

# Neutrality Agreements and Card Check Recognition: Prospects for Changing Labor Relations Paradigms

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## I. INTRODUCTION

[I]t is important ... [to] not[e] ... what scientists never do when confronted by even severe and prolonged anomalies. Though they may begin to lose faith and then to consider alternatives, they do not renounce the paradigm that has led them into crisis ... [O]nce it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternate candidate is available to take its place.<sup>1</sup>

**A**t the heart of the National Labor Relations Act (“NLRA” or “Act”) is § 7, guaranteeing workers the right to band together for collective bargaining “through representatives of their own choosing.”<sup>2</sup> This employee choice, including the right to refrain from unionizing, has long been analogized to voting in political elections. The resonance of the comparison between industrial and political democracy has helped make elections supervised by the National Labor Relations Board (“NLRB” or “Board”) the dominant explanatory structure, or paradigm, for the exercise of employee choice under the NLRA.

The past decade has witnessed a growing challenge to the election paradigm as the preferred approach for determining whether employees want union representation. A central component of this challenge is U.S. unions’ success securing agreements from employers to remain neutral during organizing campaigns. These agreements generally provide that the employer will not demand a Board-supervised election, but will recognize the union if a majority of employees sign authorization cards.

Neutrality agreements that include card check recognition provide a distinct mechanism for employees to select union representation. This approach has partially displaced NLRB elections, and has become the principal strategy pursued by many unions. Its non-electoral focus has provoked attention from labor law scholars, resistance from

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<sup>1</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* 77 (2d ed. 1970).

<sup>2</sup> 29 U.S.C. § 157 (2000).

the business community, and controversy in Congress. Competing bills have been introduced, with one side attempting to ban the technique and the other proposing to have the NLRB certify unions through neutrality and card check.

This Article examines the rise of neutrality agreements and card check as a challenge to the election paradigm. The underlying question it addresses is whether to modify or even abandon reliance on Board-supervised elections as the favored method to determine if employees want union representation. Proponents within organized labor contend that the new approach safeguards employee freedom of choice better than elections, promotes a structure for more civil labor-management discourse and encourages stable labor relations based on respect for voluntary agreements.

Business opponents criticize these arrangements as inherently threatening to employee free choice. They maintain that private agreements and reliance on authorization card signatures allow unions to exert pressure on individual employees, thereby undermining secrecy, confidentiality, and a non-coercive environment for determining employee preferences. However, these opponents fail to acknowledge how the fundamental asymmetry of power in the organizing context between employers and unions—an asymmetry deeply rooted in the current NLRB election structure—has long subverted the exercise of uncoerced choice by individual employees. Accordingly, the debate over neutrality and card check offers a chance to re-examine basic approaches to employee choice under the NLRA.

Part II of the Article describes the proliferation of neutrality plus card check agreements, and explains why unions favor these arrangements and why many employers accept them. Part III considers the business community's legal critique of these agreements, focusing on claims that they violate the NLRA by interfering with employee free choice. It concludes that these arguments are deficient: both neutrality agreements and their card check provisions are plainly permissible under the NLRA.

Part IV addresses deeper concerns about displacing the election paradigm, borrowing from Professor Thomas Kuhn's framework for explaining change in the natural sciences to analyze the possibility of such a shift taking place in American labor law. Despite the fact that the Supreme Court has long endorsed NLRB elections as the predominant and optimal method for determining employee choice, it is no longer appropriate to overlook the anomalies associated with this model. Participants on both sides understand that NLRB elections regularly feature employers' exercise of lawful yet disproportionate authority to influence election results, as well as the use of their power to affect outcomes unlawfully but with relative impunity. This conduct has helped to fuel the growth of alternative contractually based approaches to organizing. Part IV concludes by suggesting ways in which the process of establishing union representation might be restructured to be more sensitive to the imbalance of power between employers and employees.

## II. THE RISE OF NEUTRALITY AND CARD CHECK AGREEMENTS

### A. BYPASSING NLRB ELECTIONS SINCE THE MID 1990S

A union organizing campaign typically begins when a union is contacted by employees who feel unfairly treated in their work environment. In the course of its campaign, the union distributes authorization cards, providing supportive employees with the chance to designate the union as their bargaining representative. If the union has received card support from a majority of employees at the establishment, it ordinarily will request that the employer recognize the union and enter into a collective bargaining relationship. The employer may lawfully accede to this request (provided there is

in fact uncoerced majority support for the union). Employers, however, usually exercise their right to refuse recognition, setting the stage for a NLRB-conducted representation election in which management urges employees to vote against unionization. The election thus becomes a contest challenging the union's assertion that it enjoys majority support.

In the late 1970s, unions began to negotiate agreements with employers that modified this traditional approach by providing for employers to remain neutral in future organizing campaigns among their employees. Unions typically have sought these agreements in two contexts. First, they have attempted to negotiate neutrality with firms where they already represent some but not all of the company's employees. In addition, particularly in the service sector, unions have sought neutrality agreements from employers with whom they do not have an existing collective bargaining relationship.

Early neutrality agreements often conditioned an employer's neutral stance on "responsible" union behavior, pledging that management would remain neutral "providing the Union conducts itself in a manner which neither demeans the Corporation as an Organization nor its representatives as individuals."<sup>3</sup> This emphasis on mutual respect and non-confrontation is a significant aspect of the neutrality agreement approach. Whereas the "regulated" environment of a NLRB election is highly adversarial, the self-regulated regime under neutrality and card check is predicated on a pre-commitment to restraint: both labor and management agree not to injure the reputation of their opposite number.

By the late 1990s, as unions bargained for neutrality with greater frequency, these agreements had become a central component of their organizing strategy. In an important empirical study, Professors Adrienne Eaton and Jill Kriesky analyzed 132 neutrality agreements negotiated by twenty-three different national unions.<sup>4</sup> Approximately 80% of the agreements they examined were bargained during the 1990s. Not surprisingly, Eaton and Kriesky found considerable variation among these agreements. Almost all, however, included an employer commitment to neutrality, and some two-thirds included both neutrality and a provision for recognizing union majority status through a card check. In addition, most agreements called for union access to the employer's premises, thereby contracting around legal access restrictions established in 1992 by the Supreme Court. Nearly four-fifths of the agreements also imposed limits on union behavior—most often an agreement not to attack management during the campaign. Finally, more than 90% called for some mechanism, usually arbitration, to resolve allegations of non-neutral conduct or other disputes between the parties.

Eaton and Kriesky's findings suggest a link between what provisions are included in a neutrality agreement and the ultimate success of union organizing efforts. Organizing campaigns that featured an employer neutrality statement without providing for card check resulted in recognition for the union 46% of the time. By contrast, organizing campaigns in which parties agreed to both neutrality and card check ended with union recognition 78% of the time.

This 78% recognition rate is well above the average union win rate in Board elections since 1996. It also is more than twice the union win rate for elections that involve

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<sup>3</sup> Andrew M. Kramer et al., *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 B.C. L. Rev. 39, 47 (1981) (quoting the Neutrality Agreement of June 6, 1979 between Philip Morris and Local 16 T of the Bakery, Confectionery, & Tobacco Workers Union).

<sup>4</sup> See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 45 (2001). Sources for this paragraph and the following paragraph of text may be found at id. 46-48, 51-52.

larger units of 500 or more employees, units in which unions recently have attained notable successes based on neutrality and card check campaigns.<sup>5</sup> As importantly, unions' rate of achieving a first contract in the nearly 200 successful organizing campaigns monitored by Eaton and Kriesky was nearly 100%.<sup>6</sup> That achievement far exceeds unions' 60% success rate for first contracts following NLRB election victories.<sup>7</sup>

Organized labor's increasing reliance on neutrality and card check agreements appears to have significantly reduced its use of NLRB elections. After remaining relatively constant at around 3500 per year from 1983 to 1998, the number of Board elections held annually declined by close to 30% between 1999 and 2003.<sup>8</sup> Strikingly, as union organizing activity has increased since the mid 1990s, the number of representation elections has reached its lowest level in over half a century.

The proliferation of neutrality plus card check agreements has become part of unions' larger commitment to modify the NLRB election-based approach to organizing. The AFL-CIO reported that its affiliates organized nearly three million workers from 1998 to 2003; less than one-fifth of these newly organized employees were added through NLRB elections.<sup>9</sup> Some of this success involved public sector employees or was attributable to other contractually-based approaches.<sup>10</sup> Still, neutrality plus card check has become a major weapon in labor's arsenal. The Service Employees, the Needletrades, Textile, Hotel and Restaurant Employees, and the Autoworkers all report that a plurality or majority of newly organized members have come through such contractual arrangements rather than NLRB elections.<sup>11</sup>

#### B. WHY UNIONS NEGOTIATE FOR NEUTRALITY WITH CARD CHECK

Given their comparative track records, it is easy to understand why unions prefer neutrality and card check over Board-supervised elections. The explanation for their success under this approach relates in large part to effects frequently associated with employer opposition during NLRB election campaigns. Neutrality arrangements allow unions to avoid these effects by sidestepping the consequences of both employer anti-union tactics and lengthy delays under the NLRB election regime.

Numerous studies have demonstrated the adverse impact of employer speech and conduct opposing unionization. The greater the amount of employer communication

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<sup>5</sup> For presentation and discussion of sources describing NLRB election win rates, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 830 & nn. 49-50 (2005). For recent reported examples where neutrality plus card check has led to success in organizing units of more than 500 workers, see *id.* at 830, n.51.

<sup>6</sup> See Eaton & Kriesky, *supra* note 4, at 52.

<sup>7</sup> See DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 73 (1994) [hereinafter DUNLOP COMM'N REPORT] (reporting that the success rate for obtaining first contracts between 1986 and 1993 was 56%); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354-55 (1984) (reporting that certified unions obtain first contracts in only 60% of cases).

<sup>8</sup> For presentation of sources describing numbers of NLRB elections by year, see Brudney, *supra* note 5, 90 IOWA L. REV. at 827, nn.36-37.

<sup>9</sup> For detailed discussion of sources, see *id.* at 828-29, n.45. The figures on newly organized workers include public sector employees who are recruited wholly outside the NLRA domain.

<sup>10</sup> See, e.g., Agreement on Election Procedures Between Service Employees International Union ("SEIU") and Catholic Healthcare West 5 (Apr. 4, 2001) (specifying standards of conduct and privately supervised elections for up to eight separate units of employees at acute care hospitals) (on file with the Iowa Law Review).

<sup>11</sup> For discussion of sources reporting on these results, see Brudney, *supra* note 5, 90 Iowa L. Rev. at 830, n.48.

during a campaign, the less likely a union is to prevail in the election.<sup>12</sup> While one might suppose that this impact stems primarily from the informative aspects of employer speech, research in the past two decades strongly suggests it is the aggressive and hierarchical nature of the communication that generates increased management success.

When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact on employees is likely to reflect management's power over their work lives rather than the persuasive content of the words themselves. Captive audience speeches, oblique or direct threats against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline lawful techniques that have proven especially effective in defeating unionization.<sup>13</sup> Employers' unlawfully discriminatory conduct during campaigns—particularly the firing of union supporters—also has substantially curtailed unions' success.<sup>14</sup> By reducing or eliminating such tactics, neutrality agreements substantially improve unions' chances of securing majority support.

With regard to delay, there is again considerable evidence that unions fare less well as the gap widens between the filing of an election petition and the actual election.<sup>15</sup> This impact seems linked to employers' intimidating speech or conduct during the extended campaign.<sup>16</sup> The card check approach shortens the time period within which the union attempts to secure majority support and be recognized. Of even greater importance, neutrality agreements, with or without card check, minimize the prospects

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<sup>12</sup> See Richard B. Freeman & James L. Medoff, WHAT DO UNIONS DO? 234-36 (1984) (summarizing results from six studies). For a discussion of additional sources, see Brudney, *supra* note 5, 90 IOWA L. REV. at 832, n.58.

<sup>13</sup> See, e.g., Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 80-82 (Sheldon Friedman et al. eds. 1994) (reporting adverse impact from captive audience meetings and from increasing number of company letters transmitted to employees); William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law & Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) (reporting adverse impact of employer threats, captive audience speeches, and certain written communications); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 361, 364 (1990) (reporting adverse impact of supervisors speaking out against unions); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 526-30 (2001) (reporting adverse impact of captive audience speeches and threats against employees); see also Freeman & Medoff, *supra* note 12, at 234-37 (summarizing findings from eleven studies).

<sup>14</sup> See, e.g., GEN. ACCOUNTING OFFICE, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES (1982) (reporting diminished success for unions in campaigns during which employer discrimination occurred); see also Freeman & Medoff, *supra* note 12, at 234-36 (summarizing findings from six studies); Bronfenbrenner, *supra* note 13, at 81 (describing how studies actually underestimate negative impact from firings because they do not include the many campaigns that collapse before an election once the employer has discharged key union supporters).

<sup>15</sup> See, e.g., Bronfenbrenner, *supra* note 13, at 78-79 (reporting that for 261 union elections occurring in 1986 and 1987, win rate declines from 50% if election is held within sixty days of petition to 31% if election is held 61-180 days after petition); Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 88-89 (reporting that for over 45,000 union elections studied, win rate decreases steadily from 50% (if election occurs less than one month after petition is filed) to 30% (if election occurs four to seven months after petition is filed)).

<sup>16</sup> See Bronfenbrenner, *supra* note 13, at 78 (observing that delays "give employers a longer time period in which to campaign aggressively"). Roomkin & Block, *supra* note 15, at 76 (indicating same, and adding that delay increases likelihood of turnover in the workforce, thereby undermining union efforts to retain employee support).

for delay in opening collective bargaining once a determination has been made that the union enjoys majority support.<sup>17</sup>

### C. WHY EMPLOYERS AGREE TO NEUTRALITY WITH CARD CHECK

At first glance, it is less obvious why employers agree to negotiate neutrality and card check. In a follow-up study, Eaton and Kriesky found that a majority of employers identified as their principal motive the costs they would incur if they did not agree to neutrality and card check.<sup>18</sup> Specifically, many employers cited the economic losses associated with a strike, the potential damage from union picketing or handbilling of customers<sup>19</sup> or the indirect costs of strained relations with third parties—such as the withholding of financial support or investment by a municipality or union pension fund, or loss of customer business from religious or community groups. Apart from the potential risks associated with resisting the union, employers also projected certain costs from entering into a neutrality agreement, such as increased labor costs from the ensuing collective bargaining agreement and diminished attractiveness as a merger or takeover target.

At the same time, Eaton and Kriesky found that a substantial minority of employers pointed primarily to the benefits derived from reaching a neutrality agreement.<sup>20</sup> In particular, many employers who anticipated that their increased labor costs would be substantial also believed that these costs would be offset by certain advantages. Importantly, Eaton and Kriesky described a range of benefits that employers expected to realize as a result of entering into neutrality agreements; these benefits are often reflected in other accounts of such arrangements. For some employers, neutrality agreements offered advantages in marketing products or services to unionized firms<sup>21</sup> or to union members themselves.<sup>22</sup> Other employers cited the importance of assistance

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<sup>17</sup> The most egregious delays in the Board elections process actually occur after the votes have been cast, when challenges to the results or conduct of the election typically take years to resolve. See INT'L CONFEDERATION OF FREE TRADE UNIONS (ICFTU), INTERNATIONALLY RECOGNIZED CORE LABOUR STANDARDS IN THE UNITED STATES: REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF THE UNITED STATES 3 (2004) [hereinafter ICFTU REPORT FOR WTO] (reporting backlog of 25,000 employer unfair labor practice cases in 2002 and average time of 557 days for NLRB to resolve such cases, not including subsequent court proceedings); Fred Feinstein, *The Challenge of Being General Counsel*, 16 LAB. LAW 19, 34-35 (2000) (reporting that it typically takes two years to litigate an unfair labor practice case to completion and that “[d]elay in resolving a challenge to a union election victory can seriously undermine employee support and ultimately make it impossible to achieve a collective bargaining agreement”).

<sup>18</sup> See Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements* (Dec. 2002) (unpublished manuscript, on file with the Iowa Law Review). Professors Eaton and Kriesky conducted telephone interviews with high-level human resource or labor relations executives from thirty-four employers that had agreed to neutrality and card check. *Id.* at 2-4. In this paragraph and the following paragraph support from the manuscript identified appears at *id.* 6-10, 12.

<sup>19</sup> For further discussion of employers' perceptions of costs with respect to neutrality and card check, see *id.* 10, 12. See also Steven Greenhouse, *Local 226, "The Culinary" Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22 (reporting that employers' concern over “pickets ... blocking [hotel] driveways” led numerous Las Vegas hotels to agree to neutrality and card check).

<sup>20</sup> See Eaton & Kriesky, *supra* note 18, at 6-9.

<sup>21</sup> See *id.* at 7-9. See Brudney, *supra* note 5, 90 IOWA L. REV. at 837, nn.80-81 (discussing sources).

<sup>22</sup> See *Convention Center Board Seeks Neutrality from San Diego Hotel Developers, Owners*, DAILY LAB. REP. (BNA), at A-8 (May 15, 2000) (describing economic advantages for hotels that house union conventions, and reporting HERE promise to steer union convention business to San Diego if neutrality agreements signed).

from unions in lobbying for favorable legislative or regulatory outcomes.<sup>23</sup> Employers also determined that neutrality and card check might enhance their ability to attract qualified employees or promote a more cooperative stance by unions in collective bargaining.<sup>24</sup>

Eaton and Kriesky concluded that the best explanation for why the employers they studied chose not to oppose unionization was simple economic rationality.<sup>25</sup> In this respect, the decision to accede to unionization, like the decision to resist that prospect, is at root a matter of business judgment.

As the studies and accounts discussed in Part II indicate, neutrality agreements—generally accompanied by card check—have become a central feature of the labor organizing landscape over the past decade. Unions find them attractive for fairly obvious reasons. More intriguing is the fact that a substantial number of employers have been persuaded to abandon the aggressive stance they are entitled to adopt as part of an adversarial election campaign. Indeed, an important aspect of what is distinctive about the neutrality and card check approach is precisely its nonconfrontational character. I now consider whether such agreements to waive certain informational and combative advantages traditionally associated with campaign speech and conduct are themselves inherently suspect under the NLRA.

### III. THE BUSINESS CRITIQUE: DEFENDING EMPLOYEE FREE CHOICE

To put it mildly, not all employers or those sympathetic to the employer position have accepted organized labor's new approach. Concern or opposition has been expressed by a number of management attorneys and business lobbyists, by certain members of Congress, and by some labor relations scholars. Their challenges to the lawfulness of neutrality and card check revolve around the claim that such arrangements usurp or undermine the rights of individual employees under the NLRA. In essence, these critics contend that employees' § 7 right to choose "to form, join, or assist labor organizations ... and ... to refrain from any or all such activities"<sup>26</sup> is vindicated only through a spirited election campaign supervised by the NLRB, in which the employer and the union each seek to inform and persuade employees as to the merits of their respective positions.

A good sense of both the substance and rhetoric of the business challenge to neutrality and card check can be gleaned from the testimony of supporters of bills to prohibit card check recognition which were introduced by Republican members of

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<sup>23</sup> See Eaton & Kriesky, *supra* note 18, at 7; see also Kathy Robertson, *Bill Ensures Profits for Nursing Homes*, SACRAMENTO BUS. J., Aug. 20, 2004 (reporting on efforts by coalition of SEIU and nursing home chains to lobby for legislation increasing government support); *HERE Local 814 Signs Initial Accord at Waterfront Hotel in Santa Monica*, Daily Lab. Rep. (BNA), at A-5 (July 12, 2001) (reporting that city government, as owner of land on which hotel is located, made neutrality agreement a condition for approving hotel's sale to new owners); Michelle Amber, Avondale, *Unions Agree to Allow Workers to Decide if They Want Representation*, DAILY LAB. REP. (BNA), at AA-1 (Nov. 3, 1999) (reporting that as part of neutrality and card check agreement, union and management would work together to resolve pending matters before NLRB and OSHA).

<sup>24</sup> See Eaton & Kriesky, *supra* note 18, at 8 (describing management's emphasis on the need for skilled labor). Another bargaining objective often sought by management in connection with neutrality agreements is combination or streamlining of job classifications. See Greenhouse, *supra* note 19 (describing Las Vegas hotel's interest in having a small number of job categories for dishwashers, maids, and other hotel workers).

<sup>25</sup> See Eaton & Kriesky, *supra* note 18, at 22.

<sup>26</sup> 29 U.S.C. § 157 (2000).

Congress in 2002 and 2004.<sup>27</sup> These proposals sought to amend the NLRA so as to make it unlawful for an employer to recognize or bargain collectively with a union that has not been selected through a Board-supervised election. Testifying before a House hearing in 2002, attorney and former NLRB member Charles Cohen, representing the Chamber of Commerce, argued that neutrality and card check have as their “ultimate goal ... obtaining representation status without a fully informed electorate and without a secret ballot election” and “undermine the right of free choice.”<sup>28</sup> In the eyes of such critics, labor’s new approach represents an assault on the long-standing principle of democratic employee choice—the confidential, Board-regulated election that is claimed to be at once competitive and unpressured.

The very fact that critics of neutrality and card check have sought to pass legislation prohibiting it raises an inference that this approach may be permissible under existing law. There are, however, at least three distinct aspects to the argument that employer agreements to remain neutral and abandon the election process are unlawful under the NLRA. I analyze all three and conclude that none is persuasive in light of the settled doctrine or purposes and policies of the Act.

#### A. NEUTRALITY AGREEMENTS AND NLRA § 8(A)(2)

Section 8(a)(2) of the NLRA makes it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”<sup>29</sup> Some employer advocates have maintained that an employer’s agreement to refrain from saying anything negative about unions, to allow union representatives to enter its facility and express pro-union views to its employees, and to accept authorization cards as evidence of majority union backing, is tantamount to contributing unlawful support or assistance toward a union. In essence, their argument is that an agreement not to engage in opposition effectively signals that the union enjoys favor, and that the employer’s expression of deference subtly but inevitably constrains its employees in their decisions. For several reasons, this argument cannot withstand analysis.

Initially, it is difficult to understand why the contractual nature of an employer’s refraining from opposing a union should have an unlawfully inhibiting impact on employees. Employers have the right to oppose unions, but they do not have a duty to do so. The fact that an employer’s indifference or even implicit receptivity toward the union is expressed in writing rather than through ad hoc oral declarations hardly transforms the employer’s voluntary stance into a coercive signal.

If anything, federal labor statutes not only tolerate but promote contractual arrangements between management and unions as conducive to labor peace. A key provision of the law is § 301 of the Taft-Hartley Act, which makes collectively bargained contracts enforceable in federal court. Respect for such arrangements, including

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<sup>27</sup> See H.R. 4636, 107th Cong. § 2 (2002), and Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. § 3 (2004).

<sup>28</sup> *Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. on Workforce Prots. of the House Comm. on Educ. & the Workforce*, 107th Cong. 100 (2002) (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockius LLP, on behalf of the U.S. Chamber of Commerce on Oct. 8, 2002); see also *Labor Organizing Campaigns: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 108th Cong. (2004) (statement of Charles I. Cohen) (maintaining that neutrality/card check agreements amount to “gag orders” on lawful employer speech [that] limit employee free choice by limiting the information upon which employees make their decision”).

<sup>29</sup> 29 U.S.C. § 158(a)(2) (2000).



agreements to recognize a union upon proof of majority support secured outside the elections context, has long been a centerpiece of U.S. labor law.<sup>30</sup>

The Supreme Court has expressed concern that a contractual agreement between employer and union supported by only a minority of employees might provide a “deceptive cloak of authority with which [the union could] persuasively elicit additional employee support.”<sup>31</sup> But a neutrality agreement involves no such deception: the employer is simply stating its readiness to allow a union to secure majority support and its willingness to bargain with the union should it succeed.

Moreover, from a practical standpoint, employees themselves are not bound by neutrality agreements between employers and unions. Employees who wish to express opposition to unions remain free to do so. Such opposition may possibly trigger hostility from a union or its supporters, but misrepresentation, pressure, or reprisal can be fully addressed through existing NLRB procedures.<sup>32</sup> In addition, groups like the Chamber of Commerce also are not covered by neutrality agreements, and they can respond to employees seeking information on possible disadvantages of unions or disseminate such information to employees covered by a neutrality agreement.

Accordingly, there is no basis for inferring that neutrality agreements systemically inhibit the expressive options of employees who wish to oppose unionization. Indeed, Professors Eaton and Kriesky found that unions lost one out of five campaigns in which they relied on both neutrality and card check and some one-half of all campaigns involving neutrality agreements alone, suggesting that employees resisting unions retain an effective voice.

Stepping back, the argument that an employer’s formal neutrality compromises employee free choice seems to rest, at bottom, on the notion that the NLRA and, in particular, § 8(a)(2) contemplates a fundamentally adversarial relationship between management and labor. However, in adopting § 8(a)(2) Congress was focused on a more narrow issue: the need to eliminate in-house employer-dominated labor organizations in order to permit the growth of authentic collective bargaining.<sup>33</sup> A centerpiece of the bill that resulted in the NLRA was the proposed abolition of these company unions. Congress’ purpose, though, was not to stifle labor-management cooperation. Rather, it was to channel labor-management relations, whether cooperative or adversarial, through truly autonomous labor organizations in order to promote meaningful collective bargaining.<sup>34</sup>

This is not to suggest that neutrality agreements automatically fall outside the ambit of § 8(a)(2). The line between employer-union cooperation (which is encouraged) and employer support constituting undue interference (which is prohibited) remains important and is at times difficult to identify.<sup>35</sup> Employers may inhibit choice in unlawful ways,

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<sup>30</sup> See *Raley’s*, 336 N.L.R.B. 374, 385-86 (2001). See generally, *Goldsmith-Louison Cadillac Corp.*, 299 N.L.R.B. 520 (1990); *Alpha Beta Co.*, 294 N.L.R.B. 228 (1989); *Cam Indus.*, 251 N.L.R.B. 11 (1980), *enforced*, *NLRB v. CAM Indus., Inc.*, 666 F.2d 411, 412-13 (9th Cir. 1982).

<sup>31</sup> *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 736 (1961).

<sup>32</sup> See, e.g., *Bookland, Inc.*, 221 N.L.R.B. 35, 36 (1975) (holding that misrepresentations regarding the purpose or effect of signing a card result in its invalidation); *Planned Bldg. Servs., Inc.*, 318 N.L.R.B. 1049, 1062-63 (1995) (holding that use of intimidating conduct when soliciting cards is unfair labor practice, and cards may not be used to establish majority support).

<sup>33</sup> For presentation and discussion of sources regarding legislative history of § 8(a)(2), see *Brudney*, *supra* note 5, 90 Iowa L. Rev. at 849, n.140.

<sup>34</sup> See *id.* at 851, n.152.

<sup>35</sup> See *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (discussing need to find balance between encouragement of cooperation that fosters stable and peaceful industrial relations and discouragement of interference that undermines employee freedom of choice).

by helping a union solicit signed authorization cards, by designating particular employees to assist a union organizing effort, or by convening a meeting between the union and employees at which supervisors monitor the employees' reactions. On the other hand, simply arranging for a meeting between union and employees on company premises, or allowing the union to solicit cards during the workday, do not constitute unlawful support and, in fact, fall within permissible instances of employer-union cooperation.<sup>36</sup>

The position adopted by the Board and the appellate courts indicates there is nothing presumptively suspect about employer statements expressing neutrality toward a union organizing effort. While there may be instances of abuse in implementation, an employer's announced willingness to allow employees to debate on their own whether to support an autonomous union is simply not the kind of 'mischief' that § 8(a)(2) was designed to address.

#### B. NEUTRALITY AGREEMENTS AND EMPLOYER WAIVER OF THE RIGHT TO COMMUNICATE WITH EMPLOYEES

Section 8(c) of the NLRA protects employers' freedom to speak out against unionization, so long as this sharing of views "contains no threat of reprisal or force or promise of benefit."<sup>37</sup> Enacted in 1947 after the Supreme Court had warned that Board restrictions on noncoercive employer speech raised constitutional questions,<sup>38</sup> § 8(c) was meant to permit and encourage employer debate on union organizing and bargaining.<sup>39</sup> It has been contended that neutrality agreements are incompatible with § 8(c) because they amount to the waiver of a fundamental employer right, a waiver that runs contrary to federal labor policy.<sup>40</sup> This second challenge also is without merit.

Accepting for argument's sake that an employer's right to engage in noncoercive speech during a union campaign implicates First Amendment considerations,<sup>41</sup> such a right may be waived if done "voluntarily, intelligently, and knowingly ... with full awareness of the legal consequences."<sup>42</sup> Neutrality agreements that are sufficiently explicit typically satisfy this standard. Waiver provisions negotiated by sophisticated, institutional parties are regularly deemed voluntary.<sup>43</sup> They also will likely be found knowing and intelligent, given that one party (the union) ordinarily relinquishes certain demands or makes certain promises in exchange for a pledge of neutrality by the other party (the employer).<sup>44</sup>

<sup>36</sup> See, e.g., *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1, 3, 6 (2001); *New England Motor Freight Inc.*, 297 N.L.R.B. 848, 851-52 (1990).

<sup>37</sup> 29 U.S.C. § 158(c) (2000). The text of § 8(c) sets forth an evidentiary rule more than an actual right: while employer communication "shall not constitute or be evidence of any unfair labor practice," such communication may still serve as grounds for the Board to order a new election under its § 9 powers. See generally, *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1245 (1966). For present purposes, however, I assume that the protection confers a positive right to speak. *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 100 (2d Cir. 2006) (holding that § 8(c) protects employer speech rights in the unionization campaign context); but see *United States Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1091 (9th Cir. 2004) (en banc) (holding that § 8(c) does not grant employer speech rights).

<sup>38</sup> See *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477-79 (1941). See generally, *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945).

<sup>39</sup> See *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).

<sup>40</sup> See *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558 (6th Cir. 2002) (stating company's argument); *Kramer et al.*, *supra* note 3, at 72-76.

<sup>41</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1970).

<sup>42</sup> *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (setting forth standards for waiver of due process rights in civil context).

<sup>43</sup> See *id.* at 187-88.

<sup>44</sup> See William J. Guzick, *Employer Neutrality Agreements: Union Organizing Under a Nonadversarial Model of Labor Relations*, 6 INDUS. REL. L.J. 421, 458-59 (1984).

There remains the possibility that even a voluntary, knowing, and intelligent waiver may be invalid on public policy grounds. It has been asserted that any agreement by an employer to remain silent undermines § 7 rights by compelling employees to choose for or against unionization without adequate information.<sup>45</sup> The problem with this contention is that federal labor policy does not require employers to educate employees about the downsides of unionization.<sup>46</sup> Moreover, enforcing neutrality agreements actually promotes federal labor policy by respecting the parties' decision to forgo a divisive election process in favor of voluntary resolution of union-management differences.<sup>47</sup>

Finally, an employer's waiver of its right to speak during a union campaign does not deny employees' § 7 rights. That an employer is protected in speaking out against a union does not confer upon employees a right to hear such employer speech.<sup>48</sup> There is simply no basis for believing that employees opposed to unions cannot assert their own § 7 rights, even if one were to indulge the rather strained premise that an employer's interest in renouncing a voluntary neutrality agreement reflects its role as benevolent champion of these employees.<sup>49</sup>

### C. CARD CHECK RECOGNITION AND ACTUAL OR PRESUMPTIVE COERCION

As noted earlier, roughly two-thirds of all neutrality agreements include provisions for recognizing union majority status through card check. Critics have suggested that reliance on authorization cards to determine employee choice should be only a last resort because the signatures are obtained in circumstances that lack certain protective features of Board elections—the privacy of the voting booth, the secret ballot, and governmental oversight.

Taking note of such differences, the Supreme Court in a 1969 decision declared that cards were “admittedly inferior to the election process” as a means of reflecting employee choice.<sup>50</sup> At the same time, the Court made clear that authorization card signatures may serve as an adequate reflection of employee sentiment. In reaching this conclusion, the Court considered and dismissed claims that the card-signing process was inherently unreliable due to group pressure, lack of sufficient information being shared, or the presence of misrepresentation and coercion.<sup>51</sup>

Indeed, non-electoral paths to securing representative status have been approved under the NLRA since its inception. Employers whose unfair labor practices disrupt a

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<sup>45</sup> See *Dana Corp.*, 278 F.3d at 559 (reciting employer's argument); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992) (same).

<sup>46</sup> See *Hotel Employees*, 961 F.2d at 1470.

<sup>47</sup> See, e.g., *Baseball Club of Seattle (Seattle Mariners)*, 335 N.L.R.B. 563, 564-65 (2001) (holding that employer must abide by neutrality agreement, and dismissing its decertification petition); *Verizon Info. Sys.*, 335 N.L.R.B. 558, 559-61 (2001) (holding that union must abide by neutrality agreement, and dismissing its representation petition).

<sup>48</sup> The legislative history to § 8(c) makes clear that the provision was meant to allow employers to speak, at their discretion, without being penalized; there is no evidence at all that Congress contemplated an audience right to receive information. See, e.g., H.R. REP. NO. 80-245, at 33 (1947); S. REP. NO. 80-105, at 23-24 (1947); 93 CONG. REC. 7487 (1947) (veto message of President Truman); 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft); *id.* at 4261, 4266 (1947) (remarks of Sen. Ellender); *id.* at A3233 (1947) (remarks of Sen. Ball).

<sup>49</sup> *Compare Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) (expressing doubts as to the “benevolence” of an employer acting “as its workers' champion against their certified union”).

<sup>50</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

<sup>51</sup> See *id.* at 602-04 (holding that card drives will typically be accompanied by some employer information-sharing, and that group pressures on employees that accompany card-signing efforts are equally present in typical election campaign).

Board election or otherwise vitiate clear evidence of union support can be ordered by the Board to bargain based on a card majority. Employers also may be required to recognize a union based on evidence of majority status that they themselves have solicited, such as an employer-conducted poll. Further, employers always have been permitted to enter voluntarily into bargaining relationships with unions that possess a card majority. An employer may do so spontaneously, in response to a union's presentation of cards, or by contracting in advance to recognize a union if such a showing is made.<sup>52</sup> One example of the latter involves agreements providing for employees in newly acquired facilities to become part of an existing bargaining unit through card check. The Board has held that so long as the card check process protects the new employees' right to self-determination, it will give full effect to such "additional stores" clauses and will consider the employer to have waived the right to demand a Board election.<sup>53</sup> More generally, card check agreements cannot waive individual employees' rights under § 7, but those rights do not include the right of an individual employee to demand a secret ballot election.<sup>54</sup>

The fact that recognition of valid card majorities and contractual agreements to be bound by such majorities are presumptively lawful does not mean that cards are always lawfully obtained. Those soliciting signatures may misinform employees as to the content or import of the cards, may exert undue pressure to sign, or may promise benefits as an inducement for signatures. The federal courts and the Board have been attentive to such concerns and have established that signed cards may be rejected based on showings of misrepresentation, coercion, or improper promise of benefits. Likewise, courts reviewing the enforceability of neutrality and card check agreements have been careful to consider whether an agreement provides employees with a fair opportunity to decide for themselves to accept or reject the union.<sup>55</sup>

In the end, there is no evidence of systemic misconduct associated with card signatures, and no reason to believe that particular instances of misconduct are not adequately addressed through case-specific review of alleged abuses. The history of reliance on cards in a range of settings combined with the strong policy favoring voluntary labor-management agreements makes clear that card check recognition does not raise any serious problem of legality under the NLRA.

A common theme to the legal arguments reviewed in this Part is the assumption that employers and unions are meant to be adversaries, at least until the union wins its majority. It should now be evident, however, that neutrality agreements and card check fit within an exceptional but always available doctrinal alternative, premised on the idea that employees can make genuinely free choices when employer and union decide together to forgo a Board-supervised election campaign.

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<sup>52</sup> See *Goodless Elec.*, 332 N.L.R.B. 1035, 1038 (2001), and cases cited therein.

<sup>53</sup> See, e.g., *Kroger Co.*, 219 N.L.R.B. 388, 389 (1975); *Central Parking Sys. Inc.*, 335 N.L.R.B. 390 (2001). However, the current Board has indicated its willingness to revisit this question. See *Shaw's Supermarkets*, 343 N.L.R.B. No. 105 (2004) (granting review of whether public policy considerations preclude employer waiver of right to petition for Board election).

<sup>54</sup> *Cellco P'ship*, No. 4-CA-30729, 2002 WL 254221, at \*2 (N.L.R.B. Gen. Counsel, Jan. 7, 2002) (rejecting individual employee's claim that he had a right to a secret ballot election). However, despite long-established doctrine allowing a union a reasonable period to negotiate a collective bargaining agreement with an employer following lawful recognition, the current Board has questioned whether voluntary recognition should bar immediate petitions to decertify a union if supported by 30% of the employees. See *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150 (2004) (granting review).

<sup>55</sup> See, e.g., *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992).

Still, as indicated in Part I, reliance on card check and neutrality over the past decade has gone well beyond the exceptional. The widespread use of a lawful approach predicated on contractually based cooperation rather than relatively unbridled competition thus presents a challenge to the notion that NLRB elections are the best method of ascertaining what employees want.

#### IV. CHALLENGING THE ELECTION PARADIGM

Historically, elections have been the primary mechanism used to determine whether employees wish to be represented by a union. In 1969 the Supreme Court stated with confidence that “[e]lections have been ... and will continue to be held in the vast majority of cases” to make this determination.<sup>56</sup> The predominance of the election is linked to its normative position as the morally legitimate pathway to vindicate employee free choice. This preference for elections rests on the belief that they are most likely to reflect the well-informed, uninhibited, and genuine choices of employees.

In short, the use of NLRB elections to determine what employees really want is our reigning explanatory theory or paradigm. For decades, it has been accepted as descriptively accurate and normatively satisfying within the relevant public policy community. In order to understand why the election approach may warrant modification or abandonment, I invoke by analogy the work of historian of science Thomas Kuhn, who theorized how change occurs in the natural sciences. By referencing Kuhn’s explanation for shifts in perception within the scientific community, I hope to shed light on the need to rethink our approach to ascertaining employee choice regarding union representation.

##### A. KUHN’S THEORY OF PARADIGMS AND SCIENTIFIC CHANGE

According to Kuhn, problem-solving in science takes place against the backdrop of an accepted theory or organizing set of beliefs—a paradigm.<sup>57</sup> There are always anomalies or unsolved questions, but the techniques of scientific discovery are applied to work out these problems. At some critical level, however, a tolerable amount of anomaly turns intolerable. When enough anomalies cannot be solved, or when practitioners reach enough conflicting solutions, the scientific community begins to disagree about the conceptual and procedural rules of the game. What can emerge from such quarrels is an embrace by the problem-solving community of a new paradigm—a “paradigm shift.”<sup>58</sup>

The discussion that follows maintains that the election-centered approach has failed to address the increasingly anomalous results associated with its use as the guiding principle on which to predicate employee free choice. Accordingly, the

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<sup>56</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969). See also *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 302-10 (1974).

<sup>57</sup> See Kuhn, *supra* note 1, at 10 (defining paradigm in context of normal science). Kuhn’s book first appeared in 1962; the enlarged second edition, referred to here, was published in 1970.

<sup>58</sup> See *id.* at 77-83, 94-95, 109-10, 148-50, 154-59, 166-67. Kuhn’s emphasis on the social psychology surrounding scientific discovery has been vigorously challenged. At the same time, his theory has obvious relevance to law, where the objects of study are not data generated and defined within the research community itself but rather events experienced and given importance by other human actors. See Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WISC. L. REV. 521, 525-26, 539-40 (describing data, on which national scientists rely, as “a passive subject of research that must be generated by the discipline itself” (even in fields that “rely heavily on observation” as opposed to experimentation), and contrasting this with events, on which social scientists and law professors rely, and which are not “discovered” in laboratories or nature but produced by other human beings).

increasing tension between NLRB elections and neutrality plus card check may reflect an emerging recognition of the need to change paradigms for considering how best to ensure employees' right to bargain collectively through "representatives of their own choosing."

## B. THE ELECTION PARADIGM AND IMPEDIMENTS TO EMPLOYEE FREE CHOICE

### 1. *The Elections Regime as Dominant Paradigm*

The NLRB election regime furnishes a description of how employees decide whether to be represented by a union and also a justification for this method as the fairest means for their exercise of free choice. Since the late 1940s, the Board has regulated organizing on the hypothesis that employers and unions would—and should—campaign like political candidates for the support of presumptively undecided voters.<sup>59</sup> For over fifty years, the election paradigm has helped shape the strategic and litigation approaches adopted by labor and management. It also has guided the NLRB and the courts in developing legal doctrines to address various problems arising under this regime.<sup>60</sup>

The NLRB and the courts explored these challenges from within the framework of the election model. Yet if one views reliance on NLRB elections as a Kuhnian paradigm, one sees that this approach has remained unchallenged even as serious anomalies have arisen. As the ensuing discussion indicates, the assumption that NLRB elections provide the best, or only, basis for promoting and protecting employee choice has lost its validity.

### 2. *Deterioration of the Election Paradigm*

Preliminarily, there is the uncertainty and delay associated with scheduling the election and resolving disputes about its conduct. Unlike political elections, which occur on dates established well before and independent of the campaign itself, NLRB elections may occur anywhere from several weeks to months after a petition is filed.<sup>61</sup> The election date typically is not set until some time after both sides have begun campaigning and may be postponed for months by employer challenges to the composition of the unit. In addition, post-election objections by the employer may delay the results for years.<sup>62</sup> Employers who oppose unionization understand that delay

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<sup>59</sup> Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 545-47 (1993) (discussing § 8(c), enacted as part of Taft-Hartley, as establishing employers' right to campaign as if they were candidates seeking employees' support).

<sup>60</sup> Among the issues that the Board and courts have investigated under the election paradigm are the line to be drawn between lawfully predictive and unlawfully threatening employer speech, the coercive implications of employer or union promises of benefits during an election campaign, and the impact of employer misrepresentations. Agency and judicial decisionmakers also have struggled with issues of competitive access to the electorate, establishing a framework to accord employers and unions sufficient contacts with voters while not unfairly advantaging one side or the other. For discussion of the many court and Board decisions on these matters, see Brudney, *supra* note 5, 90 IOWA L. REV. at 866-67 and nn.234-39.

<sup>61</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 68, 82 (reporting median time from petition to election of roughly fifty days in 1993, about the same as in late 1970s and 1980s; 20% of elections occur more than two months after petition).

<sup>62</sup> See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 23 (2000) [hereinafter UNFAIR ADVANTAGE] (discussing unit scope challenges and consequent delays); Feinstein, *supra* note 17, at 34-35 (reporting two year delays due to litigation in late 1990s).

diminishes the ultimate chance of union success.<sup>63</sup> Employees facing these uncertainties and obstacles are discouraged from maintaining interest in unionization.<sup>64</sup>

More important, however, is the impact of employer speech and conduct that is approved under the NLRB election paradigm. The law, as interpreted, permits employers to restrict employees' speech with co-workers,<sup>65</sup> while forcing them to attend meetings at which well-scripted managers "predict" dire consequences if employees unionize.<sup>66</sup> Employers make use of intense pressure tactics in the overwhelming majority of campaigns.<sup>67</sup> Union organizers who might counter employers' dire predictions are excluded from the worksite altogether in almost all circumstances.<sup>68</sup>

The stark inequality between employer "incumbents" and union "challengers" regarding rights of access to, or speech aimed at, the voters would be unthinkable in a political election setting. Individual employees attending sophisticated captive audience speeches, or participating in one-on-one encounters with their immediate supervisors, understandably may feel intimidated if not coerced by repeated oral, written, and electronic communications linking "union presence" to layoffs, plant closings, and permanent replacement during a lawful economic strike.<sup>69</sup> Even if an employer does not immediately follow through on such predictions, their repeated expression is likely to affect employees as they contemplate the range of subtler deprivations that union supporters may face in the future.

Unlawful employer campaign activity—most notably termination or other retaliation against union supporters—further damages possibilities for a genuinely free choice. Academic observers analyzing annual Board reports have demonstrated that discriminatory conduct against employees increased at an astounding rate between the late 1950s and 1980; this pattern of employer misconduct persists in robust form today.<sup>70</sup> By 1990, there were incidents of unlawful termination in fully 25% of organizing campaigns: one of every fifty union supporters in an NLRB election campaign

<sup>63</sup> See John Logan, Consultants, Lawyers, and the "Union Free" Movement in the U.S.A. Since the 1970s, 33 IND. REL. J. 197, 200-01 (2002) (reporting that anti-union consultants and lawyers advise firms how to object to size and composition of bargaining unit, and how to file frivolous complaints with the Board, thus delaying election process and eroding employee confidence in the union and the NLRB).

<sup>64</sup> See, e.g., UNFAIR ADVANTAGE, *supra* note 62, at 69-70, 82-85 (describing how "slow[ness] ... of the legal mechanisms" and "availability of appeal after appeal" undermine unions' majority support).

<sup>65</sup> See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945).

<sup>66</sup> See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 428-29 (1953) (allowing captive audience speeches); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (allowing predictions but not threats).

<sup>67</sup> See ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that 92% of employers in contested campaigns force workers to attend closed-door meetings and 78% require employees to meet one-on-one with supervisors).

<sup>68</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

<sup>69</sup> See, e.g., UNFAIR ADVANTAGE, *supra* note 62, at 71-74 (reporting that employers threaten to close workplace in 50% of U.S. organizing campaigns); ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that employers threaten to relocate their business in 71% of all campaigns involving "non-mobile" manufacturing industries); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 69-70 (1998); (discussing origins of permanent replacement doctrine in 1938 Supreme Court decision, and substantial increase in employer use of permanent replacements in strikes since 1980).

<sup>70</sup> See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779-80 (1983); Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & POL'Y J. 327, 331 (1998); 68 NLRB ANN. REP. tbl. 2, 4 (2003). For detailed discussion of these and other sources regarding the frequency of employer unfair labor practices see Brudney, *supra* note 5, 90 IOWA L. REV. at 870-871, n.251-55.

could expect to be victimized.<sup>71</sup> A more recent study estimated that by the late 1990s, one out of every eighteen workers who participated in a union organizing campaign was the object of unlawful discrimination.<sup>72</sup>

Given pervasive employer resistance to unionization, it is not surprising that 40% of non-union, non-managerial employees believe their employer would fire or otherwise mistreat them if they campaigned for a union.<sup>73</sup> More than half of all employees who say they want union representation report management resistance as the main reason they do not have it.<sup>74</sup> A recent study estimated that, given a genuinely free choice, 44% of private sector employees would opt for union representation.<sup>75</sup>

Finally, the absence of effective remedies protecting employee free choice reinforces the ominous message for union supporters. In principle, when an employer's unlawful conduct has "interfere[d] with the elections process and tend[ed] to preclude the holding of a fair election," the Board may order the employer to bargain with a union based on a pre-election card majority.<sup>76</sup> These bargaining orders were described by the Supreme Court in 1969 as the best way to "effectuat[e] ascertainable employee free choice" as it existed before the employer's firings and unlawful threats.<sup>77</sup> Yet since the 1960s, the appellate courts have repeatedly reversed Board-issued bargaining orders,<sup>78</sup> and the NLRB's appetite for pursuing this remedy has diminished accordingly.<sup>79</sup>

One could argue that the election paradigm was flawed from its inception, in that employer-union competition differs fundamentally from a political election.<sup>80</sup> It may be that the election paradigm was more descriptively accurate and more normatively satisfying in the era following World War II, when employers acceded more readily to

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<sup>71</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 70. The incidence of illegal firings rose from one in twenty elections in the 1950s to one in four as of 1990. Firings affected one in 700 union supporters in the 1950s, but one in fifty by 1990.

<sup>72</sup> See Morris, *supra* note 70, at 330.

<sup>73</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 75 (reporting 41% figure from 1991 Fingerhut-Powers poll); see also Paul Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 117 n.25 (1990) (reporting that 43% of employees in 1984 Harris Poll thought their employer would fire, discipline, or otherwise retaliate against union supporters).

<sup>74</sup> See Richard B. Freeman & Joel Rogers, WHAT WORKERS WANT 30-37, 60-62, 86 (1999) (discussing methods for conducting national Worker Representation and Participation Study in 1994-1995, and reporting that 55% of non-union employees who said they wanted a union gave management opposition as the main reason for there not being one).

<sup>75</sup> See *id.* at 89.

<sup>76</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969) (stating Board's current practice as of late 1960s).

<sup>77</sup> See *id.* at 612, 614.

<sup>78</sup> For studies describing the appellate courts' extraordinarily high reversal rate for bargaining orders see Brudney, *supra* note 5, 90 IOWA L. REV. at 871-72 and n.260.

<sup>79</sup> See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1587 (1996) and sources cited therein (reporting that number of bargaining orders issued annually fell from over 100 in late 1960s to just 15 by early 1990s). This decline of 85% in the twenty-five years after *Gissel* approved the bargaining order remedy substantially exceeded the 50% decline in election activity over the same period. Given the 28% increase in § 8(a)(3) charges filed between 1970 and 1990, one can hardly attribute the sharp decrease in bargaining orders to more law-abiding conduct by employers. See *id.*

<sup>80</sup> See UNFAIR ADVANTAGE, *supra* note 62, at 18-25; Becker, *supra* note 59, at 569-70; Logan, *supra* note 63, at 201-04. In a NLRB election campaign an employer has the authority to set wages and benefits, assign tasks, monitor performance, and impose discipline on the voters—all on a daily basis. This power to create and communicate dependency and dominance inevitably invigorates an employer's campaign statements. By contrast, the union—even if it prevails on election day—holds neither economic nor legal power over the employees.



unionization, and analogies between industrial and political democracy reflected a societal impulse to celebrate recent national triumphs.<sup>81</sup> Even assuming, however, that the restrictions on campaign conduct imposed under the election paradigm were once defensible in principle, the pervasive practical difficulties of the past thirty years have rendered the paradigm inapplicable. The law regulating NLRB elections has developed since 1970 to exacerbate the inequalities between labor and management.<sup>82</sup> Relying on the advice of “union avoidance” consultants, employers now take greater advantage of what the law permits or does not deter.<sup>83</sup> As expressed by one eminent labor law scholar, “[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.”<sup>84</sup>

### 3. Tenacity of the Election Paradigm

Although academic observers and government commissions have documented serious problems in the NLRB election regime over a period of decades, the deterioration of the election paradigm has not triggered its rejection in favor of something new. To borrow from Kuhn’s analysis, the public policy community’s consensus around this paradigm now stands as an impediment to otherwise predictable change.<sup>85</sup>

Organized labor’s shift in its practices is a noteworthy response to the decline of the election paradigm. Some three million new members were organized by AFL-CIO unions between 1998 and 2003, with over 80% of this activity occurring outside the domain of NLRB elections. The Court’s 1969 statement, that elections “will continue to be held in the vast majority of cases,”<sup>86</sup> no longer reflects reality. Further, given that major unions are relying on neutrality plus card check and that the approach readily survives a facial legal challenge, it is likely to remain a basic organizing strategy.

Whether neutrality and card check *should* supplant elections deserves further attention and discussion. For proponents of neutrality, the very existence of a contractual agreement signifies that the employer and union have achieved some degree of mutual respect. That manifestation of the employer’s attitude, albeit within a narrow scope, may help alleviate employees’ otherwise rational perception that their employer may have a punitive stake in how they exercise their choice.

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<sup>81</sup> See generally Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 11-18 (1999); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1525 (1981); William M. Wiecek, *America in the Post-War Years: Transition and Transformation*, 50 SYRACUSE L. REV. 1203, 1217 (2000).

<sup>82</sup> See *Lechmere Inc. v. NLRB*, 502 U.S. 527, 535 (1992) (restricting union organizer access); *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (relaxing rules against employer misrepresentation); Weiler, *supra* note 70, at 1787-93 (1983) (discussing ineffectiveness of backpay awards and reinstatement remedy); *supra* notes 78-79 (discussing appellate courts’ action to place severe limits on availability of bargaining orders).

<sup>83</sup> See ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that 75% of employers hire outside consultants and security firms to run anti-union campaigns); Logan, *supra* note 63, at 200-09 (discussing in detail the vast array of ‘union-avoidance’ tactics used by firms and their hired aids during organizing campaigns).

<sup>84</sup> Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985).

<sup>85</sup> See Kuhn, *supra* note 1, at 77 (contending that scientific community’s faith in reigning paradigm is overcome not simply based on paradigm’s failure to explain natural events or conditions, but by simultaneous community-wide decisions to accept a new paradigm).

<sup>86</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969).

Opponents of neutrality often counter that if employees cannot hear from the employer, they will not be able to make a suitably informed and reasoned choice. That contention invites doubt on two grounds. One is that the employer already has the opportunity and motive to present arguments against unionization before a union appears, and is likely to have done so over months, if not years. A second is that the optimal time for informed choice about union representation will occur during contract negotiations, when employees can see how a collectively bargained workplace actually would look.<sup>87</sup>

Supporters of elections also worry that individuals sign cards without giving the matter enough thought, or from fear of criticism by fellow employees. It is not at all clear that workers succumb so readily to indifference or peer pressure.<sup>88</sup> Assuming they do, however, a union seems unlikely to retain employees' backing in negotiations unless it can persuade them that its bargaining proposals deserve majority support and even application of group pressure if warranted.

In sum, it is worth asking if the potential risks for employee free choice from a neutrality and card check approach are less than those that have been demonstrated in relation to NLRB elections. Participants and observers whose faith in the electoral process has been disrupted by its "severe and prolonged anomalies" must decide whether "an alternate candidate is available to take its place."<sup>89</sup>

### C. FUTURE PROSPECTS

This Article is meant to initiate a more open conversation about the need to rethink a legal framework; it is not the place to formulate detailed alternatives to the election paradigm. I do want to suggest, however, that several plausible models exist in comparable legal systems where promotion of collective bargaining is integrated with protection of employee choice. It may not be necessary to embrace a single option; given our federal structure and a tradition of encouraging voluntary agreements, a revised approach might allow for the coexistence of several alternative procedures.

One possibility is to follow the Canadian model, which prescribes card check certification as a basic method for establishing collective bargaining rights. Under the Canadian national labour code, as well as four provincial labour codes, a union will be certified if a majority of employees (in two provinces, a supermajority) sign authorization cards.<sup>90</sup> This willingness to defer to card majorities as reflecting employee free choice includes certain safeguards. Labour boards typically investigate the circumstances surrounding card-signing for signs of direct or tacit management support or union fraud or intimidation. Further, some boards will order an election when the union possesses only a narrow card majority, or conditions otherwise suggest a closely contested outcome.

A second option used in Canada is to retain elections as the primary tool while compressing the campaigning period to minimize intimidation or coercion. Four provincial labour codes require boards to hold an election within five to seven days of receiving a petition supported by a card majority. The assumption behind such an

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<sup>87</sup> See Weiler, *supra* note 70, at 1815-16.

<sup>88</sup> Any pressure more direct or overt than what is socially generated is already prohibited by law. See *supra*, paragraph of text preceding note 55.

<sup>89</sup> See *supra* note 1 and accompanying text (quoting Kuhn on prospects for changing paradigms).

<sup>90</sup> For presentation and discussion of Canadian labor law sources and scholarly commentary on developments in Canada's law of organizing, see Brudney, *supra* note 5, 90 IOWA L. REV. at 878-79, nn.287-90, 293-94, 297.

“instant ballot” approach is that it is neither necessary nor appropriate for the employer to play the same role as the union in a representation campaign.

The Canadian system has accepted the principle of limiting employer opportunities to oppose unionization as consistent with employee free choice. Win rates for unions organizing under the two approaches discussed are comparable to those for U.S. campaigns involving neutrality and card check. Canadian unions have maintained fairly steady levels of support in the workforce at a time when in the U.S. union representation has precipitously declined.<sup>91</sup> Meanwhile, there is scant evidence that the Canadian options undermine employees’ ability to express their true preferences.<sup>92</sup>

A third alternative involves borrowing from recently revised British labour law. The Employment Relations Act of 1999 provides for a statutory recognition procedure that effectively encourages non-electoral recognition as the primary option with elections as a fallback.<sup>93</sup> When a union formally requests recognition and the employer does not accede voluntarily, the new British statute provides two possible pathways. The union will first apply to the Central Arbitration Committee (“CAC”), a governmental entity charged with determining whether there is in fact majority support within an appropriate unit. If the CAC is satisfied that the union enjoys majority status, it can declare the union recognized without an election.

As with the Canadian model, there are exceptions. The CAC must hold an election, even if a majority of employees are union members, in three situations: (i) when an election is in the interest of good industrial relations; (ii) when a significant number of workers inform the CAC they do not want the union; and (iii) when “evidence” regarding the circumstances under which employees became union members creates doubts about whether a significant number of workers really want the union. On the other hand, the British statute includes provisions that create incentives for employers to explore voluntary recognition. An employer that resists a recognition request accompanied by strong employee support and instead opts for an election must grant the union reasonable access to employees during the campaign. In addition, if the union prevails the CAC can impose a procedure setting forth detailed standards for the conduct of collective bargaining.

Initial results indicate that employers are inclined to sign voluntary agreements and avoid the CAC election process if the union has majority support. Over 90% of recognition arrangements established between 2000 and 2003 resulted from voluntary agreements between employer and union with no government supervision. One British commentator, noting employers’ frequently neutral or receptive attitudes towards

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<sup>91</sup> See Douglas G. Gilbert et al., CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER 27 (2003) (stating that Canadian unions as of 2001 continued to represent about 32% of nonagricultural workforce, compared to 14% in the United States; recent successful campaigns at Wal-Mart and McDonald’s highlight differences); *U.S.-Based Unions Lost Ground in Canada from 1977 to 2003, New Study Determines*, DAILY LAB. REP. (BNA), at A10-11 (Sept. 1, 2004) (reporting 43% growth in Canadian union membership from 1977 to 2003, roughly parallel to increases in Canadian employment levels; unionization at 32.6% in 1977 and at 30.5% as of June 2004).

<sup>92</sup> Canadian and provincial labour boards monitor use of both card check recognition and expedited elections, and they have imposed penalties for the serious misuse or exploitation that has occasionally occurred. See R.C. Purdy Chocolates Ltd. & C.E.P., Local 2000, 77 C.L.R.B.R. (2d) 1, 21 (Can. Lab. Bd. 2002) (noting that certification of union was obtained with forged cards, and emphasizing this was only such known instance since Labour Code provision was enacted twenty-eight years earlier; Board cancels union’s certification).

<sup>93</sup> For presentation and discussion of British labor law sources and scholarly commentary on developments under the new 1999 statute, see Brudney, *supra* note 5, 90 IOWA L. REV. at 881-82, nn.301-09.

unionization, has suggested that these employers perceive a range of business advantages to unionization similar to those cited by U.S. employers when they enter into neutrality plus card check arrangements.<sup>94</sup>

Each of the options summarized here stems in part from legislators' periodic willingness to rethink their basic approach for protecting workers' ability to choose whether to support a union. In the United States, such rethinking is only possible through substantial movement by Congress. The "Employee Free Choice Act," initially introduced in the House and Senate in 2003, would require the NLRB to certify a union that has received majority support through authorization cards, precluding employers from insisting on a Board election.<sup>95</sup> However, the myriad factors that have made so many U.S. employers fiercely resistant to unions likely will fuel strong opposition to such a reform. Thus, while the election paradigm no longer reflects descriptive reality, it remains useful in strategic and rhetorical terms to explain and justify the status quo.

Neutrality agreements plus card check have not wholly supplanted NLRB elections, nor are they likely to do so. Yet when properly structured, with safeguards to ensure that cards are signed voluntarily and a neutral reviewer to verify majority support, they may grow into the primary option exercised by employees and unions under our federal labor law framework. There are ample policy-related reasons to encourage such growth. As demonstrated, neutrality plus card check poses no serious doctrinal challenge to employee freedom of choice. From a practical standpoint, neutrality agreements seem to promote employee free choice at least as effectively as the faltering elections-based regime—by minimizing obstacles posed by lengthy election-related delays and by reducing the corrosive impact of lawful and unlawful employer pressure.

Neutrality plus card check also advances two distinct values fundamental to our labor laws. By transforming union organizing campaigns from bitterly divisive contests into more civil arrangements, neutrality and card check agreements encourage stable and peaceful labor relations. In addition, neutrality plus card check celebrates voluntary and separately negotiated solutions to labor management disputes. Such voluntary contractual arrangements have long been a favored element of our national labor policy.

## V. CONCLUSION

The development of neutrality and card check as a competing paradigm indicates its emerging importance in structuring the organizing process. A series of challenges are facing the Board and the courts as unions and employers probe the opportunities and risks accompanying this new approach.<sup>96</sup> Assuming that Congress neither ratifies

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<sup>94</sup> See Gregor Gall, *Trade Union Recognition in Britain, 1995-2002: Turning a Corner?*, 35 *INDUS. REL. J.* 249, 255-56 (2004) (citing employers' perception that unions often can contribute to enhanced employee productivity, leverage in securing public sector contracts, and assistance in dealing with complex regulatory environment); compare *supra* Part I.C (discussing U.S. employers' similar motivations).

<sup>95</sup> See H.R. 800, 110th Cong. (2007); S. 842, 109th Cong. (2005). As of February 2007, the House bill, introduced by Rep. Miller (D-Cal.), had 233 cosponsors; the Senate bill from the 109<sup>th</sup> Congress, introduced by Sen. Kennedy (D-Mass), had forty-four cosponsors.

<sup>96</sup> See, e.g., *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87 (2d Cir. 2006) (addressing whether state or local laws encouraging or requiring neutrality are preempted by the NLRA); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res.*, 390 F.3d 206 (3d Cir. 2004) (same); *United States Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2004) (en banc) (same); *Hotel & Rest. Employees Union, Local 217 v. J. P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (addressing challenges to enforceability of neutrality agreements under § 301 of LMRA); Shaw's Supermarkets, 343 N.L.R.B. No.

nor disapproves the alternative framework, it seems likely that both NLRB elections and neutrality plus card check will coexist as potentially preeminent descriptive and normative accounts of the employee self-determination process.

Further discussion regarding these competing paradigms will take place against a backdrop of growing economic uneasiness. The sharply diminished role played by unions in the U.S. economy since the 1960s has been accompanied by a substantial growth of economic inequality. Earnings for non-supervisory employees have been stagnant for the past three decades,<sup>97</sup> employees work longer hours,<sup>98</sup> the gap between workers in the upper and lower tiers has widened,<sup>99</sup> and the divide between salaries for CEOs and average workers has become simply breathtaking.<sup>100</sup>

The possibility of a shift in paradigms does not signify that the overall rate of unionization will increase. Despite polls showing heightened interest in unions among U.S. workers, there has been no real growth in unionization during recent times. Absence of growth may be attributed to many factors—weaknesses of the legal regime, fierceness of employer resistance, but also lack of sufficient energy or imagination among unions, and broader economic pressures and conditions. Over the past decade, however, organizing activity has become more intense, and the success of neutrality plus card check has begun to shift the tenor of debate. That shift may help to initiate a more frank discussion of how to improve conditions of employment for workers in a society characterized by ever-increasing disparities in wealth.

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105 (2004) (addressing whether public policy considerations preclude enforcement of after-acquired stores clause as waiver of employer right to petition for Board election); *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150 (2004) (addressing whether voluntary recognition of union by employer should preclude decertification election petitions filed by employees); *New Otani Hotel & Garden*, 331 N.L.R.B. 1078 (2000) (addressing whether unions' request for neutrality and card check constitutes demand for recognition giving employer the right to insist on a Board election).

<sup>97</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 19 (discussing stagnation of real earnings as of early 1990s); Freeman & Rogers, *supra* note 74, at 13 & n.16 (discussing various studies on stagnation of earnings); Thomas I. Palley, PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM 52, 57 (1998) (discussing the decline in average compensation for non-supervisory workers from 1970 to 1995).

<sup>98</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 19 (reporting modest decline in length of vacation and holiday time for fully employed U.S. workers from early 1970s to early 1990s; U.S. workers averaged 200 more hours of work per year than workers in Europe, with amount of vacation time a major reason for difference).

<sup>99</sup> See, *id.* at 18 (reporting that male workers in the top decile earn 2.14 times median earnings in United States compared to 1.4 to 1.7 times the median in most European countries, and that U.S. earnings distribution has widened greatly in recent years); Freeman & Rogers, *supra* note 74, at 13 (reporting that top 10% of U.S. workers earn 5.6 times as much as bottom 10%, compared with 2.1 times in European Union and 2.4 times in Japan).

<sup>100</sup> See Palley, *supra* note 97, at 57-58 (reporting that in 1960, average CEO pay was forty-one times average factory worker pay; by 1996, average CEO received 212 times average factory worker pay).