislative history as well as early Board decisions, Professor Craig Becker developed how the democratic political campaign had become the “legitimizing metaphor”¹⁸³ for the Wagner Act and collective bargaining more generally.¹⁸⁴ Early Board decisions, however, 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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ The answer, according to Becker, is not to embrace the freewheeling regulation of the

¹⁸⁰ Id. at 1815–16.

¹⁸¹ Id. at 1816.

¹⁸² Becker, *supra* note 10, at 497.

¹⁸³ Id. at 498.

¹⁸⁴ See *id.* at 500–23.

¹⁸⁵ Id. at 535–40 (discussing *American Tube Bending Co.*, 44 N.L.R.B. 121 (1942), enforcement denied, 134 F.2d 993 (2d Cir. 1942)).

¹⁸⁶ 29 U.S.C. §§ 158(c), 159(c) (2000); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

¹⁸⁷ Becker, *supra* note 10, at 547–48.

¹⁸⁸ Getman et al., *supra* note 88, at 157; Bok, *supra* note 10, at 68.

¹⁸⁹ See Becker, *supra* note 10, at 523–47.

political model but rather to get rid of the political analogy and its trappings.¹⁹⁰ Becker's prescription is to strip employers of "any legally cognizable interest in their employees' election of representatives."¹⁹¹

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.¹⁹² Employers would not have the right to challenge elections or voters, and thus would not have the right to place observers at the polls.¹⁹³ More generally, campaign rules would attempt to prevent employers from "exploiting their singular economic power to persuade employees."¹⁹⁴ Thus, employers would not be permitted to host any "captive audience" campaign presentations.¹⁹⁵ They would be bound to follow the rules on solicitation and distribution that they laid down for union representatives.¹⁹⁶ Although Becker's proposal seems to allow for employer speech as long as the rules offer the union similar opportunities, 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."¹⁹⁷

Becker firmly set his rhetoric 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 was not willing to commit to the logical extension that his ideas would require. The reason, perhaps, is that both sets of critics do not account for the critical role that campaigns and employers play, albeit imperfectly, in providing information to employees about their representation decision.

¹⁹⁰ See *id.* at 577–85.

¹⁹¹ *Id.* at 500.

¹⁹² *Id.* at 586–87.

¹⁹³ *Id.* at 586.

¹⁹⁴ *Id.* at 592.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 593.

¹⁹⁷ *Id.* at 600.

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 political election and scientific laboratory. 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 balanced and democratic process with a flood of complicated regulations. Believing that most employees have already made up their minds, political model proponents 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 into the post-election reality. Proponents of the laboratory conditions approach argue that employer coercion and disapproval 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 though 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.¹⁹⁸ It manages the strategy of negotiations, strikes, lockouts, and other weapons of “economic warfare.”¹⁹⁹ 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 as their representative, employees essentially designate 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 (unless they are in a “right to work” state).²⁰⁰ Individual employees, on the other hand, have individualized agreements and thus have sole control over the decision. Third, the NLRA gives

¹⁹⁸ 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). See, e.g., 2007–2011 Basic Agreement Between Major League Baseball and the Major League Baseball Players’ Association arts. II, IV, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Feb. 18, 2008).

¹⁹⁹ The metaphor of “economic warfare” has often been used in discussing the union-employer relationship. See, e.g., *N.Y. Tel. Co. v. N.Y. State Dep’t 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.”).

²⁰⁰ See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744–45 (1963) (permitting “agency shop” agreements whereby unions charge nonmembers for the costs of collective representation). However, states are permitted under § 14(b) of the NLRA to outlaw agency shop agreements. 29 U.S.C. § 164(b) (2000). Twenty-two states currently have “right to work” provisions outlawing such agreements. Harper et al., *supra* note 13, at 982–83.

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.²⁰¹ 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.²⁰² Legal commentators have recognized this conclusion, even as they fail to apply its ramifications. For example, Derek Bok has written that the union representation decision rests on 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?²⁰³ These questions simply break down the overall utility 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.²⁰⁴

²⁰¹ See 29 U.S.C. § 158(a)(5).

²⁰² Or, put more precisely, “[i]f 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”).

²⁰³ Bok, *supra* note 10, at 49.

²⁰⁴ Weiler, *supra* note 162, 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

The purchase-of-services paradigm thus provides a better model for the actual decisions that employees are making. The laboratory conditions model focuses on the “uninhibited desires” of employees, either for or against unionization,²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ The union is the employees’ representative; it is not a representation of them.

Moreover, the appeal of unions is that they have the ability to get more for employees than the employees would get on their

up their minds whether to take the risks and make the sacrifices necessary to achieve a favorable collective agreement.”).

²⁰⁵ Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

²⁰⁶ See 79 Cong. Rec. 9682 (1935) (remarks of Rep. Griswold), *reprinted in* 2 NLRA Legislative History, *supra* note 72, at 3109 (noting that, under the Wagner Act, employees would not “control anything except the selection of [their] representatives”); Becker, *supra* note 10, 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.”).

²⁰⁷ See Alan Hyde, *Democracy in Collective Bargaining*, 93 Yale L.J. 793, 810 (1984).

own. Part of this may stem from a union's ability to represent a large group 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. The union controls when the employees are called upon to exert the collective economic power of a strike.²⁰⁸ 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 that unions are voluntary associations 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 outside of right-to-work states, all covered employees must pay for the costs of the services that the union provides.²⁰⁹ 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.²¹⁰ In *Communications Workers of America v. Beck*, the Supreme Court chose to differentiate between different components of the dues and ruled that nonmembers need not pay the union for services that are not directly related to collective bargaining services.²¹¹ This somewhat cabined view of union representation helps make the

²⁰⁸ 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).

²⁰⁹ See supra note 200 and accompanying text.

²¹⁰ See *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954) ("Thus Congress recognized the validity of unions' concern about 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their 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.").

²¹¹ 487 U.S. 735, 762–63 (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'" (quoting *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 447 (1984))).

point that represented employees are paying for a service—that of union representation.²¹²

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: “any organization of any kind, or any agency or 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.”²¹³ 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. Unions representing employees under the NLRA are, however, almost always nonprofit associations.

There seem to be three functional reasons for this phenomenon. First, the Clayton Act provides an antitrust exemption for those labor organizations “instituted for the purposes of mutual help, and not having capital stock or conducted for profit.”²¹⁴ This exemption thus excludes for-profit unions. Second, nonprofit status affords tax benefits.²¹⁵ Third, the requirements of the Labor-Management Reporting and Disclosure Act (“LMRDA”) would be difficult to meet for organizations other than nonprofit associations. Under the LMRDA, a union must give its members “equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor

²¹² 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*.

²¹³ 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, 993 (1982) (disqualifying a union that provided ancillary employment referral services); *Sierra Vista Hosp.*, 241 N.L.R.B. 631, 633 (1979) (discussing how the presence of supervisors in policymaking positions creates a conflict of interest and may disqualify a union).

²¹⁴ Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17 (2000)).

²¹⁵ I.R.C. § 501(c)(5) (2000).

organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings.”²¹⁶ Dues can only be increased through a vote by the majority of the membership.²¹⁷ Unions must file extensive reports with the Department of Labor regarding assets, liabilities, salaries, and other proprietary information.²¹⁸ In addition, the LMRDA imposes strict fiduciary duty requirements on union officers and employees.²¹⁹ 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.²²⁰

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.²²¹ 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 services they deliver to paying customers.”²²² The rationales provided for the nonprofit form in the commercial context generally relate to the nature of the product and customers. As Professor Henry Hansmann has argued, “nonprofit firms commonly arise where customers are in a peculiarly poor position to determine, with reasonable cost or effort, the quality or the quantity of the services they receive from a firm.”²²³ As will be discussed below, employees are in a

²¹⁶ 29 U.S.C. § 411(a)(1) (2000).

²¹⁷ *Id.* § 411(a)(3).

²¹⁸ *Id.* § 431.

²¹⁹ *Id.* § 501 (requiring, inter alia, that union agents “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”).

²²⁰ *Id.* § 402(i), (j).

²²¹ See Henry Hansmann, *The Ownership of Enterprise* 234 (1996).

²²² *Id.*

²²³ *Id.* at 228.

particularly poor position to judge the quality of union representation services prior to securing those services.²²⁴ Moreover, like colleges and nursing homes, unions generally provide services in which the customer becomes “locked in” for a period of time.²²⁵

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.²²⁶ In addition, unions share important similarities, at least in their organizational form, to for-profit public corporations.²²⁷ 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.²²⁸ Both union members and shareholders are thus members with control rights as well as customers of their organizations.

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.²²⁹ However, even as nonprofits, unions fit comfortably

²²⁴ See *infra* Section III.A.

²²⁵ See Hansmann, *supra* note 221, at 234 (noting customer lock-in as a reason for preferring a nonprofit service provider); *infra* Section III.E (discussing the difficulty of the union decertification process).

²²⁶ See Hansmann, *supra* note 221, at 149 (discussing customer-owned cooperatives in the areas of wholesale and supply firms, utilities, clubs, and housing cooperatives).

²²⁷ Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. Ill. L. Rev. 367, 374–76.

²²⁸ See Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2000)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78mm (2000)).

²²⁹ 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 221, at 235 (arguing that “[t]he nonprofit form is a very crude consumer protection device” that may not be sufficient to justify the other inefficiencies of the nonprofit organizational form).

within the collection of commercial nonprofits that provide services to paying customers and may even make a profit.²³⁰

C. The Decision to Purchase

The “purchase of services” paradigm may also seem counterintuitive in light of 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. Because 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.²³¹ 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. All who enjoy the services must pay for them in order to prevent free-riding.²³² 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

²³⁰ 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 229, at 512–13 (noting that union leaders may plow profits into excessive amenities, office buildings, perks, and salaries).

²³¹ Cf. Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 *U. Mich. J.L. Reform* 447, 481 (2000) (arguing that individuals have preferences that trump the group-solidarity model of unionism).

²³² See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88–97 (1971).

to take.²³³ Other service providers, such as neighborhood associations, also impose mandatory fees on those who receive services, even if individual customers would choose to reject those services.²³⁴ 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. The Board provides for a one-time, secret ballot election in which employees register their choice through a Board-conducted election. But there are other ways of tabulating employee choice.²³⁵ The method of making this choice should not overwhelm the underlying dynamic. Even though an election is being used to determine employee preferences, the underlying choice is still whether or not the group should make a collective decision to purchase representation services.

The generation of information in the election campaign has been an important justification for the superiority of the representation election over other methods of making the representation decision.²³⁶ It is surprising that the Board, courts, and commentators have generally overlooked the role of information in the Board's regulation of this process. 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

²³³ 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 nonprofit neighborhood associations whether they would independently choose to or not. See Sarah Max, *Hate Your Homeowners Association?*, CNN Money, Apr. 22, 2004, <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.").

²³⁴ See Lee Anne Fennell, *Revealing Options*, 118 Harv. L. Rev. 1399, 1444–46 (2005) (discussing private community associations).

²³⁵ Card-check certification agreements, for example, provide that employees may choose the union by submitting a card at any point in time over some extended period.

²³⁶ See, e.g., *Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007) (discussing the potential for "misinformation" under a card-check agreement); *Shepard Tissue, Inc.*, 326 N.L.R.B. 369, 369–73 (1998).

market for union representation raise particular concerns about the economic rationality and efficiency of those decisions.

III. INFORMATION DEFICIENCIES IN THE MARKET FOR UNION REPRESENTATION

Rational decisions to exchange goods or services—in other words, trade—are the economic mechanisms whereby we improve our individual and societal welfare. 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.²³⁷ Of course, there can be contractual winners and losers; many 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.

For contractual exchanges to be Pareto optimal, however, they must use the proper data, or “perfect information.”²³⁸ If the data is faulty, the results will be faulty, no matter how logical the decision-maker. 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—that is, misrepresentations about information material to the contract. The definition of “fraud,” however, has long extended to omissions in

²³⁷ See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 *J. Legal Stud.* 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.”).

²³⁸ 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, 883 (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 decision making, where individuals act without accurate cost information, there is no policymaking at all, rather just the random and often tragic outcomes of market anarchy.”).

disclosure as well as to affirmative misrepresentations, as the famous case of *Laidlaw v. Organ*²³⁹ 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.²⁴⁰ Although one might say that, in the absence of a fiduciary relationship, there is no common law requirement to disclose, this is an overstatement.²⁴¹ In fact, in a number of instances, courts have required parties to disclose information or risk rescission of the contract and even liability for fraud.²⁴²

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.²⁴³ The Food and Drug Administration requires extensive labeling on prepackaged food products in order to inform the public about ingredients, calories, and fat content.²⁴⁴ The Truth in Lending Act requires the disclosure of interest rates in specific terms.²⁴⁵ Perhaps

²³⁹ 15 U.S. 178, 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 ceased and that the British blockade that had reduced the value of tobacco had thus ended as well. 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 195.

²⁴⁰ 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 review articles and treatises” have dealt with this “vexing question”).

²⁴¹ *Id.*

²⁴² See Restatement (Second) of Contracts § 161 (2007) (listing four categories of cases in which courts have required disclosure).

²⁴³ For example, the federal Magnuson-Moss Warranty Act requires disclosure about warranties on consumer products. See, e.g., 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.”).

²⁴⁴ See 21 U.S.C. § 393(b)(2)(A) (2000); 21 C.F.R. § 101.9 (2006); FDA, What FDA Regulates, <http://www.fda.gov/comments/regs.html> (last visited Sept. 18, 2007). For discussion of a particular change in the regulations concerning trans fatty acids, see generally FDA, Food Labeling: *Trans* Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 68 Fed. Reg. 41,434 (July 11, 2003).

²⁴⁵ See Peterson, *supra* note 238, at 880 (“The most important requirements of the Truth in Lending provisions centered around the disclosure of the cost of credit based

most famously, the Securities Act of 1933²⁴⁶ and the Securities Exchange Act of 1934²⁴⁷ 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.²⁴⁸

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. Likewise, the political election model assumes that the two “parties” will generate sufficient information between themselves for the employees to make their decision.²⁴⁹ 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

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 Truth in Lending Act mandatory disclosures).

²⁴⁶ 15 U.S.C. §§ 77a–77aa (2000).

²⁴⁷ 15 U.S.C. §§ 78a–78mm (2000).

²⁴⁸ See, e.g., Peterson, *supra* note 238, 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.”).

²⁴⁹ There is a vibrant literature over the degree of knowledge and rationality at work in the American political process, specifically amongst voters. See, e.g., Michael X. Delli Carpini & Scott Keeter, *What Americans Know About Politics and Why It Matters* (1996); John A. Ferejohn, *Information and the Electoral Process*, in *Information and Democratic Processes* 3, 3 (John A. Ferejohn & James Kuklinski eds., 1990); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 *Critical Rev.* 413 (1998). In making the analogy, I am not speaking to the actual level of information available to voters in an election; rather, I am drawing upon the theoretical role of the election campaign in providing greater information.

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.²⁵⁰ For the most part, however, requiring disclosure of information more generally dampens the incentive to find this information in the first place.²⁵¹

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 that information; those sellers that provide it will sell more products.²⁵² 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.²⁵³

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 Professor George Akerlof.²⁵⁴ 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

²⁵⁰ See, e.g., *Hill v. Jones*, 725 P.2d 1115, 1119 (Ariz. Ct. App. 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. 625, 629 (Fla. 1985))).

²⁵¹ Richard A. Posner, *Economic Analysis of Law* 112 (7th ed. 2007).

²⁵² 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 238, at 602–04 (discussing the differences between informational advertising and persuasive advertising).

²⁵³ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669, 681 (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”).

²⁵⁴ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488, 488–90 (1970).

seller's purported information 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."²⁵⁵

The "market for lemons" problem is not confined to used cars. As Professor Bernard Black has pointed out, securities markets are a "far more vivid example than George Akerlof's original example of used cars."²⁵⁶ 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.²⁵⁷

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 and lead to Akerlof's downward spiral. The result is complete destruction of the market.

Why is information so crucial to the securities markets? Corporate shares represent a property right in a corporation that exists only as a fictional person, created through the filing of documents 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

²⁵⁵ Id. at 490.

²⁵⁶ Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 *UCLA L. Rev.* 781, 786 (2001).

²⁵⁷ Id.

and directors—to act as their representatives in running the corporation so as to maximize shareholder value.²⁵⁸ Although shareholders elect the board of directors, who 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.²⁵⁹

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.²⁶⁰

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.²⁶¹ The union promises to improve the

²⁵⁸ Directors are not strictly agents of the corporation; they are, in fact, more akin to elected representatives or trustees. See, e.g., *Cont'l Sec. Co. v. Belmont*, 99 N.E. 138, 141 (N.Y. 1912) (“The directors are not ordinary agents . . . They are trustees clothed with the power of controlling the property . . . without let or hindrance.”); *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, (1906) 2 Ch. 34, 42–43 (Eng.).

²⁵⁹ See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

²⁶⁰ Schwab, *supra* note 227, at 367–68.

²⁶¹ See *id.* at 379 (noting that in comparison to shareholders, “[u]nion members have even greater difficulty monitoring and evaluating their leaders”). Products with unobservable qualities are sometimes described as “experience goods”—namely, goods whose “salient characteristics can only be learned after purchase, by actual use.” 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, 658–59 (1979); see also Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 *J.L. & Econ.* 67, 68–69 (1973) (referring to such goods as “credence” goods). Experience goods are contrasted with “search goods,” those for which the consumer can establish the product’s quality prior to purchase. See, e.g., Carlton & Perloff, *supra* note 238, 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

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? Will they properly manage my retirement? It is very difficult to know ahead of time what union dues will buy. Even after purchase, it may be difficult to know the quality of the union's negotiating abilities.²⁶² 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 discussed below,²⁶³ 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 stock, the purchaser needs information about the organization in order to determine whether the benefits of such a decision outweigh the costs.

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

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,²⁶⁴

when intervention in experience goods markets on the basis of imperfect information is justified." Schwartz & Wilde, *supra*, at 662.

²⁶² See Schwab, *supra* note 227, at 379–80 ("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?").

²⁶³ See *infra* Section III.E.

²⁶⁴ See *supra* Section I.B.

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.²⁶⁵

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. 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 on their behalf. In making this case, the union may bring out information about the employer that might seem negative to employees. For example, the union may argue that the employer's profit margins

²⁶⁵ Thus, much of the debate surrounding campaign reform has been whether parties have sufficient funds to get their messages 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]lectoral 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 on 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 (1996) (arguing that any limitations on spending reduce communications).

are extremely high. Or, 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.²⁶⁶ Whether I hire Joy 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.²⁶⁷ 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.²⁶⁸ 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. Because the employer is looking to preserve both the contractual status quo as well as its ability to act independently with regard to employees, it has 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—that is, the potential for higher wages—is not a negative for the employees. So the 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

²⁶⁶ See Becker, *supra* note 10, at 498–500.

²⁶⁷ Under the NLRA, the employer has a duty to bargain collectively with the union over terms and conditions of employment. 29 U.S.C. § 158(a)(5) (2000). 29 U.S.C. § 158(a)(5) requires an employer to bargain “in good faith” and the employer may not implement changes to the terms and conditions unless it has reached agreement with the union or has bargained to impasse. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

²⁶⁸ See 29 U.S.C. § 158(d) (requiring the employer to both notify the collective bargaining representative of changes to terms and conditions of employment and to offer to meet for the purpose of negotiations).

employees the best deal it can and that the union will not be able to get any further concessions from the employer.

The previous discussion, however, 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 strongest 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 be more likely to help them.²⁶⁹

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).²⁷⁰ 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.²⁷¹ 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 discussed

²⁶⁹ In saying this, I recognize that there could still be 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.

²⁷⁰ 29 U.S.C. § 158(a)(2) (prohibiting employer domination of or interference with a labor organization).

²⁷¹ 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).

below, with a sweetheart union an employer could lock its employees into a collective bargaining agreement for three years.²⁷²

True “sweetheart” deals—ones involving payoffs to union officials—are of course illegal.²⁷³ 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 directly 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.²⁷⁴ 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 due to 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.

²⁷² See *infra* Section III.E.

²⁷³ See 29 U.S.C. § 186 (2000) (outlawing payments from employers to unions or union officials).

²⁷⁴ See Schwartz & Wilde, *supra* note 261, at 668 (arguing that information regulation is not justified in a competitive market).

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 2565 elections involving only one union, and 154 elections involving more than one union.²⁷⁵ 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-CIO union.²⁷⁶ In addition, member unions cannot disseminate information as part of an organization campaign that may “adversely affect” the reputation of another member union.²⁷⁷ These restrictions facilitate AFL-CIO monopolies over certain groups of employees.²⁷⁸ Such monopolies are not subject to the general antitrust regulations, as nonprofit labor unions are specifically exempted from federal antitrust laws.²⁷⁹

There are good reasons for Article XX and other limitations on union competition. Competition between unions wastes union resources.²⁸⁰ Moreover, a union can more effectively utilize collective worker power if the union represents a large percentage of workers in the industry.²⁸¹ However, there are collateral effects

²⁷⁵ 69 NLRB Ann. Rep. 16 (2005), available at http://www.NLRB.gov/publications/reports/annual_reports.aspx (follow “Sixty-Ninth Annual Report of the NLRB for Fiscal Year Ended September 30, 2004” hyperlink).

²⁷⁶ AFL-CIO Const. art. XX, § 2, available at <http://www.afl-cio.org/aboutus/thisistheafclcio/constitution/art20.cfm>.

²⁷⁷ *Id.* § 5.

²⁷⁸ Labor unions are permitted to monopolize employee representation under the Clayton Act. See Clayton Act § 6, 15 U.S.C. § 17 (2000) (original version at ch. 323, § 6, 38 Stat. 730, 731 (1914)).

²⁷⁹ 15 U.S.C. § 17; cf. 29 U.S.C. § 105 (2000) (prohibiting injunctions against labor unions on the grounds that participants are part of an “unlawful combination or conspiracy”). In addition, some union-employer agreements are given a nonstatutory exemption from antitrust sanctions. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965).

²⁸⁰ AFL-CIO Unity Committee, *AFL-CIO No-Raiding Agreement*, 8 *Indus. & Lab. Rel. Rev.* 102, 103 (1954) (finding that union raids are “a drain of time and money far disproportionate to the number of employees involved”).

²⁸¹ See Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 *U. Pa. J. Lab. & Emp. L.* 651, 680 (2006) (noting the argument that “rival unionism results in a buyer’s auction in which competing unions

to labor unions' 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.²⁸² 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."²⁸³ 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.²⁸⁴ Although the market, through interactions between sellers and buyers, is best equipped to determine what information is necessary to disclose,²⁸⁵ sometimes 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.²⁸⁶ So

undercut each other and prevent the establishment of a uniform wage rate in a given product market").

²⁸² 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, 2-4 (2003). For a broader argument in favor of union competition, see generally Pawlenko, *supra* note 281, at 681-87.

²⁸³ Black, *supra* note 256, at 787.

²⁸⁴ See, e.g., George J. Benston, *The Effectiveness and Effects of the SEC's Accounting Disclosure Requirements*, in *Economic Policy and the Regulation of Corporate Securities* 23-25 (Henry G. Manne ed., 1969). See generally Henry G. Manne, *Insider Trading and the Stock Market* 93-110 (1966) (discussing the effects of different legal rules on non-insider traders).

²⁸⁵ 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 a consensus among suppliers of capital or other transactors in the capital markets 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.").

²⁸⁶ Easterbrook & Fischel, *supra* note 253, at 681, 714.

without mandatory disclosure, it is claimed, the securities markets would not dry up; instead, issuers would use market approaches to create trustworthy information.²⁸⁷

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.²⁸⁸ 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 no governmental penalties for failing to disclose, 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.²⁸⁹ 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 firm's 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.

²⁸⁷ 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).

²⁸⁸ See Easterbrook & Fischel, *supra* note 253, at 683 ("If the firm simply asked for money without disclosing the project and managers involved... it would get nothing.").

²⁸⁹ 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,”²⁹⁰ to the proper functioning of the securities markets. Reputational intermediaries have been blamed for the failures of the 2001–2002 corporate scandals,²⁹¹ and the Sarbanes-Oxley Act of 2002 endeavors to shore up the ability of accountants and lawyers to serve as informational gatekeepers.²⁹² However, much of the current “reputational intermediaries” system depends on the law to require or reinforce the provision of those services.²⁹³ 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 requirements²⁹⁴ for controlling informational asymmetry is “[a] sophisticated accounting profession with the skill and experience to catch at least some

²⁹⁰ See John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 *Bus. Law.* 1403, 1405 (2002) (defining gatekeepers in the securities regulation context as “reputational intermediaries who provide verification and certification services to investors”).

²⁹¹ See, e.g., Frank Partnoy, *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets* 347, 350 (2003); Coffee, *supra* note 290, at 1403–05.

²⁹² 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”).

²⁹³ For example, the Sarbanes-Oxley Act imposed rigorous independence requirements on accountants. See 15 U.S.C. § 78j-1(g) (Supp. V 2005) (creating new independence requirements); *id.* §§ 7211–7219 (establishing Public Company Accounting Oversight Board (“PCAOB”). The market did not require these standards of accountants prior to Sarbanes-Oxley, 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) (arguing that most of the empirical studies on the subject found that “audit quality—and hence auditor independence—is not jeopardized by the provision of nonaudit services”). Other intermediaries include attorneys and the securities exchanges. 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 ensuring compliance with private contracts. The stock exchanges are given special privileges and responsibilities by the SEC as self-regulating organizations. See, e.g., 15 U.S.C. § 78(f) (2000) (providing for the registration of “national security exchanges”); Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 *N.C. L. Rev.* 475, 475–78 (1984) (discussing the scheme of self-regulation).

²⁹⁴ See Black, *supra* note 256, at 790–99.

instances of false or misleading disclosure.”²⁹⁵ 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.”²⁹⁶

Union financial disclosure is governed by the LMRDA, also known as the Landrum-Griffin Act.²⁹⁷ The Department of Labor implements the LMRDA’s requirements through regulations,²⁹⁸ these regulations were recently modified to require a greater amount of disclosure.²⁹⁹ However, the new regulations have been criticized for not requiring unions to employ independent auditors.³⁰⁰ 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.³⁰¹

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

²⁹⁵ Id. at 793.

²⁹⁶ 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 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.

²⁹⁷ 29 U.S.C. §§ 401–531 (2000).

²⁹⁸ See 29 C.F.R. §§ 403.1–403.11, 408.1–408.13 (2006).

²⁹⁹ See Labor Organization Annual Financial Reports, 68 Fed. Reg. 58,373, 58,374 (Oct. 9, 2003) (codified at 29 C.F.R. pts. 403, 408).

³⁰⁰ See Recent Regulation: Department of Labor Increases Union Financial Reporting Requirements, 117 Harv. L. Rev. 1734, 1734 (2004).

³⁰¹ Id. at 1739.

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veracity.³⁰² 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 such information exists. The NLRB is an independent agency and distinct from the Department of Labor, which is an executive branch agency.³⁰³ 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.³⁰⁴

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.”³⁰⁵ 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.³⁰⁶

The press does cover union failures and scandals, and such information is obviously relevant to the union representation

³⁰² See Louis Jackson & Robert Lewis, *Winning NLRB Elections: Management’s Strategy and Preventive Programs* 18–19 (1972) (discussing how employers can use LMRDA disclosures to contrast their plans with those “propagandized” by the union); Roger S. Kaplan & Philip B. Rosen, *Responding to Union Organizing Campaigns* § 6.06 (2002) (same).

³⁰³ 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).

³⁰⁴ In fact, the information is accessible on the Department of Labor’s website. See Dep’t of Labor, *Online Public Disclosure Room: Union Reports and Collective Bargaining Agreements*, <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>.

³⁰⁵ See Black, *supra* note 256, at 798.

³⁰⁶ *Id.*

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.³⁰⁷ 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, the potential for monetary gains from selling information about unions on a national scale is low. Additionally, prospective 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, the information would benefit all potential employees at the firm, and so they would not have an incentive to pay because of the free-rider problems inherent in obtaining the information. 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, 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 the bundle of

³⁰⁷ A search of the Consumer Reports website revealed no information about unions. See Consumer Reports Search Results for “Unions,” <http://www.consumerreports.org/cro/search.htm?query=unions> (last visited Sept. 15, 2007) (finding almost exclusively results about credit unions).

shareholder rights.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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. Moreover, the statute provides that a new election cannot be held within one year of a prior election.³¹¹ In the representation context, the Board has extended this ban until a year after it has actually certified the union as the bargaining representative.³¹² The Board will consider any decertification petition filed within a year of certification to be

³⁰⁸ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *Geo. L.J.* 439, 439–40 (2001) (listing transferable shares as one of the five “core functional features” of the corporate form).

³⁰⁹ 29 U.S.C. § 159(c)(1) (2000).

³¹⁰ *Id.* § 159(e)(1).

³¹¹ *Id.* § 159(e)(2).

³¹² See *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (“[T]he Board’s view that the one-year period should run from the date of certification rather than the date of election seems within the allowable area of the Board’s discretion in carrying out congressional policy.”).

untimely.³¹³ The union therefore has at least a de jure one-year minimum term.³¹⁴

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.³¹⁵ 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.³¹⁶ The agreement, however, need not be ratified by members in order to have preclusive effect, unless the agreement expressly requires such approval by its terms.³¹⁷

Of course, if the union and employer keep negotiating agreements, making sure to have a new contract before the previous 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.³¹⁸ 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.”³¹⁹ Although there are some exceptions to the contract bar doctrine, they generally involve an illegal clause in the contract³²⁰ or union incapacity through schism or defunctness.³²¹

³¹³ See *Chelsea Indus.*, 331 N.L.R.B. 1648, 1648 (2000).

³¹⁴ 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.* at 1649.

³¹⁵ The contract bar has long been part of Board doctrine. See *National Sugar Ref. Co.*, 10 N.L.R.B. 1410, 1415 (1939) (holding that the Board will “not proceed with an investigation of representatives until such time as the contract is about to expire”).

³¹⁶ *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962).

³¹⁷ See *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160, 1162–63 (1958).

³¹⁸ See *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000, 1001 (1962).

³¹⁹ *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995, 1001 (1958).

³²⁰ See *The Developing Labor Law*, *supra* note 37, at 527–29.

³²¹ See *id.* at 535–37.

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.³²² However, even when a union is merely incompetent, employees would still be stuck with a poor bargaining representative for a lengthy period of time.

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.³²³ This rule replaced the old standard that permitted employers to cease negotiating based on a “good faith reasonable doubt” that the union had continuing majority support.³²⁴ Under the new rule, an employer may cease to negotiate with the union only if it can prove that the union no longer enjoys majority support.³²⁵ 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 participation in the process.

There are substantial policy reasons for making it difficult for employees to decertify a union.³²⁶ 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.

³²² See G. Robert Blakey & Ronald Goldstock, “On the Waterfront”: RICO and Labor Racketeering, 17 Am. Crim. L. Rev. 341, 344 & n.26 (1980) (recognizing that the contract bar rule allows the employer and union to benefit from a “sweetheart” contract).

³²³ *Levitz Furniture Co. of the Pac., Inc.*, 333 N.L.R.B. 717, 717 (2001).

³²⁴ See *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 361, 364 (1998) (discussing the Board’s prior “good faith reasonable doubt” standard).

³²⁵ 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, 722–23. The Board did not decide whether an employer is allowed to poll its employees if it has good faith reasonable doubt about continuing majority status. *Id.* at 723.

³²⁶ See *Gen. 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”).

F. No Policing of Misrepresentation

As discussed previously,³²⁷ the Board has held that misrepresentations do not violate the Board's "laboratory conditions" as long as such misrepresentations are not akin to forgery.³²⁸ 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 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 [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.'³²⁹

A hands-off policy towards the hurly-burly world of political campaigns might be an appropriate one.³³⁰ 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 action

³²⁷ See *supra* Subsection I.B.2.

³²⁸ *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 131 (1982).

³²⁹ *Id.* at 132 (quoting *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1313 (1978)).

³³⁰ 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).

based on misrepresentations.³³¹ 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.³³² Rule 10b-5 offers substantially more protection against misrepresentations than traditional common law fraud.³³³ There has been little controversy about Rule 10b-5's basic mission: to eliminate misrepresentations and misleading omissions in the market for securities.³³⁴

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 since the 1950s.³³⁵ This decline comes 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.³³⁶

³³¹ In addition to Rule 10b-5, see 17 C.F.R. § 240.10b-5 (2007), which prohibits misrepresentations or omissions in connection with the purchase or sale of a security, § 11(a) of the Securities Act prohibits a false statement of a material fact in a registration statement, see 15 U.S.C. § 77k(a) (2000), and § 12(a)(2) of the Act imposes liability for a false statement of material fact in a prospectus, see *id.* § 77l(a)(2).

³³² 17 C.F.R. § 240.10b-5.

³³³ See Matthew T. Bodie, *Aligning Incentives with Equity: Employee Stock Options and Rule 10b-5*, 88 Iowa L. Rev. 539, 595–96 (2003).

³³⁴ Commentators on both sides of the mandatory disclosure debate agree that securities markets need strong antifraud protection. See Posner, *supra* note 251, at 480–84 (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) (“The social value of preventing fraud in the sale of securities is too clear to require elaboration.”).

³³⁵ See Press Release, U.S. Dep’t of Labor, *supra* note 1, at tbl.3.

³³⁶ See, e.g., Joseph Carroll, *Sixty Percent of Americans Approve of Labor Unions*, Gallup News Service, Aug. 31, 2007, <http://www.gallup.com/poll/28570/Sixty-Percent-Americans-Approve-Labor-Unions.aspx> (showing that sixty percent, in

However, there is some evidence of concerns about union competence.³³⁷ According to one public poll, seventy-one percent of people agreed that the government ought to do more to protect union members from corrupt union officials.³³⁸ Certainly, images of union corruption have inundated the public since the 1950s. The 1957–58 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.³³⁹ Episodes of malfeasance by union officials continue. Congress, courts, and commentators have struggled to identify the best methods to curtail such corruption and have resorted to such extraordinary measures as forced judicial trusteeships with no set time limits.³⁴⁰ While the federal government has had significant success in removing organized crime from certain unions,³⁴¹ the shadow of corruption remains. And in the popular media, television programs such as *The Sopranos* portray unions as mere vessels for mafia control of certain industries.³⁴²

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

2007, approve of labor unions and fifty-three percent, in 2006, believe that unions mostly help the economy); John Zogby et al., *Nationwide Attitudes Toward Unions 12* (2004), http://psrf.org/info/Nationwide_Attitudes_Toward_Unions_2004.pdf (finding that sixty-three percent of those polled approve of labor unions).

³³⁷ 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 Andy Stern).

³³⁸ Zogby et al., *supra* note 336, at 15.

³³⁹ Robert F. Kennedy, *The Enemy Within* (1960); Michael J. Nelson, Comment, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 *Geo. Mason L. Rev.* 527, 532–37 (2000).

³⁴⁰ 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).

³⁴¹ Professor Jim Jacobs has extensively discussed the federal government’s role in eliminating mob influence from unions. See, e.g., James B. Jacobs, *Mobsters, Unions, and Feds: The Mafia and the American Labor Movement 2*, 114–60 (2005); James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, *in* 30 *Crime & Justice* 229 (Michael Tonry ed., 2003); James B. Jacobs et al., *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 *Lab. Law.* 419, 419–24 (2004).

³⁴² *The Sopranos* (HBO television broadcast, 1999–2007).

securities legislation³⁴³ and has been cited repeatedly as justification for further mandatory disclosure.³⁴⁴ The Sarbanes-Oxley Act was perhaps in large part an effort to restore investor confidence after the shocks of 2001 and 2002.³⁴⁵ Although some commentators have criticized the lack of empirical support for this justification,³⁴⁶ there is no question that market confidence encourages investment in equities.³⁴⁷ In fact, the system of public securities regulation could be considered a government subsidy to investors and issuers. By taking steps to ensure the integrity of the markets, the government saves investors and issuers enforcement costs that these private parties would otherwise bear. Our securities market would not be as strong without this system of public intervention.³⁴⁸

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 breeding 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.

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 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

³⁴³ Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1, 51 (1983).

³⁴⁴ Easterbrook & Fischel, *supra* note 253, at 692 (“The justification most commonly offered for mandatory disclosure rules is that they are necessary to ‘preserve confidence’ in the capital markets.”).

³⁴⁵ 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).

³⁴⁶ Easterbrook & Fischel, *supra* note 253, at 693.

³⁴⁷ *Id.*

³⁴⁸ See Black, *supra* note 256, at 782–85.

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,³⁴⁹ 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 ensure 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.³⁵⁰ 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 a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a *lack of information* with respect to one of the choices available.³⁵¹

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 material information into the marketplace. However, there are significant concerns about the efficacy and the costs of such a system. 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 at issue. This Article has discussed a number of difficulties in the market for union representation: information asymmetry, conflicts of interest, lack

³⁴⁹ See *supra* Subsection I.B.3.

³⁵⁰ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966).

³⁵¹ *Id.* at 1240 (emphasis added) (citation omitted).

of competition, lack of reputational intermediaries, difficulty of exit, and lack of fraud protection. Each difficulty is created by a different set of circumstances. The conflict of interest problem, for example, is the result of a specific set of union-employer relationships in which the union has been captured, to some degree, by the employer. Smaller, non-AFL-CIO unions are more likely to fit this profile. 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; larger unions will be the cause of these concerns. Any consideration of regulations would have to disentangle these distinct difficulties.

In addition, it is important to keep an eye on the collateral effects of mandatory disclosure. The overall problem is lack of information leading to potentially irrational decisions. But disclosure regulation could have serious externalities. For example, on the one hand, greater disclosure requirements could lead to increased costs for union organizational campaigns and thus fewer such campaigns. On the other hand, if union disclosure were coupled with required employer disclosure, employers might seek to avoid this disclosure by bypassing the Board's processes through, for example, card-check certification agreements. Depending on one's ultimate policy preferences, the benefits of regulation addressing information problems may be outweighed by the costs such regulation imposes on unionization and industry overall. But the effects of any system must be considered in their 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 a system of disclosure is that, for certain types of union-related information, the Board could piggyback on the existing disclosure regime under the LMRDA. LMRDA requires extensive union reporting on union finances, employee and officer pay, and dues.³⁵² This information is available for public use and now can be found on the Internet. But employees in the midst of a representation campaign are not

³⁵² See *supra* Section III.D.

directed to this information. The Board may be able to use this 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 utilize the extensive system of securities regulation required of public companies.

3. Informational Overload and the Marginal Employee

Information overload has been a regular concern whenever disclosure requirements are contemplated. 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.³⁵³ In crafting an information disclosure regime, policy makers would need to make the information accessible and understandable to avoid the risk of conducting a fruitless exercise.

At the same time, some commentators contend that the problem of information overload has been exaggerated.³⁵⁴ Given the importance of the marginal consumer in shaping the market for union services, additional information may be effective even if only one consumer avails herself of it. In a representation campaign, the marginal employee makes the difference as to whether the employees choose the union 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 that serves as a repository for information about the campaign and takes steps to make sure employees receive 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.³⁵⁵ 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 facilitate the

³⁵³ See Edwards, *supra* note 245, at 221–23; Paredes, *supra* note 345, at 444–49.

³⁵⁴ See, e.g., Schwartz & Wilde, *supra* note 261, at 675–76.

³⁵⁵ See SEC Filings & Forms (EDGAR), <http://www.sec.gov/edgar.shtml> (last visited Dec. 14, 2007).

optimal level of information dispersion among employees by creating extensive access to information while avoiding the pitfalls of information overload. This is but one option that should be considered in addressing information problems.³⁵⁶

B. Neutrality and Card-Check Agreements

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 and card-check agreements are an increasingly popular way for unions to sign up new members.³⁵⁷ 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 may contain 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. Card-check certification essentially allows the parties to opt out of the NLRB's representation policies. Unions began negotiating neutrality and card-check agreements in the 1970s and their popularity has substantially increased.³⁵⁸

³⁵⁶ 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, "Such prerecognition bargaining allows an informed choice by *both* employers and employees." *Id.* at 303.

³⁵⁷ See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 *Iowa L. Rev.* 819, 824, 828-30 (2005).

³⁵⁸ *Id.*; *id.* at 824 (asserting that "[a]s a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation").

The attraction of neutrality and card-check agreements for unions is clear. A 2001 study of such agreements found that when they included a card check provision, the union secured representation of the employees over seventy-eight percent of the time.³⁵⁹ It is less clear, however, why employers would agree to them. In some 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.³⁶⁰ The most prominent neutrality agreements include ones in the automotive and telecommunications industries, which have a high union density.³⁶¹ On the other end of the spectrum, unions have also had some success in securing neutrality agreements through organizing campaigns using an array of political and economic pressures.³⁶² Some state and local government agencies now require or encourage employers to sign neutrality agreements in order to be eligible for governmental contracts.³⁶³ In Las Vegas, the Hotel and Restaurant Employees International Union (“HERE”) and the Service Employees

³⁵⁹ Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *Indus. & Lab. Rel. Rev.* 42, 52 (2001).

³⁶⁰ See 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* 139, 146–47 (Richard N. 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).

³⁶¹ 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).

³⁶² For a discussion of one such campaign, see Kenneth M. Casebeer, *Of Service Workers, Contracting Out, Joint Employment, Legal Consciousness, and the University of Miami* 30–32 (Univ. Miami Legal Studies, Working Paper No. 2007-06, 2007), <http://ssrn.com/abstract=1020623> (discussing SEIU strike at the University of Miami).

³⁶³ See Brudney, *supra* note 357, at 838 & n.85 (discussing laws, resolutions, or executive orders in California, Massachusetts, Missouri, New Jersey, and Wisconsin); Hartley, *supra* note 360, at 392–93.

International Union (“SEIU”) have successfully used these tools to obtain neutrality agreements with high profile employers.³⁶⁴

Despite their increasing popularity, it is difficult to say how pervasive card-check and neutrality agreements may eventually become. On the one hand, Congress came close to passing legislation that would have installed card-check authorization as a means for unions to obtain Board certification as collective-bargaining representatives.³⁶⁵ The House passed the bill, and while it failed to meet the cloture requirements in the Senate, a majority of Senators voted for it.³⁶⁶ Although President Bush promised to veto the bill if it passed, the legislation has the support of the Democratic presidential contenders.³⁶⁷ Thus, it is certainly conceivable—far more conceivable than at any point in the recent past—that such a procedure could soon become law.

In the meantime, however, labor must push for such agreements on its own. Unions such as SEIU have enjoyed real success in securing card-check and neutrality agreements as the structure for their organizing campaigns.³⁶⁸ However, the success has come after great struggle. 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 circumstances. In addition, Congress has also considered legislation to prohibit employer recognition based on a card-check majority.³⁶⁹ Although it seems unlikely that such a prohibition would pass, the most recent bill garnered fifty-seven cosponsors.

³⁶⁴ 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), [http://www.workinglife.org/wiki/Employer+Neutrality+and+Card-Check+Recognition+Get+Results+\(October+1999\)](http://www.workinglife.org/wiki/Employer+Neutrality+and+Card-Check+Recognition+Get+Results+(October+1999)) (last visited Feb. 18, 2008).

³⁶⁵ Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2 (2007).

³⁶⁶ See U.S. Senate, Roll Call Vote, H.R. 800, June 26, 2007, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00227.

³⁶⁷ Steven Greenhouse, Clash Nears in the Senate on Legislation Helping Unions Organize, N.Y. Times, June 20, 2007, at A16.

³⁶⁸ See, e.g., Steven Greenhouse, Union Claims Texas Victory with Janitors, N.Y. Times, Nov. 28, 2005, at A1.

³⁶⁹ See Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. § 3 (2004); Workers’ Bill of Rights, H.R. 4636, 107th Cong. § 2 (2002).

The Board has also implemented new procedures that make a union's card-check certification less likely to stick. In *Dana Corp.*, the Board held that it will not automatically bar a decertification election in the wake of a card-check certification mandated by a neutrality agreement.³⁷⁰ Prior to *Dana*, the Board had required 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."³⁷¹ However, the majority in *Dana* placed new restrictions on the recognition bar in the card-check context. In order for the bar to apply when the employer recognizes a card-check majority, employees in the bargaining unit must receive notice of their right to file a decertification petition and must have forty-five days in which to file such a petition (if they wish).³⁷² The recognition bar will only apply after the forty-five day period.³⁷³

The strongest argument against neutrality and card-check agreements is the potential impairment of employee free choice. Anti-union organizations and commentators have criticized neutrality agreements as opportunities for union intimidation and misinformation to carry the day.³⁷⁴ Critics of card-check neutrality

³⁷⁰ 351 N.L.R.B. No. 28 (Sept. 29, 2007).

³⁷¹ See *Dana Corp.*, 341 N.L.R.B. 1283, 1284 (2004) (Liebman & Walsh, Members, dissenting from grant of petition for review) (citing *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1966); *Sound Contractors Ass'n*, 162 N.L.R.B. 364, 365 (1966)).

³⁷² *Dana Corp.*, 351 N.L.R.B. No. 28.

³⁷³ However, it may be possible for unions 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) (2000). See *UAW v. Dana Corp.*, 278 F.3d 548, 550 (6th Cir. 2002); *AK Steel Corp. v. United Steelworkers of Am.*, 163 F.3d 403, 406 (6th Cir. 1998); *Hotel & Rest. 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.

³⁷⁴ See, e.g., *Emerging Trends in Employment and Labor Law: Labor-Mgmt. Relations in a Global Econ.: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. & the Workforce, 107th Cong. 30* (2002) [hereinafter 2002 Hearings] (statement of Charles I. Cohen) (arguing that the "ultimate goal" of a card-check neutrality agreement is "obtaining representation status without a fully informed electorate and without a secret ballot election"); *Union Free America, Neutrality Agreements and Card Check Elections*, http://www.unionfreeamerica.com/neutrality_cardcheck.htm (last visited Nov. 17, 2007) ("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

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agreements have cited the lack of a “fully informed electorate”³⁷⁵ under such agreements as well as the need for employees to “hear[] views on as many sides of the issue as possible.”³⁷⁶ The Board itself echoed these concerns when it asserted that “union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options.”³⁷⁷

Given the concern about informed employee choice, neutrality and card-check agreements may in fact give rise to a greater need for some system of information disclosure than do 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. No campaign means less chance of intimidation—but also less flow of information. Taking steps to get the appropriate information to employees may take much of the teeth out of the critiques of neutrality and card-check agreements while preserving the features that make them attractive to unions and academic commentators. 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.

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.

representation. The unions know this. That’s why they want card check elections instead of secret ballot elections.”).

³⁷⁵ 2002 Hearings, *supra* note 374, at 30 (statement of Charles I. Cohen).

³⁷⁶ Compulsory Union Dues and Corporate Campaigns: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & the Workforce, 107th Cong. 9 (2002) (statement of Daniel V. Yager).

³⁷⁷ *Dana Corp.*, 351 N.L.R.B. No. 28. The Board cited to *Excelsior Underwear, Inc.* to support this point. See *id.* at 6 n.21 (citing *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 (1966)); see also *id.* at 2 (“While the voluntary recognition process is founded on a majority card showing, it is a far less reliable indicator of actual employee preference than the results of a Board secret-ballot 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 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.