



# Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing

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ENABLING EMPLOYEE CHOICE:  
A STRUCTURAL APPROACH TO THE RULES  
OF UNION ORGANIZING

*Benjamin I. Sachs*

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## ENABLING EMPLOYEE CHOICE: A STRUCTURAL APPROACH TO THE RULES OF UNION ORGANIZING

*Benjamin I. Sachs\**

*The proposed Employee Free Choice Act (EFCA) has led to fierce debate over how best to ensure employees a choice on the question of unionization. The debate goes to the core of our federal system of labor law. Each of the potential legislative designs under consideration — including both “card check” and “rapid elections” — aims to enhance employee choice by minimizing or eliminating managerial involvement in the unionization process. The central question raised by EFCA, therefore, is whether enabling employees to limit or avoid managerial intervention in union campaigns is an appropriate goal for federal law. This Article answers this foundational question in the affirmative. It reaches this conclusion by conceptualizing federal labor law in terms of legal default rules, drawing in particular on the preference-eliciting default theory of statutory interpretation and the reversible default theory from corporate law. Doing so leads to the argument that card check, rapid elections, and similar mechanisms are best understood as “asymmetry-correcting altering rules” — means of mitigating the impediments that block departure from the nonunion default. Understanding EFCA in this way also requires that we ask how such an altering rule should be constructed. This Article addresses this institutional design question by arguing that card check’s open decisionmaking process is flawed and that rapid elections, while an improvement over the status quo, are an insufficient method of mitigating the relevant impediments to employee choice. Accordingly, this Article offers two new designs — alternatives to both card check and rapid elections — that would accomplish the legitimate function of minimizing managerial intervention while at the same time preserving secrecy in decisionmaking.*

### I. INTRODUCTION

Federal labor law aims to ensure that employees have a choice on the question of unionization. But enabling this choice has proven an elusive goal. Indeed, designing a legal regime that protects employees’ ability to choose whether they wish to bargain individually or collectively with their employers has been a central and continuing challenge for scholars, Congress, and the National Labor Relations Board (NLRB).

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The question of employee choice has gained heightened attention in the opening months of the Obama Administration. The interest centers around the Employee Free Choice Act (EFCA), a bill that would change the process through which workers organize unions. As currently drafted, EFCA would enable employees to form unions through a procedure known as “card check.” Under card check, if a majority of workers in a relevant unit sign authorization cards solicited in an open process by union organizers and other employees, the employer would be legally obligated to recognize the union as the employees’ collective representative.<sup>1</sup>

EFCA’s card check provision captured the public’s attention, became the subject of intensive media coverage, and led to heated congressional debate. Card check also generated intense opposition, based primarily on the procedure’s failure to provide employees with a confidential means to register their choices on the question of unionization. Echoing arguments made historically to support secret balloting in political elections, critics of the legislation have asserted that an open decisional mechanism like card check impedes autonomous employee choice because it leaves employees unduly vulnerable to coercive solicitation by union organizers.<sup>2</sup> Now, following months of scrutiny, Senate negotiators are entertaining possible alternatives to card check. The lead proposal is a “rapid elections” regime, which, as I describe below, would maintain the secret ballot but mandate that union elections take place almost immediately after the completion of a union organizing drive.<sup>3</sup>

Whether EFCA becomes law in its current form, is amended to substitute rapid elections for card check, or fails to pass, the debate over the legislation allows for reexamination of questions central to labor law. As I will explain, card check and rapid elections share the same substantive goal: they aim to minimize or eliminate managerial

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<sup>1</sup> See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). EFCA was passed by the House of Representatives in 2007 but died in the Senate after a cloture vote failed 51–48. See Govtrack.us, H.R. 800: The Employee Free Choice Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-800> (last visited Nov. 22, 2009).

<sup>2</sup> See *infra* notes 45–46 and accompanying text.

<sup>3</sup> See, e.g., Steven Greenhouse, *Democrats Drop Key Part of Bill To Assist Unions*, N.Y. TIMES, July 16, 2009, at A1. I discuss rapid elections in section V.B.1, concluding that while such a regime would constitute an improvement over the status quo, more robust reform is both possible and desirable. According to the Bureau of National Affairs (BNA), in addition to rapid elections, Senate negotiators are also considering substituting a “mail-in card[]” procedure for card check. Derrick Cain, *Negotiations Continue on EFCA Bill Despite Report on Compromise Deal*, [2009] Daily Lab. Rep. (BNA) No. 136, at A-18 (July 20, 2009). I develop the mail-in procedure below, see *infra* section V.B.3, pp. 723–27, a proposal offered in Benjamin Sachs, *Card Check 2.0: A Better Fix for Union Organizing than the Employee Free Choice Act*, SLATE, Apr. 16, 2009, <http://www.slate.com/id/2216272>.

intervention in union organizing efforts.<sup>4</sup> A rapid elections regime attempts to achieve this goal in a straightforward way: by requiring that workers vote on unionization almost immediately after an organizing drive has ended, rapid elections limit the amount of time management has to campaign against unionization. Card check attempts to achieve this same goal by jettisoning the election entirely and allowing employees to demand union recognition as soon as a majority have signed cards. Card check, that is to say, is designed to allow workers to complete a unionization effort before management is aware that such an effort is underway.

Accordingly, the central substantive question raised by the EFCA debate — by each of the designs under consideration — is whether it is appropriate for federal law to enable employees and unions to minimize, or avoid entirely, managerial intervention in organizing efforts. This issue is foundational for labor law.<sup>5</sup> It is a question that long predates the Employee Free Choice Act and one that will long outlive the current debate, irrespective of its outcome.

The question could be answered in a predictable and relatively easy way if labor law had a normative preference for unionization. But because labor law neither favors nor disfavors unionization, instead allowing employees to decide which form of bargaining they prefer, the appropriateness of curtailing managerial intervention in union organizing efforts must be investigated as part of an overall analysis of employee choice. To this end, I propose to address this question in a new way by drawing on the preference-eliciting default theory of statutory interpretation and the reversible default theory from corporate law, two closely related theories of legal default rules.<sup>6</sup> Although these theories grow out of very different contexts, both help determine how legislatures (or courts) should choose default rules for a legal regime designed to maximize the satisfaction of some relevant preference set. Both theories, moreover, share a key insight: because of asymmetric impediments of one kind or another, it is often more difficult for parties to “depart” from one default rule than it would be for them to de-

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<sup>4</sup> As discussed in section V.B.3, the mail-in procedure also under consideration in the Senate shares this same goal.

<sup>5</sup> A seminal treatment is found in Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises To Keep*]. For additional discussion, see PAUL C. WEILER, *GOVERNING THE WORKPLACE* 257–61 (1990); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 793–801 (1994); and Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 507–15 (1993).

<sup>6</sup> See EINER ELHAUGE, *STATUTORY DEFAULT RULES* 151–67 (2008) (preference-eliciting default theory); Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (reversible default theory); Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002) (same).

part from another. Both theories then suggest the same answer: when the legislature (or court) does not know with certainty which default rule will maximize satisfaction of the relevant preference set, and when it is more difficult to depart from one default than it would be from the other, the legislature (or court) should choose the default from which it is easier to depart.<sup>7</sup> That way, if the initial placement of the rule turns out to be wrong, the parties will be best positioned to exercise their preferences and correct the misplacement.

In contexts defined by asymmetric impediments to departure, then, changing the default rule is one means to maximize satisfaction of preferences. It is not, however, the only means. In certain contexts, the same preference-maximizing goals that can be achieved by adopting a reversible or preference-eliciting default can also be secured by changing the *process* through which parties depart from the default. More specifically, by changing the process through which parties depart from a default in a manner that mitigates the asymmetry that called for the reversible default in the first place, legislatures (or courts) can maximize the preferences that are the aim of the legal regime.<sup>8</sup> Professor Ian Ayres has named the processes through which parties depart from defaults “altering rules.”<sup>9</sup> I will name a rule that corrects an asymmetric ability to depart from the default an “asymmetry-correcting altering rule.”

Card check and rapid elections are best understood as asymmetry-correcting altering rules. The good to be maximized by the rules governing employee decisionmaking on the union question is employee choice.<sup>10</sup> As in the corporate law and statutory interpretation contexts, moreover, labor law must choose a default rule: workplaces must either be union or nonunion by default.<sup>11</sup> Preference-eliciting and re-

<sup>7</sup> See ELHAUGE, *supra* note 6, at 153–55; Bebchuk & Hamdani, *supra* note 6, at 492–93.

<sup>8</sup> As I elaborate below, Professors Lucian Bebchuk and Assaf Hamdani point to the operation of such a rule in the corporate context. See Bebchuk & Hamdani, *supra* note 6, at 505–06; see also *infra* section III.A.2, pp. 677–79.

<sup>9</sup> Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 6 (2006). Ayres has identified the role played by altering rules — and has named them — but has not yet provided a comprehensive treatment of the subject. See *id.* at 3 n.2.

<sup>10</sup> This statement is not a claim that the only good sought by the entire regime of labor law is free employee choice, but only a claim that choice is the good sought by those labor law rules that govern employee decisionmaking on the union question. See, e.g., *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (noting that Congress has required the Board to establish rules and “safeguards necessary to insure the fair and free choice of bargaining representatives by employees”); see also Arlen Specter & Eric S. Nguyen, *Policy Essay: Representation Without Intimidation: Securing Workers’ Right To Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 312 (2008) (“The most critical focus of [labor law] reform should be protecting the right of employees to freely choose whether they wish to be represented.”).

<sup>11</sup> See Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 208 (2001) (“In the workplace, as elsewhere, the law cannot ‘do nothing.’ . . . [I]t is necessary to start somewhere — not with nature or voluntary arrangements but with an initial allocation of legal

versible default theory suggest a way to approach this decision. First, when it comes to maximizing employee preferences on the union question, we must be — by definition — entirely uncertain whether employees prefer the union or nonunion option.<sup>12</sup> Second, because of collective action problems and managerial opposition to unionization, which I describe below, employees have an asymmetric ability to depart depending on where the default is set. It is at least somewhat more difficult for employees to depart from the nonunion default and choose unionization than it would be for employees to depart from a union default and choose nonunion bargaining.

In this setting, then, we have two options to maximize employee choice. First, labor law could impose a new default rule of union bargaining. Second, we could change the altering rule — the process through which employees depart from the nonunion default — in a way that mitigates the asymmetric ease of departure. Because the relevant asymmetry here flows from management's opposition to unionization and its ability to intervene in the employee organizing process, an altering rule — like card check or rapid elections — that minimizes management's ability to intervene can correct the relevant asymmetry.

This Article accordingly provides conceptual support for both a new default rule of unionized collective bargaining and a new altering rule that minimizes managerial intervention in organizing. In the abstract, there is no reason to prefer one approach over the other,<sup>13</sup> but because there are highly significant pragmatic, political, and institutional reasons to favor a new altering rule, that is the approach this Article pursues. It should be noted that either approach is appropriate not because of any normative preference for unionization or a belief that more employees desire unionization than want nonunion bargaining.<sup>14</sup> To the contrary, either approach is appropriate precisely because we assume complete uncertainty about what employees desire, and we seek to enable them to choose *either* union or nonunion bargaining with equal ease.

The default and altering rule analysis is thus meant to point us toward a revised labor law that removes certain impediments to the eli-

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rights."); see also WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 228 (noting that individual employment contracting is often understood to be the natural default rule); Barenberg, *supra* note 5, at 959–61.

<sup>12</sup> See 29 U.S.C. § 157 (2006) (setting out employees' right to form and join labor unions and an equal "right to refrain from any or all of such activities").

<sup>13</sup> Although, as I explain below, because of workforce turnover, a union default would not be sufficient unless paired with an asymmetry-correcting altering rule. As such, our choice is not between adopting a union default *or* an asymmetry-correcting altering rule, but between adopting a union default *and* an asymmetry-correcting altering rule *or* adopting just the new altering rule. See *infra* pp. 693–95.

<sup>14</sup> See ELHAUGE, *supra* note 6, at 163; *infra* p. 693.

citation of workers' preferences and that eliminates several forms of interference with employee preference formation. These goals, to be sure, constitute a more limited project than creating ideal conditions for fully autonomous and deliberative choice among workers.<sup>15</sup> That project would call into question more than the rules of union organizing and employee decisionmaking I take up here. Such a project also would necessitate a reexamination not only of the first principles of labor law, but likely also the organization of the firm itself.<sup>16</sup> Additionally, it would require agreement on the deeply contested issue of what constitutes fully autonomous (or free) choice. The present analysis concerns itself with a range of issues that, while narrower than those implicated by such a project, is nonetheless central to advancing employee choice on the question of unionization.

An approach to maximizing employee choice that depends on minimizing managerial participation in union organizing campaigns, of course, raises two related questions. The first is whether labor law ought to provide employers with an affirmative right to intervene in the employee organizing process. As I will show, the argument in favor of an affirmative right for employer intervention depends on a flawed conception of what unionization entails. Unionization, for better or worse, does not effect a shift in sovereignty over the firm. It is a far more limited process, one in which employees decide to bargain collectively, rather than individually, with their employers and to name their agent for these purposes.<sup>17</sup> And while the outcome of the employees' decisionmaking process will impact employers, this fact does

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<sup>15</sup> For an example of a project that is closer to these ambitions, see Barenberg, *supra* note 5.

<sup>16</sup> As I note below, *see infra* note 152, deliberative democratic theorists agree that an ideal deliberative process requires both formal and substantive equality among the participants in the debate. *See, e.g.*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 22 (Alan Hamlin & Philip Pettit eds., 1989). Organizing rules — such as those I propose — might insulate employees from employer interventions during organizing efforts, *see infra* note 152, but they could never entirely eliminate managerial influence over employee preference formation. Given the explicit *inequalities* inherent in the employer-employee relationship, unless that relationship is itself reconstructed, organizing rules and labor law more broadly simply may not be capable of creating ideal deliberative or choice processes.

<sup>17</sup> The move from individual to collective bargaining describes the change in the relationship between employees and employers effected by unionization. Unionization can also create new possibilities for community among workers, modify employees' perceptions of themselves in important ways, and — particularly in immigrant communities — alleviate conditions of intense social isolation. *See, e.g.*, HÉCTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS* 20–58, 138 (1993); RICK FANTASIA, *CULTURES OF SOLIDARITY* 121–79 (1988); William V. Flores, *Mujeres en Huelga: Cultural Citizenship and Gender Empowerment in a Cannery Strike*, in *LATINO CULTURAL CITIZENSHIP* 210, 210–54 (William V. Flores & Rina Benmayor eds., 1997). But the ways in which unions can reconstitute employee-to-employee relationships and alter workers' self-perceptions cannot provide a justification for employer intervention in the union organizing process, so I do not consider those dynamics here.

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not entitle employers to an affirmative right to intervene in that process.

The second question returns us to the focus on employee choice and concerns the loss of information available to employees in an organizing effort conducted with a minimum of managerial involvement. A decrease in the quantity of information available to employees — information concerning the demerits of unionization — is a cost of adopting an asymmetry-correcting altering rule that minimizes employer intervention. But, as I will show, the cost to employee choice is likely to be marginal and will not outweigh the benefits to choice that flow from the new altering rule. This is so for several reasons, including the fact that neither card check nor rapid elections would deprive management of its ability to mount an argument against unionization, but would change only the time frame in which it is likely to do so.

The question of managerial intervention in union organizing efforts is the core conceptual issue raised by the debate over EFCA. But that debate also raises an institutional design question worthy of attention. Namely, if minimizing managerial intervention through an asymmetry-correcting altering rule is a legitimate goal for labor law, the question of how best to design such an altering rule remains. The debate over card check also poses the particular question of whether an open decisional mechanism is necessary to the purpose of minimizing managerial intervention and, more broadly, whether an open decisional mechanism is an appropriate means to achieve that goal.

This Article contends not only that an open decisional mechanism is unrelated to the substantive goal of minimizing employer intervention in unionization campaigns, but also that openness has no legitimate asymmetry-correcting function. Openness, however, can expose employees to forms of union and coworker interference at the moment of decision that should be of concern. While claims of physical intimidation by union organizers do not find support in extant empirical evidence,<sup>18</sup> the potential for intimidation inherent in an open voting procedure — and the significant public concern over this potential — raises legitimacy issues for unions organized through such processes. Moreover, if voting is open, organizers and coworkers will often enjoy other, nonphysical but effective forms of influence: especially in low-wage industries, union organizers may possess an advantage in learning and rhetorical skills that can give them the kind of “epistemological authority” that Professor Lynn Sanders describes.<sup>19</sup> And the coworkers who are sent to solicit cards are often selected because of their

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<sup>18</sup> See sources cited *infra* note 46.

<sup>19</sup> Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 349 (1997) (internal quotation marks omitted).

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location within the organization of work, which may provide them with very real sources of authority vis-à-vis the workers they solicit — so long as the vote is an open one.

This Article asks, therefore, how we can best construct a decisional mechanism that minimizes managerial intervention in employee organizing efforts while at the same time preserving secrecy in decision-making. To be sure, rapid elections offer employees a confidential decisional mechanism, and according to the analysis offered here, they constitute an improvement over the status quo. But, for reasons developed below, rapid elections are not the best approach to minimizing managerial intervention in union organizing efforts. Among other problems, the success of a rapid elections regime would depend on heroic performance by the NLRB, a federal agency that over the last several decades has proved itself to be anything but “rapid.”<sup>20</sup>

Because neither card check nor rapid elections are the optimal course, this Article proposes two alternatives that I call “card check 2.0.” The first proposal, borrowing voting technologies used in union elections in the airline and railroad industries, would enable employees to cast secret ballots in their homes over the phone or via the internet. The second, drawing on the model of early voting now used in U.S. political elections, would allow employees to vote by secret ballot at regulated polling sites, or through mail ballot voting, at any time during an organizing drive. In short, both designs preserve the secret ballot, and both explicitly disable union organizers and union supporters from soliciting or handling ballots or even being present when employees register their choice on the union question. But both preserve the asymmetry-correcting function of enabling employees to minimize or eliminate employer intervention in union organizing drives.

This Article proceeds as follows. Part II provides, by way of background, a stylized description of the union organizing process under traditional National Labor Relations Act<sup>21</sup> (NLRA) rules, under a rapid elections regime, and under card check. Part III explains the preference-eliciting and reversible default theories and applies these theories to the union organizing context. It then suggests card check and rapid elections as asymmetry-correcting altering rules. This Part also discusses the inadequacies of traditional enforcement as an approach to employee choice. Part IV addresses the questions of management’s affirmative right to intervene in the employee organizing process and employees’ interest in receiving information from employers about unionization. Part V evaluates arguments for openness in voting, assesses the prospects for a rapid elections regime, and then proposes

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<sup>20</sup> See discussion *infra* section V.B.1, pp. 718–19.

<sup>21</sup> 29 U.S.C. §§ 151–169 (2006).

two alternatives to card check and rapid elections that accomplish the organizing-technological goal of enabling employees to minimize employer intervention in employee organizing drives while preserving secrecy in employee decisionmaking. Part VI concludes.

## II. UNION ORGANIZING UNDER THREE LEGAL REGIMES

In this Part, I offer a highly stylized model of union organizing under current NLRA rules and then provide a model of organizing under two alternative regimes: rapid elections and card check.<sup>22</sup>

### A. *The Current NLRA Procedure*

Under federal labor and employment law, individual employment contracting is the default rule in U.S. workplaces — bargaining over terms and conditions of work in the default position takes place between individual employees and their employers.<sup>23</sup> The NLRA gives employees the right to depart from this default by forming labor unions and bargaining collectively with their employers over terms and conditions of employment.<sup>24</sup> Under traditional NLRA procedures, the process of departing from the default rule involves two discrete phases: the organizing phase and the decisional phase.

During the organizing phase, union organizers along with sympathetic employees attempt to build support for the union among the workforce. Although some discussions between employees take place at work, the effort consists primarily of visits with employees when they are not at work through so-called “house calls.”<sup>25</sup> Through these discussions, organizers and pro-union employees field questions from employees about the process of forming a union and about the likely results if unionization should succeed, and they relate the merits of unionization. Ultimately, organizers urge employees to commit to voting

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<sup>22</sup> These simplified accounts are sufficient for present purposes. For two recent and superb descriptions of the fuller process, see STEVEN HENRY LOPEZ, *REORGANIZING THE RUST-BELT* (2004); and RUTH MILKMAN, *L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT* (2006). For a description of less traditional organizing tactics, see Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing To Win with a Comprehensive Union-Building Strategy*, in *ORGANIZING TO WIN* 19–36 (Kate Bronfenbrenner et al. eds., 1998).

<sup>23</sup> See, e.g., WEILER, *GOVERNING THE WORKPLACE*, *supra* note 5, at 228.

<sup>24</sup> See 29 U.S.C. § 157. If a majority of employees in a relevant bargaining unit decide they want collective bargaining, the law requires the employer to bargain in good faith with the union that the employees select as their representative. See *id.* §§ 158(a)(5), 159(a).

<sup>25</sup> The prevalence of and need for offsite contacts is largely a product of NLRA rules. Under current law, employers are entitled to prohibit discussions of unionization during work time and in working areas. See, e.g., *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *cited in* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945). Moreover, union organizers have no right to access employees on company property. See *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).

in favor of unionization and to signing authorization cards, which are later used to request that the NLRB conduct a union representation election.<sup>26</sup>

Because of the intensity of employer opposition to unionization, a subject I take up below, unions try to complete as much of the organizing phase as possible before the employer becomes aware of the effort. Thus, union organizing guides instruct organizers on maintaining as low a profile as possible for as long as possible. For example, in the American Federation of State, County and Municipal Employees *Organizing Model & Manual*, the first three stages of an organizing campaign are described in a chapter titled “Keeping the Campaign Private.”<sup>27</sup> The Teamsters’ organizing guide is similarly clear about the importance of conducting organizing without employer knowledge, instructing organizers that at all early stages of the campaign “the organizer’s work is totally underground.”<sup>28</sup>

Under current NLRA rules, although a union can avoid managerial intervention for a time, the union is required to give management notice of the organizing campaign well before the vote on unionization takes place. An employer is only obligated to recognize a union as its employees’ collective representative if and when a majority of employees vote for union representation in a secret ballot election conducted by the NLRB.<sup>29</sup> In order to secure such an election, employees must “petition” the Board by submitting authorization cards signed by at least 30% of the employees in the relevant bargaining unit,<sup>30</sup> and once this petition is filed, the Board notifies the employer of the orga-

<sup>26</sup> See 29 U.S.C. § 159.

<sup>27</sup> AM. FED’N OF STATE, COUNTY & MUN. EMPLOYEES, ORGANIZING MODEL & MANUAL 1-6 (1999) (on file with the Harvard Law School Library). The first step involves assessing employees’ interest in unionization. The manual explains, “While assessing worker interest, don’t tip off the employer. This is ‘undercover’ work.” *Id.* The second phase involves making initial contacts with potential leaders, and here the manual instructs organizers “to recruit potential leaders as quietly and as quickly as we can.” *Id.* at 1-9. And then in the third stage of the campaign, which involves building an “organizing committee” of employees, the manual directs that “[t]he organizer needs to constantly stress the need for secrecy and to make assessments discreetly.” *Id.* at 1-11.

<sup>28</sup> INT’L BHD. OF TEAMSTERS, ORGANIZING GUIDE 9 (on file with the Harvard Law School Library).

<sup>29</sup> See, e.g., *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974). While a union is entitled to demand recognition from the employer once the union has authorization cards signed by a majority of the employees in a relevant bargaining unit, the employer is under no obligation to recognize a union based on cards — even if they are signed by 100% of the unit employees — and is entitled to respond to the union’s demand with a simple “no comment.” See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969). See generally James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005). This was not always the case, and in earlier years the Board would order recognition, or mandate bargaining, based on other signs of majority support. See, e.g., Becker, *supra* note 5, at 507–15.

<sup>30</sup> See 29 U.S.C. § 159(c)(1)(A); 29 C.F.R. § 101.18 (2009).

nizing effort. On average, an NLRB election is scheduled forty-one days after the employees' petition is filed, meaning that the campaign is public for approximately six weeks prior to the time employees vote.<sup>31</sup>

Once the organizing campaign becomes public, employers — in nearly all cases — mount a campaign of their own designed to discourage employees from choosing unionization.<sup>32</sup> As has been documented both in the scholarly literature and in congressional hearings on the matter, employers have at their disposal a variety of mechanisms, both legal and illegal, for discouraging unionization, and they use these tools with some frequency.<sup>33</sup> For example, firms often schedule one-on-one meetings between employees and their supervisors along with mandatory meetings of the entire workforce, during work time, to convey their view that unionization is not in the interests of the employees or the firm.<sup>34</sup> Employees may be disciplined or discharged if they refuse to attend these meetings.<sup>35</sup> Quite often, though prohibited by federal law, employers threaten that unionization will result in job

<sup>31</sup> John-Paul Ferguson reports: "The average case that went to election did so in 41 days, and 95% of elections were held within 75 days of filing. The tail, however, is quite long; the maximum delay before election recorded in the data is 1,705 days." John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 *INDUS. & LAB. REL. REV.* 3, 10 n.9 (2008).

<sup>32</sup> In her study of 1004 NLRB certification elections, Kate Bronfenbrenner found that employers mounted some form of anti-union effort in 96% of the campaigns. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10 tbl.3 (Econ. Policy Inst., EPI Briefing Paper No. 235, 2009) [hereinafter Bronfenbrenner, *No Holds Barred*], available at [http://epi.cdn.net/edc3b3dc172dd1094f\\_oym6ii96d.pdf](http://epi.cdn.net/edc3b3dc172dd1094f_oym6ii96d.pdf). As Professor Paul Weiler writes, "[i]t is the time lag between the filing of a representation petition and the vote . . . that gives the employer the opportunity to attempt to turn its workers against the union." Weiler, *Promises To Keep*, *supra* note 5, at 1777. Employees who oppose the union will also attempt to persuade coworkers that unionization is a mistake and that remaining in the default position of individual bargaining is the optimal choice. In some cases, employees form a "vote no" committee. These committees are frequently supported by the employer, although such support is illegal. See, e.g., Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 79 tbl.5.1 (Sheldon Friedman et al. eds., 1994); James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs*, in *ORGANIZING TO WIN*, *supra* note 22, at 213, 219 tbl.13.1.

<sup>33</sup> See, e.g., H.R. REP. NO. 110-23, at 8 (2007); KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* (2000), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports>; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1537 & n.42 (2002); Weiler, *Promises To Keep*, *supra* note 5, at 1769–86.

<sup>34</sup> According to several empirical studies of employer anti-union tactics, between 75% and 98% of employers schedule one-on-one meetings with employees to discourage unionization, while 80–90% of companies require employees to attend a mass meeting. See GORDON LAFER, *AM. RIGHTS AT WORK, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS* app. at 42 tbl.2 (2007).

<sup>35</sup> See, e.g., *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030–31 (1968); *Babcock & Wilcox Co.*, 77 N.L.R.B. 577, 578 (1948).

loss and in the closing of the firm.<sup>36</sup> Finally, in many organizing campaigns, employers discharge union supporters as a means of nipping an organizing campaign “in the bud.”<sup>37</sup>

Under current rules, when the organizing phase is complete, employees are called on to make their choice about unionization through a secret ballot election. On a day designated by the Board, employees are directed to a location on the employer’s property where they cast their ballots. If more than 50% of voting employees vote in favor of unionization, the employer is required by law to recognize the union as the employees’ bargaining agent. If fewer than 50% vote in favor of unionization, the firm continues with the default arrangement of individual employment contracting.<sup>38</sup>

### B. Rapid Elections

A rapid elections regime would leave nearly all of the current rules for union organizing and recognition in place, and thus union campaigns under such a regime would proceed largely in the manner described immediately above. Unions, as they do now, would attempt to keep their organizational activity underground for as long as possible. As under current law, in order to unionize under a rapid elections regime, employees would be required to petition the Board for an election once they gathered cards signed by 30% of the relevant bargaining unit.<sup>39</sup> When employees filed the petition, the Board would notify the employer of the campaign. Employees would vote, as they do now, in a secret ballot election conducted on the employer’s property.

Unlike the current regime, however, a rapid elections regime would call on the NLRB to hold representation elections within a strictly li-

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<sup>36</sup> See, e.g., *Shearer’s Foods, Inc.*, 340 N.L.R.B. 1093, 1094 (2003); see also BRONFENBRENNER, *supra* note 33, at v, 18; Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10 tbl.3.

<sup>37</sup> *Lloyd’s Ornamental & Steel Fabricators, Inc.*, 197 N.L.R.B. 367, 367 (1972). As I note below, the data on the specific level and rate of discharges are contested. See *infra* note 113. For example, Professors John Schmitt and Ben Zipperer report that one in five union activists is discharged, Professor Charles Morris puts the number at approximately one in eighteen, and a report by the Center for Union Facts arrives at one in thirty-seven. See JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, *DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS 1* (2007), available at [http://www.cepr.net/documents/publications/unions\\_2007\\_01.pdf](http://www.cepr.net/documents/publications/unions_2007_01.pdf); J. JUSTIN WILSON, CTR. FOR UNION FACTS, *UNION MATH, UNION MYTHS 7* (2008), available at [http://www.unionfacts.com/downloads/union\\_math\\_union\\_myths.pdf](http://www.unionfacts.com/downloads/union_math_union_myths.pdf); Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL’Y J. 317, 330 (1998). For reasons explained in section II.B.1, below, our concern will be less with the precise frequency of discharge and more with the general phenomenon. See *infra* pp. 684–85.

<sup>38</sup> See 29 U.S.C. §§ 158(a)(5), 159(a) (2006).

<sup>39</sup> In some proposals, the move to rapid elections entails a concomitant increase in the percentage of employee support necessary for a petition. Weiler, for example, suggests requiring 55% or 60% employee support for a rapid-election petition. See WEILER, *GOVERNING THE WORKPLACE*, *supra* note 5, at 255.

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mitted period of time following the filing of the petition. Proposals range from five days to two weeks.<sup>40</sup> As such, rapid elections aim to reduce dramatically the period of time during which a union campaign must be public and thus to minimize the amount of time that employers have to intervene in organizing efforts. As Professor Paul Weiler describes it, in a rapid elections regime:

The Board would . . . conduct an immediate election in five days or so [following the petition] . . . [B]ecause the vote would be conducted so close to the time the union surfaced from its organizational drive, the die would largely be cast as far as the employer was concerned. There would be no extended campaign during which management could try either to persuade or to pressure its employees to change their minds.<sup>41</sup>

Two points bear mention. First, although rapid elections aim to limit the window of opportunity for managerial intervention in union campaigns, the proposal would still statutorily guarantee employers some minimum window of time — again, five days to two weeks — during which they could oppose unionization. Second, rapid elections would restrict managerial intervention to this statutory minimum only if employees succeed in keeping their campaigns “private” until the moment the petition is filed. Should management learn of union organizational activity prior to the filing of a petition, its interventions could begin at that point.

### C. Card Check

Card check would offer employees a substantially different process for organizing unions. Under a card check regime, employees would register their choice on the question of unionization by signing a card indicating that they want a union to serve as their agent for purposes of collective bargaining with the employer.<sup>42</sup> Unlike an NLRB election, in a card check regime there is emphatically no requirement of secrecy. To the contrary, cards may be solicited by a union supporter and signed in the presence of the union supporter who solicited the card. Moreover, although the validity of a card can be challenged *ex post* on the ground that it was obtained through coercion or fraud, there is no contemporaneous oversight of the card solicitation process. Under a card check regime, if a majority of employees in the relevant bargaining unit sign authorization cards, the employer is then required to recognize the union as the employees’ agent and to bargain collectively with the union. If fewer than 50% of employees in the unit sign

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<sup>40</sup> See, e.g., Greenhouse, *supra* note 3.

<sup>41</sup> WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 255–56.

<sup>42</sup> See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

cards, the firm remains in the default position of individual employment contracting.<sup>43</sup>

For our purposes, the most salient difference between these two decisional mechanisms — between card check and an NLRB election — is secrecy.<sup>44</sup> The openness of card check as a decisional mechanism has generated enormous criticism. Critics assert that card check impedes autonomous employee choice because an open decisional mechanism exposes employees to coercive pressure from the coworkers and union organizers who solicit cards.<sup>45</sup> Professor Charles Craver, for example, writes that a card check process opens “the possibility that employees may have signed authorization cards due to social pressure, misunderstanding, or outright coercion.”<sup>46</sup>

<sup>43</sup> *See id.*

<sup>44</sup> Separate objections are discussed later in this Article. *See* discussion *infra* Part IV, pp. 701–12.

<sup>45</sup> *See, e.g.,* DANIEL V. YAGER, TIMOTHY J. BARTL & JOSEPH J. LOBUE, *EMPLOYEE FREE CHOICE: IT’S NOT IN THE CARDS* 4, 18, 62 (1998); *see also infra* section V.A, pp. 713–18. These arguments against a public decisionmaking process and in favor of secret voting mirror a central historical argument in favor of the secret ballot in political elections. Perhaps ironically — given the current political posture of the debate — the development of the secret ballot election in the United States, and earlier in Australia, is understood as a story about protecting poor and working-class voters against the coercive influence of their employers and political parties. In the early and mid-nineteenth century, voters in U.S. elections voted in public. But with the expansion of the franchise, and particularly the enfranchisement of poor and working-class citizens, open voting created the possibility for vote-buying and outright coercion. As Professors Bruce Ackerman and James Fishkin write:

Public balloting might be tolerable in a political world which imposed restrictive property requirements. . . . But as the franchise widened, public voting took on a different appearance. It began to look like a trick by which the rich might retain effective electoral power while formally conceding the right to vote to the unwashed. If the poor could vote only in public, they could not afford to deviate from the political opinions of their economic masters. . . . James Mill . . . had already made the point: without a secret ballot, ordinary people would only “go through the formalities, the mummery of voting . . . .”

BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 38 (2004) (quoting James Mill, *The Ballot*, WESTMINSTER REV., July 1830, at 1, *reprinted in* JAMES MILL, *POLITICAL WRITINGS* 227, 227 (Terence Ball ed., 1992)); *see also* BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS* 18 (2002) (noting connection between secret ballots and the effort to eliminate vote-buying by political parties). *But see* Pamela S. Karlan, *Elections and Change Under Voting with Dollars*, 91 CAL. L. REV. 705, 708–09 (2003) (describing the movement to secret ballots as part of an attempt “to exclude illiterate and foreign-born immigrants in the North, and blacks in the South,” *id.* at 708). In a different context, concerns about executive branch retaliation can motivate legislative adoption of secret procedures. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 416 (2004).

<sup>46</sup> Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals To Reform Labor Law*, 93 MICH. L. REV. 1616, 1641 (1995) (reviewing WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993)). Summarizing the critics, Professor William Gould writes that “[t]he objection to the use of authorization cards lies in the fact that the signing of the card may result from peer pressure or may not reflect the employee’s intent.” GOULD, *supra*, at 162. Outside the legal academy, critics of card check have been nearly uniform in attacking the possibilities for coercive

Proponents of the legislation argue that card check advances autonomous employee choice; they do not, however, trumpet card check's attributes as a decisional mechanism. They do not, for example, defend openness in decisionmaking,<sup>47</sup> nor do they critique the secret ballot as an unfair means for employee voting. Rather, supporters argue that card check enhances employee choice because it corrects what they see as flaws in the union organizing process that precedes the casting of ballots.<sup>48</sup> Namely, in their support of card check, proponents point to management's ability to intervene in the employee organizing process and through various means to interfere coercively with employee decisionmaking on the question of unionization.

The framing of the card check debate, though, raises a puzzle. If card check is a different way for employees to register their choice on the question of unionization — if it is simply a different *decisional mechanism* — how can it affect the ways in which management does or does not intervene in the union organizing process? The answer to this puzzle lies in the observation that card check is more than a deci-

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influence that flow from the openness of the decisional process. See, e.g., Glenn M. Taubman, "Neutrality Agreements" and the Destruction of Employees' Section 7 Rights, ENGAGE, May 2005, at 101, 103 ("[T]he process of soliciting union authorization cards relies upon coercion and misrepresentations . . ."); News Release, Nat'l Right To Work Legal Def. Found., Federal Labor Board To Reconsider Validity of Union Organizing Through Controversial "Card Check" Method (June 8, 2004), available at [http://www.nrtw.org/b/nr\\_318.php](http://www.nrtw.org/b/nr_318.php) (arguing that under card check, "union operatives bully workers face-to-face to sign union authorization cards that count as a 'vote' in favor of unionization"); U.S. Chamber of Commerce, Challenging the Unions' Anti-Growth Agenda, <http://www.uschamber.com/unions.htm> (last visited Nov. 22, 2009) (stating that card check "would expose workers to union intimidation" (emphasis omitted)). EFCA proponents, on the other hand, point to the rarity of reported incidents of union coercion during card-gathering conducted under voluntary card check agreements. See, e.g., *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 12–17 (2007) (testimony of Cynthia L. Estlund, Catherine A. Rein Professor of Law, New York University School of Law) [hereinafter *Estlund Testimony*], available at [http://help.senate.gov/Hearings/2007\\_03\\_27\\_a/2007\\_03\\_27\\_a.html](http://help.senate.gov/Hearings/2007_03_27_a/2007_03_27_a.html); Brudney, *supra* note 29, at 862; Adrienne E. Eaton & Jill Kriesky, *No More Stacked Deck: Evaluating the Case Against Card-Check Union Recognition*, PERSP. ON WORK, Summer 2003, at 19, 20; Gordon Lafer, *What's More Democratic than a Secret Ballot? The Case for Majority Sign-Up*, 11 WORKINGUSA 71, 80–81 (2008).

<sup>47</sup> Professor Gordon Lafer is one exception. See *infra* note 242 (discussing Lafer, *supra* note 46, at 80–81).

<sup>48</sup> For example, the AFL-CIO tells readers of its webpage that card check responds to the fact that "employers routinely harass, intimidate, coerce and even fire workers struggling to gain a union." AFL-CIO, Employee Free Choice Act: The System for Forming Unions Is Broken, <http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm> (last visited Nov. 22, 2009). American Rights at Work, a leading supporter of the legislation, argues that card check is "better at ensuring employee free choice by allowing employees to express their true wishes free from employer coercion," and that card check procedures "avoid the anti-democratic and inherently coercive anti-union campaigns that are typical of the NLRB election process." Am. Rights at Work, Majority Sign-Up Q&A, <http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/majority-sign-up-qa.html> (last visited Nov. 22, 2009).

sional mechanism. In fact, and more importantly, card check is what I will call an organizing technology: it is a device that enables employees to conduct union organizing campaigns without giving notice to management that a campaign is underway and thus to limit, or avoid entirely, managerial intervention.

Card check functions in this way because, under a card check regime, unions have no affirmative obligation to disclose the existence of the organizing drive to the employer until the union has successfully gathered cards from a majority of employees. Once a majority of employees have signed union authorization cards, however, the organizing drive is complete and the employer is obligated to recognize and bargain with the union.<sup>49</sup> The window for employer intervention has, accordingly, closed. To be sure, card check's organizing technology cannot always accomplish this objective perfectly. Even under card check, no union can ensure that in every campaign management will not learn of its organizing efforts: most obviously, an employee opposed to unionization can inform management of the organizing drive as soon as she is visited by a union organizer. But these imperfections do not alter the underlying logic and purpose of the technology.

Although many proponents of card check legislation do not make the point explicitly, the fact that card check functions as an organizing technology of this sort is made clear by academic observers. Professor Mark Barenberg, for example, describes card check as a "samizdat" approach to labor law reform.<sup>50</sup> According to Barenberg:

[Card check is designed] to preempt the employer's use of its machinery of communication and incentives by allowing workers to organize unions secretly through whatever underground or external communication network they currently can muster. . . . The employer would therefore have no opportunity to interfere with the workers' collective organizing — unless it got wind of the underground card solicitations.<sup>51</sup>

Professor Richard Epstein characterizes the organizing phase under card check as "clandestine,"<sup>52</sup> while Weiler describes the Canadian card check regime by explaining that "[t]he employer is afforded no opportunity to campaign against the union," because "when the union surfaces with a majority of the bargaining unit signed up, the statutory condition for certification is satisfied."<sup>53</sup>

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<sup>49</sup> See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

<sup>50</sup> Barenberg, *supra* note 5, at 936 (internal quotation marks omitted).

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

<sup>52</sup> Richard A. Epstein, *The Employee Free Choice Act Is Unconstitutional*, WALL ST. J., Dec. 19, 2008, at A15.

<sup>53</sup> Weiler, *Promises To Keep*, *supra* note 5, at 1806; see also *Estlund Testimony*, *supra* note 46. Professor Craig Becker provides a further, historical account of card check's organizing-technological function. During the brief period when the Board certified unions based on a card majority, Becker explains that card check "shielded [employees'] self-organization from their em-

In sum, both rapid elections and card check aim to restructure the union organizing process in order to minimize or eliminate employer intervention in that process. The question posed by these regimes, therefore, is whether this goal is an *appropriate* one for federal law. It is to this question, one of the central issues for labor law, that I turn now.

### III. LABOR LAW'S ALTERING RULE

#### A. *Default and Altering Rules*

Federal labor law neither mandates nor prohibits unionization. Rather, it establishes the default position of individual, nonunion employment contracting, a nondefault alternative of collective bargaining through unions, and an “altering rule.”<sup>54</sup> An altering rule, as Ayres defines it, specifies the “means of opting” for a nondefault alternative; it “tell[s] private parties the necessary and sufficient conditions” for moving from the default position to the nondefault alternative.<sup>55</sup> Labor law’s current altering rule — the *means* through which workers opt out of nonunion bargaining and opt into unionized collective bargaining — is the NLRB secret ballot election process.

Neither card check nor a rapid elections regime would change labor law’s default rule; the default position would still be individual, nonunion employment contracting. Nor would card check or rapid elections change the statutory alternative to the default rule; collective bargaining through unions over terms and conditions of employment would remain the nondefault alternative. Both alternatives would, however, change labor law’s altering rule in order to minimize management’s ability to intervene in the unionization process. Under rapid elections, employees would vote on the union question almost im-

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ployer . . . [because] [m]embership cards could be solicited without employers knowing that their employees were organizing.” Becker, *supra* note 5, at 535. Professor James Brudney, explaining the reduced levels of opposition to unionization campaigns under voluntary card check agreements, writes that “[t]he diminished levels of employer opposition presumably relate to unions’ ability to . . . reach large numbers of workers before employers can begin to generate pressure against the organizing effort.” Brudney, *supra* note 29, at 826. In the context of a voluntary card check agreement, reduced employer opposition may in fact be attributable to a selection effect; namely, those employers who voluntarily agree to card check recognition may for various reasons be less inclined to oppose unionization. The relevance of Brudney’s observation here is merely that card check does in fact enable unions to conduct organizing efforts with a minimum of employer intervention.

<sup>54</sup> Ayres, *supra* note 9, at 6. As several authors have noted, there is nothing inevitable or natural about the choice of a nonunion default rule. Paul Weiler, for example, explains that the rule has “its roots in the common law background of the NLRA: the tacit legal assumption that the ‘natural’ status for a workplace is nonunion.” WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 228; see also Barenberg, *supra* note 5, at 933–34; Sunstein, *supra* note 11, at 256.

<sup>55</sup> Ayres, *supra* note 9, at 6.

mediately following the completion of their organizing efforts. Card check would effect a more pronounced change: under card check, employees could move from the nonunion default to the union alternative by signing authorization cards.

Card check and rapid elections, moreover and more to the point, are not simply modified altering rules; they are *easier* altering rules than those provided by current law. By allowing employees to complete organizing campaigns with a minimum of managerial intervention and opposition, card check and rapid elections make it significantly easier than it is under current law for employees to opt out of the nonunion default and choose unionization.

To assess whether such a liberalization of labor law's altering rule is appropriate, I turn to two theories of legal default rules: the preference-eliciting default theory in statutory interpretation<sup>56</sup> and the reversible default theory in corporate law.<sup>57</sup> Both theories are concerned with maximizing the satisfaction of some relevant set of preferences, and their conclusions are remarkably similar. As I will show, according to both the preference-eliciting and reversible default approaches, where there is uncertainty regarding how to maximize the good sought by a rule (for example, enactable preferences in statutory interpretation and shareholder value or preference in corporate law<sup>58</sup>) and there is an asymmetric ability to depart from one default or another, we should choose the default from which it is easiest to depart.

Changing the default is one way to maximize preferences where asymmetric impediments to departure exist. But, as I will argue and as reversible default theory suggests, the same preference maximization that can be achieved by changing the default can also be secured by adopting an altering rule that eliminates the asymmetric impediment to departure. That is, by adopting an "asymmetry-correcting altering rule" we can achieve the same preference-maximizing aims of a reversible or preference-eliciting default.

1. *Preference-Eliciting Default Theory.* — In his recent work on statutory interpretation, Professor Einer Elhauge argues that, under conditions of uncertainty and asymmetric power, courts should interpret unclear legislation by using "preference-eliciting default rules."<sup>59</sup> These default rules are most likely to maximize "political satisfaction" because they are most likely to result — at the end of the day — in

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<sup>56</sup> See ELHAUGE, *supra* note 6, at 151–67.

<sup>57</sup> See Bebchuk, *supra* note 6; Bebchuk & Hamdani, *supra* note 6.

<sup>58</sup> It is possible, for purposes of this discussion, to remain agnostic as to whether shareholder preferences are equivalent to shareholder (or firm) value. As noted below, our concern here is with *how* these default theories maximize the good sought by the legal regime and not with *what* good the legal regime seeks to maximize. See *infra* notes 60, 74.

<sup>59</sup> ELHAUGE, *supra* note 6, at 152.

statutory language that most fully captures the “enactable preferences” of the polity.<sup>60</sup> Although preference-eliciting defaults are designed to maximize enactable preferences, these default rules do *not* call on courts to choose the statutory interpretation they believe is most likely to capture those preferences.<sup>61</sup> Rather, a preference-eliciting default requires courts to choose the interpretation “more likely to be corrected by the legislature because it burdens some politically powerful group with ready access to the legislative agenda.”<sup>62</sup> That is, a preference-eliciting default requires courts to choose the interpretation that would be disfavored by the party to the interpretive debate with the greatest capacity to force the legislature to correct an erroneous interpretation.

Elhauge provides the following illustration. Suppose, he writes, that a court can interpret a statute in two different but plausible ways: interpretation *A* or interpretation *B*. There is a 60% chance that interpretation *A* captures enactable preferences, and there is a 40% chance that interpretation *B* gets it right. Now suppose, Elhauge continues, that if interpretation *A* does *not* capture enactable preferences, there is a 0% chance that the legislature will correct the court’s interpretation — a 100% chance that the incorrect interpretation will stick. Conversely, if interpretation *B* is incorrect, there is a 100% chance that the legislature will react by correcting the court’s interpretation — a 0% chance that the wrong choice will stick.<sup>63</sup>

In this example, should the court choose interpretation *A*, it can expect that overall “expected political satisfaction” will be 60%: in the 40% of the cases where the court’s interpretation does not capture enactable preferences, the legislature will do nothing to correct the court’s inaccurate interpretation. However, should the court go with interpretation *B*, expected political satisfaction will be 100%. This is so because the court will choose the right interpretation 40% of the time, but in the 60% of the cases in which the court chooses the wrong interpretation, the legislature will correct the court and replace the

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<sup>60</sup> *See id.* Elhauge’s argument for preference-eliciting defaults depends on a conclusion that enactable preferences are the “good” that statutory interpretation should maximize. Although Elhauge mounts a defense of this conclusion, *see id.* at 23–38, it is a contestable one. But it is unnecessary to take a position on this debate here. What Elhauge’s theory of preference-eliciting defaults shows us — and, as I will explain below, what reversible defaults theory shows us as well — is how to design a default rule (in conditions of uncertainty and asymmetric power) in order to maximize a good once we have determined what that good is. The *how* question can be pursued independently of the *what* question, and that is what I intend to do here.

<sup>61</sup> For a seminal discussion of nonmajoritarian defaults in contract law, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989).

<sup>62</sup> ELHAUGE *supra* note 6, at 152. The legislative “correction” can be *ex ante* in the form of more precise drafting to avoid the potential for future judicial misinterpretation, or it can be *ex post* in the form of a legislative override of the judicial misinterpretation. *See id.*

<sup>63</sup> *Id.* at 153.

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court's interpretation with a new statute that better captures enactable preferences. As such, "[c]hoosing preference-eliciting option *B* will . . . ultimately increase the expected satisfaction of enactable preferences, even though option *B* itself is less likely to reflect enactable preferences than *A*."<sup>64</sup>

Elhauge shows that preference-eliciting default rules are appropriate when certain conditions are met: first, there must be uncertainty regarding enactable preferences; and second, there must be an asymmetry in the likelihood that the legislature will correct the judicial interpretation depending on which interpretation the court chooses.<sup>65</sup> In fact, the appropriateness of employing a preference-eliciting default depends primarily on an interaction between these conditions. Where there is complete certainty about the legislature's preferences, there is no justification for a preference-eliciting default. In these cases, a court knows what the legislature prefers, and it should interpret the statute accordingly.<sup>66</sup> Where there is uncertainty about legislative preference, however, a preference-eliciting default rule is appropriate if there is sufficient asymmetry between the likelihood that the legislature will correct one option or another. Most useful for our purposes, Elhauge shows that when a court is completely uncertain about what interpretation the legislature would prefer — if, following the illustration above, the court believes there is a 50% chance that the legislature would choose interpretation *A* and a 50% chance that the legislature would choose *B* — then a preference-eliciting rule is appropriate if there is any asymmetry in the likelihood of correction. As Elhauge writes:

[W]here a court is completely uncertain about whether a legislature would prefer option *A* or *B*, a preference-eliciting default rule makes sense as long as the legislature is to *any* extent more likely to correct *B* than *A*. Even if the odds that *B* will stick uncorrected are 99%, and the odds that

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

<sup>65</sup> *Id.* at 155–65. Elhauge adds a third condition: the interim costs of choosing the wrong rule must be tolerable. This condition underscores the fact that the preference-eliciting rule will often result in a judicial interpretation of a statute that is less likely to capture enactable preferences in the short run, in order to elicit a legislative reaction that will better capture enactable preferences in the long run. Although some legislative correction will come ex ante in the form of more precise legislative drafting intended to avert the prospect that a court will apply a preference-eliciting rule, much will be ex post in the form of legislative override of judicial opinion. In these cases, between the moment of judicial interpretation and the moment of legislative correction, we are forced to live with a rule that fails to capture enactable preferences. There are costs associated with this fact. *See id.* at 165. In our context, in which we assume complete uncertainty as to employee preference, either default rule is equally likely to be wrong, and each rule will have costs associated with it that will be difficult to measure. Given the statutory commitment to ensuring a choice on the union question, the costs of either default probably must be deemed “acceptable.” In any event, as discussed below, I do not suggest that we change labor law's default rule, and so we need not engage in this cost calculus.

<sup>66</sup> *Id.* at 155.

*A* will stick uncorrected are 100%, option *B* should be chosen when the court has no reason to think the legislature might prefer option *A* over *B*.<sup>67</sup>

In the context of statutory interpretation, asymmetry in the likelihood of legislative correction flows from differentials in the political power of groups on either side of the interpretive dispute.<sup>68</sup> These power differentials might be explained, as Elhauge shows, because one side has a better ability to shape the legislative agenda, to intervene in drafting, to raise issues with the legislature, or to block legislative change.<sup>69</sup> But “[w]hatever the cause, preference-eliciting analysis provides a reason for favoring” the party with less political power in the interpretive dispute.<sup>70</sup> This conclusion is, in some respects, deeply counterintuitive. After all, if courts were to choose a default rule geared toward most accurately estimating enactable preferences, they would do far better by choosing the interpretation favored by the most politically *powerful* side of the debate. But again, Elhauge shows that by choosing the interpretation favored by the politically *weaker* side of the interpretive debate, the court can invite legislative correction in the event that it chooses wrongly, and thereby maximize political satisfaction.<sup>71</sup>

Finally, Elhauge stresses that the reason it is appropriate for courts to choose a default rule that favors the politically weaker party in an interpretive debate is definitively not because those with less political power are more likely to support benevolent policies, nor because politically weak groups deserve any kind of special solicitude, nor because the politically weak are likely to reflect enactable preferences of the polity as a whole.<sup>72</sup> It is not because the politically weak are likely to be “right” in any sense. To the contrary, the point of favoring the politically weak is that doing so “will produce a precise legislative appraisal of the weight the political process wishes to give those interests.”<sup>73</sup> That is, the point of favoring the politically weak is that doing so will more likely result in an outcome that maximizes enactable pre-

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<sup>67</sup> *Id.* at 162. Elhauge demonstrates this theory formally, *see id.* at 161–62, but it is sufficient here simply to observe the following: if there is a 50% chance that both interpretation *A* and interpretation *B* capture legislative preferences, and there is a 0% chance that the legislature will correct *A* but a 1% chance that it will correct *B*, then the court can assume that the expected political satisfaction of choosing *A* is 50% while that of choosing *B* is 50.5%. In order to maximize enactable preferences, the court should choose *B* — the preference-eliciting default — even though both interpretations are just as likely to capture enactable preferences.

<sup>68</sup> *See id.* at 162–63.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 163.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

ferences, even though enactable preferences may well ultimately prove to be contrary to the policies the politically weak would have chosen.

2. *Reversible Default Theory.* — For Elhauge and statutory interpretation, the question is how to design a default rule that maximizes enactable preferences when there is uncertainty regarding those preferences and the distribution of political power between the parties to the interpretive dispute produces an asymmetric ability to depart from the default. Professors Lucian Bebchuk and Assaf Hamdani take up a similar question in the context of corporate law and come to a similar conclusion.<sup>74</sup> As Bebchuk and Hamdani explain, outside of those relatively few areas of corporate governance that are regulated by mandatory rules (for example, insider trading), corporations enjoy the freedom to establish rules of governance by contract, generally by including such rules in the corporate charter.<sup>75</sup> But corporate charters are “inevitably incomplete,” and to address these gaps corporate law provides default rules that remain in force until the corporation amends its charter.<sup>76</sup> The challenge for corporate law is to select default rules that are most likely to maximize shareholder value or shareholder preferences.<sup>77</sup>

The traditional approach to default rules in corporate law is the “hypothetical bargains” approach.<sup>78</sup> Here, where there is uncertainty regarding which of two rules would maximize value, the court or the legislature is to choose the rule that it believes “fully informed and rational shareholders would have most likely chosen had they considered

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<sup>74</sup> See Bebchuk & Hamdani, *supra* note 6; see also Bebchuk, *supra* note 6. In developing a theory of default rules for this context, Bebchuk and Hamdani make two normative assumptions, both of which are worth noting here but, again, neither of which is important for our purposes. First, the authors assume that the good to be maximized by the law of corporate governance is shareholder value. See Bebchuk & Hamdani, *supra* note 6, at 491 n.6. This is a contestable — though fairly widely held — view. But again, our concern here is not *what* good corporate law seeks to maximize, but rather *how* a default regime can maximize that good. Second, the authors assume that “market players and investors in any given company are more likely than public officials to identify the superior [that is, value-maximizing] arrangement for their company.” *Id.* at 497. This assumption is necessary to justify the choice of some default rule rather than a mandatory one; where the public officials “know better” than market actors what the right outcome is, mandatory rules are appropriate. *Id.* Again, this assumption — though widely held — is also contestable, but we need not engage with this debate either. Our question is not *whether* a default arrangement is appropriate in the labor law context, but *which* default arrangement best maximizes employee choice. We can therefore accept both assumptions for the purposes of this discussion.

<sup>75</sup> See, e.g., Bebchuk & Hamdani, *supra* note 6, at 496.

<sup>76</sup> *Id.*

<sup>77</sup> This assertion accepts, for these purposes, the assumptions noted above. See *supra* note 74. Again, we can remain agnostic regarding whether shareholders will always have a preference for maximizing value.

<sup>78</sup> Bebchuk & Hamdani, *supra* note 6, at 491 (internal quotation marks omitted) (citing David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991)).

this question.”<sup>79</sup> Bebchuk and Hamdani, however, reject the hypothetical bargains approach to corporate defaults because, as they explain, this approach “overlooks a fundamental asymmetry in the process of opting-out of default rules.”<sup>80</sup> The asymmetry of concern to Bebchuk and Hamdani flows from management’s control over the process by which corporate charter amendments are initiated. Although a corporate charter can be amended by a vote of the corporation’s shareholders, such a vote “take[s] place only on amendments initiated by management.”<sup>81</sup> Thus, this managerial “veto power over charter amendments” creates an asymmetry between those arrangements that management favors and those it disfavors.<sup>82</sup>

In particular, should a legislature or court choose a default rule that turns out to decrease shareholder value, and management disfavors the rule, shareholders will be able to depart from the default rule because management will likely initiate a charter amendment. In contrast, should the legislature or court choose a value-decreasing default rule that management favors, it is less likely that shareholders will be able to depart from the default because it is less likely that management will initiate the amendment process. Because “there are impediments to reversing a default arrangement favored by managers[,] . . . such an arrangement . . . might not be reversed even if the arrangement is value decreasing.”<sup>83</sup>

According to Bebchuk and Hamdani, this asymmetry between the reversibility of defaults favored and disfavored by management suggests that the hypothetical bargains approach will often fail to maximize shareholder value. To correct this failing, the authors suggest the “reversible defaults” approach.<sup>84</sup> Under the reversible defaults rule:

[W]henver there is uncertainty over the identity of the value-maximizing arrangement, a preference should generally be given to the alternative that is more restrictive of managers. This restrictive alternative would be reversed if it turns out to be value decreasing [and left in place if not], whereas the alternative favored by managers would remain in place if chosen as default even if it turned out to be value decreasing.<sup>85</sup>

So far, the theory of reversible defaults points to the same conclusion as the theory of preference-eliciting defaults. According to both

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 492.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* There is a “differen[tial] in the prospects of reversal by corporations between those default rules that management favors — because they restrict managers less than their alternative — and those alternative, more restrictive rules.” *Id.*

<sup>83</sup> *Id.* at 503. In relatively rare circumstances, shareholders can successfully pressure management to propose charter amendments that do not favor management. *See id.* at 502–03.

<sup>84</sup> *Id.* at 503.

<sup>85</sup> *Id.*

approaches, the combination of uncertainty regarding the relevant preference set and an asymmetric ability to depart from the default calls for choosing the default from which it is easiest to depart. But Bebchuk and Hamdani provide an additional insight that is important here. Namely, the authors explain that although a charter amendment is required to opt out of *most* corporate default arrangements, in some instances the default can be reversed by amending the corporate bylaws. And unlike a charter amendment, bylaws can be amended by shareholders without board approval — that is to say, without a need for management to initiate the amendment process.<sup>86</sup> Accordingly, in instances where default reversal can be accomplished through bylaw amendment, management no longer enjoys an asymmetric ability to block a departure from the default rule. As Bebchuk and Hamdani put it, “[w]ith respect to such issues [governed by bylaw amendment], . . . the asymmetry between arrangements favored and disfavored by managers in terms of ease of reversibility would largely disappear.”<sup>87</sup> And so they conclude that “[b]y allowing opting out via a bylaw amendment, public officials would ensure that, if the chosen default turned out to be value decreasing, shareholders would be able to reverse it easily and not be stuck with a value-decreasing arrangement.”<sup>88</sup>

Although Bebchuk and Hamdani do not use the following language, what they identify here are two different altering rules for corporate law defaults — two different “means of opting” for a nondefault alternative.<sup>89</sup> What their theory reveals, moreover, is that when a court or legislature is faced with uncertainty regarding which rule shareholders would prefer, and there is an asymmetric ability to depart depending on which rule is chosen as the default, the court or legislature can maximize value in one of *two* ways. First, the court or legislature can choose the reversible default, the one from which it is easiest to depart. Or second, the default can be set according to the traditional hypothetical bargains approach, and the altering rule can be changed in a manner that mitigates the asymmetric ability or power to depart from the default. The key insight here is that value — or shareholder preference — can be maximized *either* by choosing the default rule from which it is easiest to depart *or* by adopting an asymmetry-correcting altering rule.<sup>90</sup>

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<sup>86</sup> See *id.* at 505–06.

<sup>87</sup> *Id.* at 505.

<sup>88</sup> *Id.* at 506.

<sup>89</sup> Ayres, *supra* note 9, at 6.

<sup>90</sup> The two approaches may not be perfect substitutes. For example, collective action problems can impede shareholders from pursuing bylaw amendments, even in the absence of managerial interference. See Bebchuk & Hamdani, *supra* note 6, at 506. For Bebchuk and Hamdani,

*B. Default and Altering Rules To Maximize Employee Choice*

For preference-eliciting default theory, the question is how to design default rules to maximize the enactable preferences of the legislature. For reversible default theory, the question is how to design a default regime to maximize shareholder value or preference. In our context, the question is how to structure the rules governing organizing campaigns in a manner that maximizes the satisfaction of employee preferences on the union question. What might preference-eliciting and reversible default theory tell us about the appropriate choice of default and altering rules in this context? Again, a preference-eliciting or reversible default approach is appropriate when there is uncertainty regarding how to maximize the good sought by the regime and there is an asymmetric ability to depart from the default depending on where the default is set. In our context there is uncertainty — indeed definitional uncertainty — regarding actual employee preferences. For each workplace and for each potential bargaining unit, we do not know, nor are we permitted to assume, whether employees prefer union or non-union bargaining until they in fact express a choice on this question. Further, as I discuss in this section, there is an asymmetric ability to depart depending on where the default is set. Because of a series of collective action problems and market failures that disproportionately affect employees who wish to move from nonunion to union governance, and because of managerial opposition to unionization, it is more difficult for employees to depart from a nonunion default (to choose unionization) than it would be for employees to depart from a union default (to choose nonunion, individual employment contracting).

1. *Impediments to Unionization: Collective Action Problems and Direct Managerial Intervention.* — Management generally opposes unionization. This fact is essentially undisputed and is evident from a host of empirical studies. In Professor Kate Bronfenbrenner's sample of 1004 NLRB certification elections, for example, employers mounted some form of anti-union effort in 96% of the campaigns.<sup>91</sup> Similarly,

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the implication of these coordination problems is that — even when opting out of the default is possible through bylaw amendment — there should still be a presumption, though not as strong, in favor of setting the default rule against management. *See id.*

<sup>91</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10 tbl.3. Although spending levels cannot tell us what percentage of employers oppose union drives, the aggregate levels are suggestive. Annual spending on union opposition “consultants” is estimated at approximately \$200 million, and when managerial and supervisory time is included, the estimates approach \$1 billion. *See* John Logan, *Consultants, Lawyers, and the ‘Union Free’ Movement in the USA Since the 1970s*, 33 *INDUS. REL. J.* 197, 198 (2002); *see also* JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION* 79–117 (Hoyt N. Wheeler & Roy J. Adams eds., 1990); John Logan, *The Union Avoidance Industry in the United States*, 44 *BRIT. J. INDUS. REL.* 651, 656 (2006). Although he disputes the accuracy of many of Bronfenbrenner's findings, Epstein agrees that employers oppose unionization. He attributes this opposition to a “brutal economic reality.” Richard A.

Chirag Mehta and Professor Nik Theodore collected data on sixty-two union campaigns launched in the Chicago metropolitan area in 2002. Out of the sixty-two campaigns in the study, the employer engaged in some form of anti-union effort in sixty-one, or 98.4% of the time.<sup>92</sup>

The fact of employer opposition establishes the basis for a series of asymmetric impediments to unionization. The first of these impediments flows from an “intrapersonal collective action problem.”<sup>93</sup> Here, rather than some individuals bearing the costs of an activity from which many others reap the benefits (as in a traditional collective action setting), the problem arises because “the costs and benefits, for a particular person, of engaging in an activity change dramatically over time.”<sup>94</sup> Because “[m]any workers greatly discount the future, sometimes treating it as irrelevant,”<sup>95</sup> they may be prone to one particular form of intrapersonal collective action problem: “[A] refusal, because the short-term costs exceed the short-term benefits, to engage in activity having long-term benefits that dwarf long-term costs.”<sup>96</sup> In our context, for the individual employee considering whether to support a union-organizing effort, the short-term costs of supporting unionization almost always exceed the short-term benefits. As we have seen (and as I will discuss in more detail below), workers bear a substantial risk of losing their jobs should they support a unionization effort,<sup>97</sup> and among those union supporters who are not discharged or formally disciplined for their activity, many face softer forms of retaliation that are nonetheless quite significant and can diminish career prospects.<sup>98</sup> In the short term, moreover, there are often no benefits from unionization; even when a campaign is successful, it takes many months to bargain a first contract and usually much longer to realize the full gains of that contract.<sup>99</sup> And although the long-term benefits may well be substan-

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Epstein, *The Case Against the Employee Free Choice Act* 25 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 452, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337185). Namely, Epstein writes, employers “perceive that they have much to lose through unionization in the form of forgone wage increases, reduced pension and health plans, restrictive work rules, work stoppages, and a general loss of management prerogatives.” *Id.* at 24–25.

<sup>92</sup> CHIRAG MEHTA & NIK THEODORE, AM. RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 8 (2005), available at <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEdcompressedfullreport.pdf>.

<sup>93</sup> Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 26 (1991).

<sup>94</sup> *Id.*; see also Shane Frederick, George Loewenstein & Ted O’Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 367–68 (2002).

<sup>95</sup> Sunstein, *supra* note 11, at 206.

<sup>96</sup> Sunstein, *supra* note 93, at 26. Professor Cass Sunstein calls this “myopic behavior.” *Id.*

<sup>97</sup> See, e.g., SCHMITT & ZIPPERER, *supra* note 37, at 11; see also *infra* p. 687.

<sup>98</sup> See, e.g., Barenberg, *supra* note 5, at 933.

<sup>99</sup> On average, it takes ten months for the parties to bargain a first contract. Ferguson, *supra* note 31, at 5. More importantly, many contracts delay or stagger the implementation of, for ex-

tial (in the form of wage and benefit gains, for example),<sup>100</sup> these benefits are likely to be substantially discounted.<sup>101</sup>

Accordingly, intrapersonal collective action problems can impede the move from a nonunion default to the union alternative. But the same problems would not hinder the move in the opposite direction — from a union default to nonunion, individual employment contracting. Here, the short-term costs to employees are likely to be de minimis and to be outweighed by short-term benefits. Employers likely would not punish employees who supported this departure from the default, and might indeed reward such workers either through explicit benefits or through softer forms of promotion.

The intrapersonal collective action problem is similar to, and exacerbated by, a dynamic that Barenberg terms an “intertemporal market failure.”<sup>102</sup> Here, the problem is not that workers highly discount the future benefits of unionization, but rather that the workers who bear the upfront costs of unionization are not able *in fact* to recapture those costs through downstream rewards. So, “[e]mployees who, as union pioneers and activists, risk their careers and bear other material and psychic costs cannot generally capture the stream of benefits flowing to workers who subsequently enter the already unionized workplace.”<sup>103</sup> Again, this market failure will reduce the likelihood that workers will depart from the nonunion default, but its logic does not apply to the union default. In that context, again, upfront costs are unlikely: employees who support the departure from the union default will not bear risks to their careers or other “material and psychic costs” but can expect, if anything, enhanced career prospects along with other material and psychic benefits that come from an approving management.

In addition to intrapersonal collective action problems and intertemporal market failures, traditional collective action problems also make it more difficult for employees to depart from the nonunion default. Employers have the discretion to ban much speech about unio-

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ample, wage gains over the life of the contract, increasing the distance between the costs of union organizing and the benefits of a union contract. See, e.g., *CNA Members Ratify Four-Year Contract with Two Hospitals Covering 1,450 Nurses*, 23 Lab. Rel. Wk. (BNA) No. 33, at 1290 (Aug. 13, 2009), available at <http://news.bna.com/lrn/> (search for “CNA 1,450 nurses”; then follow hyperlink to the article). Should EFCA pass as currently drafted, the parties would have only four months to complete first-contract bargaining, which would reduce average bargaining time but would have no predictable impact on what gains are included in the first contract.

<sup>100</sup> See generally John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation*, in *WHAT DO UNIONS DO?* 160 (James T. Bennett & Bruce E. Kaufman eds., 2007); David Card, Thomas Lemieux & W. Craig Riddell, *Unions and Wage Inequality*, in *WHAT DO UNIONS DO?*, *supra*, at 114.

<sup>101</sup> See Sunstein, *supra* note 11, at 206.

<sup>102</sup> Barenberg, *supra* note 5, at 933.

<sup>103</sup> *Id.*

nization on company property (since rules prohibiting employees from discussing unionization during working time are presumptively valid)<sup>104</sup> and can bar nonemployee union organizers from company property entirely.<sup>105</sup> As such, employees who wish to communicate information in support of unionization bear the substantial transaction costs of identifying and then contacting all other prospective supporters during nonwork time.<sup>106</sup> Management, on the other hand, is immune from such collective action problems. For example, managers have access to complete information about bargaining unit members and have the ability (and the legal right) to conduct one-on-one and company-wide captive audience meetings during working time to discourage unionization.<sup>107</sup> Management, moreover, has a “centralized capacity to overcome free-rider problems among individual workers.”<sup>108</sup> Although much of this conduct would constitute an unfair labor practice,<sup>109</sup> management can provide resources — including communicational, logistical, and financial resources — to workers who oppose unionization, while withholding similar resources from pro-union employees. For example, management often provides support to “vote no” committees during organizing drives.<sup>110</sup> Finally, management can help employees opposed to unionization overcome “second-order” collective action problems by imposing punishment on pro-union employees — a coordination cost that the anti-union employees would otherwise have to bear.<sup>111</sup>

These collective action problems make it more difficult for employees to depart from a nonunion default than it would be for them to depart from a union default. But beyond these asymmetric impediments, management can, and does, intervene directly in the employee decisional process in order to deter unionization.<sup>112</sup> I will briefly dis-

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<sup>104</sup> See, e.g., *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), cited in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

<sup>105</sup> See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992). See generally Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994).

<sup>106</sup> See Barenberg, *supra* note 5, at 934.

<sup>107</sup> See, e.g., *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953) (announcing rule that such captive audience meetings are prohibited only if delivered within twenty-four hours of election). Management can also enlist supervisors “who can be peremptorily fired if they fail to implement the anti-union campaign to upper management’s satisfaction — [and who] afford[] a ready-made political machine for this purpose.” Barenberg, *supra* note 5, at 934 (footnote omitted).

<sup>108</sup> Barenberg, *supra* note 5, at 800.

<sup>109</sup> See 29 U.S.C. § 158(a)(2) (2006).

<sup>110</sup> In one study, Bronfenbrenner found that such support was provided in 31% of the campaigns. BRONFENBRENNER, *supra* note 33, at 73.

<sup>111</sup> Barenberg, *supra* note 5, at 787.

<sup>112</sup> If all employer anti-union conduct designed to influence employee decisionmaking is taken to be a legitimate part of how employees form their preferences, then the “stickiness” of the non-union default caused by direct managerial opposition is attributable to legitimately altered employee preferences. I address this question in the next section, arguing that some employer inter-

cuss two particular forms of intervention: first, managerial threats or predictions that a successful unionization campaign will result in closure of the enterprise; and second, the discharge of employees in retaliation for support of unionization. Both forms of intervention are prevalent and both have the intended effect of deterring unionization.<sup>113</sup>

With respect to threats of closure, the Bronfenbrenner study finds that 57% of the 1004 employers in the sample made threats to close all or part of the firm if the employees decided to unionize.<sup>114</sup> With respect to discharge of workers for union activity, estimates of the frequency of discharge rates vary. Bronfenbrenner finds that employers discharged union activists in 34% of campaigns,<sup>115</sup> whereas John Schmitt and Ben Zipperer estimate that nearly one in five workers who takes an active role in union organizing is discharged for doing so.<sup>116</sup> Professor Charles Morris estimates that between 1992 and 1997, one in eighteen workers involved in organizing activity faced illegal retaliation.<sup>117</sup> The lowest end of the estimate range comes from a study prepared by the Center for Union Facts.<sup>118</sup> This study reports that in 2.7% of campaigns where the union filed an election petition, an employee was illegally fired for union activity.<sup>119</sup>

Wherever the discharge rate falls in this spectrum of estimates, and however frequent threats and predictions of closing are, several pieces of evidence suggest that these forms of management opposition to unionization are “extremely effective in reducing union election win rates.”<sup>120</sup> Making modest assumptions about the rationality of employer spending, these findings should not be surprising. Employers

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ventions cannot be understood as contributing to autonomous employee choice. See *infra* section III.B.2, pp. 685–91.

<sup>113</sup> The data available on the specific prevalence of these interventions are contested. See, e.g., Epstein, *supra* note 91, at 18–41. As noted above, however, we are concerned here not with the magnitude of the asymmetry created by employer opposition, but more simply with the existence of the asymmetry. As such, the precision of the data presented here is of less moment than the general phenomena they report.

<sup>114</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10. In her 2000 study, Bronfenbrenner found that in mobile industries (including manufacturing and communication), employers threatened closure in 68% of the organizing campaigns. BRONFENBRENNER, *supra* note 33, at v, 20.

<sup>115</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10.

<sup>116</sup> SCHMITT & ZIPPERER, *supra* note 37, at 11.

<sup>117</sup> Morris, *supra* note 37, at 330.

<sup>118</sup> The Center for Union Facts is a “union watchdog” dedicated to educating the public about “union officials’ abuse of power.” UnionFacts.com, About Us, <http://www.unionfacts.com/aboutUs.cfm> (last visited Nov. 22, 2009).

<sup>119</sup> WILSON, *supra* note 37, at 7. The substantially lower rate reported in this last study might be explained by the fact that by looking only at cases where an election petition was filed, the study excludes all instances in which union activists were discharged and the union was never able to gather sufficient support to file a petition. Nor does this study attempt to capture those illegal discharges of union supporters — after the filing of a petition — for which an unfair labor practice charge was not filed. See *id.* at 5–7.

<sup>120</sup> BRONFENBRENNER, *supra* note 33, at 43.

expend a great deal of resources combating union organizing drives, and it would be puzzling if they did so without in fact deterring unionization. Most specifically, employers frequently subject themselves to legal liability (in the form of back wage payments and reinstatement orders) in order to discourage unionization. Although monetary damages under the NLRA are limited to compensatory relief,<sup>121</sup> backpay orders are certainly not free. In fiscal year 2007, for example, the Board awarded \$117.3 million in backpay for “lost wages caused by unlawful discharge and other discriminatory action.”<sup>122</sup>

Empirical studies on the impact of employer interventions into the employee organizing process support the conclusion that these interventions have their intended effect. In her 2009 study, Bronfenbrenner found that employer anti-union activity was associated with declining union win rates. Thus, when employers used no anti-union tactics, the success rate of worker organizing efforts was 72%.<sup>123</sup> When employers deployed one to four of the anti-union tactics identified by Bronfenbrenner — some of which are legal, but many of which are illegal under the NLRA — the union win rate was 65%. And when an employer used ten or more anti-union tactics, the win rate was just 45%.<sup>124</sup> Of particular relevance here, Bronfenbrenner finds that threats of plant closings and discharges of union activists (when the worker is not reinstated before the election) are associated with union win rates lower than in campaigns where these tactics are not deployed.<sup>125</sup>

2. *Managerial Intervention and Employee Free Choice.* — I have argued that two sets of factors make it at least somewhat more difficult for employees to depart from the nonunion default than it would be for them to depart from a union default. The stickiness of the nonunion default is due, first, to collective action problems (and intertemporal market failures) that hinder employee efforts at unionization but would not hinder efforts to deunionize. Second, I have argued that a nonunion default is stickier than a union default because employer in-

<sup>121</sup> See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2695 & n.31 (2008).

<sup>122</sup> 72 NLRB ANN. REP. 10 (2007), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2007Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2007Annual.pdf).

<sup>123</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 11.

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

<sup>125</sup> See *id.* at 10. In an earlier study, Professor William Dickens found that the typical employer anti-union campaign, involving both legal and illegal tactics, reduced by 5–10% the probability that the average employee would vote “yes” on the question of unionization. See Weiler, *Promises To Keep*, *supra* note 5, at 1784. Phil Comstock and Maier Fox, summarizing the results of more than 150,000 interviews with workers in nonunion firms, report that 22% of white workers and 48% of African American workers cited “management pressure” as the primary impediment to union support. Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 32, at 90, 101.

intervention in the organizing process moves employee preferences in the nonunion direction. Yet, if employees are more likely to choose nonunion bargaining following employer intervention because they have legitimately formed a preference for nonunion bargaining, then the increased stickiness of the nonunion default attributable to direct managerial intervention (as opposed to that caused by asymmetric collective action problems) would simply be a legitimate product of altered employee preferences. If, however, this shift in employee preferences reflects an illegitimate influence on preferences, then the stickiness here would not reflect employee free choice and would call for correction.

In what sense might employer intervention in the union organizing process be inconsistent with employee free choice? A straightforward way to conceive of this dynamic begins with the observation that the commitment to employee “free” choice reflects the idea that employees’ choices on the question of unionization should be autonomous. As is conventionally understood, force and fraud impede the autonomy of choices.<sup>126</sup> Thus, where managerial intervention involves either force or fraud — coercion or misinformation — the influence of such intervention on employee preference expression should not be understood as contributing to free employee choice.<sup>127</sup>

The discharge of union activists is a particularly stark example of managerial intervention that takes this form. Here, employees who

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<sup>126</sup> Cf. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1132 (1986). See generally 2 E. ALLAN FARNSWORTH, *CONTRACTS* § 4.9, at 234–36 (4th ed. 2004). The relevant point here is only that force and fraud impede autonomy, not that force or fraud (as conventionally defined) are the only sources of such interference.

<sup>127</sup> A different way to conceive of the inconsistency between certain forms of employer influence and employee choice is through the lens of “adaptive” preferences. According to Sunstein, *autonomous* choices are those made with “a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on the process of preference formation.” Sunstein, *supra* note 93, at 11. Following Sunstein, then, preferences are not autonomously formed if individuals believe that some part of the universe of options, which is in fact open to them or in some normatively compelling sense should be open to them, is unavailable. See, e.g., Barenberg, *supra* note 5, at 796–97. Preferences formed under these conditions can be described as “adaptive” rather than autonomous. JON ELSTER, *SOUR GRAPES* 109–10 (1983). Sunstein provides several examples of adaptive preference formation, one of which relates specifically to unionization. He writes that:

Workers seem not to be willing to trade much in the way of money for self-government. But that preference may be a product of a belief that self-government in the workplace is unavailable. Were the option to be one that workers conventionally thought available, the option might be highly valued.

Sunstein, *supra* note 126, at 1148 (footnote omitted); see also Jon Elster, *Comments on Krouse and McPherson*, 97 ETHICS 146, 153 (1986) (“[R]ather than the absence of worker-controlled firms being explained by the absence of a desire for self-management, the causal chain may be the other way around.”). Indeed, much employer intervention into the union organizing process — including in particular the discharge of union activists and threats of plant closure described below — has the intent and the effect of signaling to workers that unionization, although available as a formal legal matter, is unavailable as a practical matter.

are openly supportive of union organizing efforts face “the [employment] equivalent of capital punishment.”<sup>128</sup> The effect on the employees actually discharged is literally to deprive them of the option of unionization: no longer employed by the employer, the discharged worker has lost her chance to support and ultimately join the union. But the signaling effect of such discharges extends beyond those workers actually removed from the workforce. The message sent by such discharges to the workforce as a whole is that support for unionization carries with it the very real risk that one’s employment at the firm will end.<sup>129</sup>

Of course, discharging an employee for supporting unionization is an unfair labor practice, and reinstatement is available as a remedy.<sup>130</sup> As I have noted in a previous article, however, the weakness of the NLRB’s remedial arsenal has rendered this unfair labor practice charge nearly meaningless.<sup>131</sup> Even in cases where the Board pursues and successfully prosecutes a discharge case, it takes the Board approximately two years to issue a reinstatement order.<sup>132</sup> Thus, in almost every instance, a union supporter discharged for organizing activity will remain out of the workforce for the entire life of the unionization effort.<sup>133</sup> To the extent that other employees involved in an organizing effort understand discharge as the potential price for supporting unionization, their choice on the question should not be understood as autonomous or free.

<sup>128</sup> *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 421 (1981) (quoting M. Jay Whitman, *Wildcat Strikes: The Unions’ Narrowing Path to Rectitude?*, 50 IND. L.J. 472, 481 (1975)).

<sup>129</sup> In Bronfenbrenner’s recent study, 34% of employers fired at least one union activist during the organizing campaign. Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10 tbl.3.

<sup>130</sup> See 29 U.S.C. §§ 158(a)(1), 158(a)(3) (2006); *id.* § 160(c).

<sup>131</sup> See Sachs, *supra* note 121, at 2694–97.

<sup>132</sup> See *id.* at 2695.

<sup>133</sup> In Bronfenbrenner’s 2000 study, employees discharged for union activity were reinstated before the election was held in only 3% of the cases where unfair labor practice charges were filed. BRONFENBRENNER, *supra* note 33, at 74 tbl.9. As Morris concludes, a “belated reinstatement does nothing to repair the damage caused by the chilling effect on unionization resulting from the discharge.” Morris, *supra* note 37, at 338. Morris also notes that “59 percent of employees who had been offered reinstatement refused to accept it, mostly (88 percent) because of their fear of company backlash; and of those who did accept reinstatement, 65.3 percent quit within a relatively short period of time because of what they perceived to be unfair treatment.” *Id.* (footnotes omitted) (citing Elvis C. Stephens & Warren Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31, 33–34 (1974)); see also Warren H. Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357, 360–64 (1981). Section 10(j) of the NLRA gives the Board authority to seek preliminary injunctive relief in cases of retaliatory discharge. See 29 U.S.C. § 160(j). See generally Morris, *supra* note 37, at 345–47. But while the Board formally possesses this power, it rarely employs it. In fiscal year 2008, for example, the Board authorized the General Counsel to seek section 10(j) injunctions in just twenty-one cases. See 73 NLRB ANN. REP. app. at 135 tbl.20 (2008), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2008Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2008Annual.pdf). See generally Sachs, *supra* note 121, at 2695 n.35.

While the discharge of union activists is a form of coercive intervention, employer threats that they will close all or part of the firm if the employees choose to unionize — which occurred more than half the time in Bronfenbrenner's sample<sup>134</sup> — can be a form of misinformation that interferes with autonomous employee choice. Here, the message is that unionization will lead not just to the discharge of certain union supporters, but also to the loss of all employees' jobs. Although predictions based on economic facts that unionization will lead to firm closure do not constitute misinformation, several pieces of evidence suggest that employer statements regarding firm closure made during organizing drives are more likely to be threats, lacking a grounding in economic fact, than they are to be genuine predictions. To start, what employees will demand through collective bargaining and what an actual contract will require can only be known at the conclusion of bargaining and is indeterminate during the course of an organizing effort. As such, it is rarely the case that employers can predict that unionization *simpliciter* will lead to any specific outcome.<sup>135</sup> Second, there is ample theoretical and empirical support for the view that unions will not — and most often do not — make wage demands that threaten the continued viability of the firm, at least in the short to medium term. Unions generally do not push for contractual gains that “destroy the goose that lays the golden egg.”<sup>136</sup> Third, Bronfenbrenner finds that actual threats of plant closure are unlikely to be related to the financial condition of the firm.<sup>137</sup> In her recent study, Bronfenbrenner reports that although 57% of employers in the sample threatened full or partial closure in the event of unionization, only 15% of firms actually closed any part of their businesses following the union drive.<sup>138</sup>

Finally, research regarding the general effects of unionization on firm survival and employment levels lends support to these conclusions. Thus, as reflected in a recent survey of the contemporary literature, studies report that while unionization may lead to slower growth, fewer expansions, and fewer firm “births,” unionization has no effect on firm “deaths” or on employment levels.<sup>139</sup> In a 2004 study, for ex-

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<sup>134</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10 tbl.3.

<sup>135</sup> There are, however, reported cases where a firm's customers have a policy of not dealing with unionized employers, in which case unionization itself might lead to a loss in the firm's income and thus job loss. *See, e.g.*, *DTR Indus., Inc.*, 311 N.L.R.B. 833 (1993).

<sup>136</sup> Richard B. Freeman & Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 *INDUS. & LAB. REL. REV.* 510, 526 (1999) (internal quotation marks omitted); *see also* RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6 (1984).

<sup>137</sup> BRONFENBRENNER, *supra* note 33, at vi.

<sup>138</sup> Bronfenbrenner, *No Holds Barred*, *supra* note 32, at 10 tbl.3.

<sup>139</sup> *See* Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, in *WHAT DO UNIONS DO?*, *supra* note 100, at 193, 217–18.

ample, Professors John DiNardo and David Lee examined firms where the NLRB ran a union election between 1984 and 1999, a data set that allowed the authors to examine business survival and employment effects over periods ranging from two to seventeen years.<sup>140</sup> The authors report that unionization had no significant impact on business survival.<sup>141</sup> Similarly, the authors found that the effect of unionization on employment was also statistically insignificant — ranging from slightly positive to slightly negative.<sup>142</sup> Professors Timothy Dunne and David Macpherson, in a 1994 study, and Professors Richard Freeman and Morris Kleiner, in a 1999 article, also conclude that unionization does not increase the likelihood of firm death.<sup>143</sup> Accordingly, Professor Barry Hirsch concludes his review of the contemporary literature by writing that “the empirical literature finds that U.S. unions are associated with slower employment growth but exhibit little or no difference in rates of business failure or survival.”<sup>144</sup>

Like discharges of union supporters, employer statements connecting unionization to plant closure may violate the Act.<sup>145</sup> Three factors, however, suggest that the potential for unfair labor practice liability is insufficient to alleviate concerns with threats of this kind. First, remedial weakness again renders deterrence from the unfair labor practice insufficient.<sup>146</sup> Second, in *NLRB v. Gissel Packing*

<sup>140</sup> See John DiNardo & David S. Lee, *Economic Impacts of New Unionization on Private Sector Employers: 1984–2001*, 119 Q.J. ECON. 1383, 1410 (2004). The authors observed firm existence and employment levels in 2001. Because elections took place between 1984 and 1999, business survival effects were averaged over periods ranging from two to seventeen years. See *id.*

<sup>141</sup> See *id.* at 1428.

<sup>142</sup> See *id.* at 1386, 1428.

<sup>143</sup> See Timothy Dunne & David A. Macpherson, *Unionism and Gross Employment Flows*, 60 S. ECON. J. 727, 728 (1994); Freeman & Kleiner, *supra* note 136, at 526 (“[U]nions do not, on average, drive firms or business lines out of business or produce high displacement rates for unionized workers.”); see also Hirsch, *supra* note 139, at 218 (reviewing this literature). But see Robert J. LaLonde et al., *Using Longitudinal Data on Establishments To Analyze the Effects of Union Organizing Campaigns in the United States*, 41/42 ANNALES D’ÉCONOMIE ET DE STATISTIQUE 155, 156 (1996) (reporting negative employment effects).

<sup>144</sup> Hirsch, *supra* note 139, at 218. Of course, it is something of a puzzle how or why unions could cause slower employment growth but not affect survival rates. Freeman and Kleiner propose one explanation: unions will push for contract gains but will not kill the “goose that lays the golden egg.” Freeman & Kleiner, *supra* note 136, at 526 (internal quotation marks omitted). Or, in Hirsch’s characterization, unions are “willing to drive enterprises toward the cliff but not over it.” Hirsch, *supra* note 139, at 218. Another possibility is that the wage premiums that unions bargain for allow firms to respond to economic downturns by cutting wages (through concessionary bargaining) rather than by contracting. See *id.* (citing Darren Grant, *A Comparison of the Cyclical Behavior of Union and Nonunion Wages in the United States*, 36 J. HUM. RESOURCES 31, 31–57 (2001)).

<sup>145</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–19 (1969); see also, e.g., *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 322 (7th Cir. 1995); *Shearer’s Foods, Inc.*, 340 N.L.R.B. 1093, 1094 (2003); *Be-Lo Stores*, 318 N.L.R.B. 1, 3 (1995).

<sup>146</sup> The typical remedy in an unlawful threat of plant closure charge is a cease-and-desist order. See, e.g., *Talsol Corp.*, 317 N.L.R.B. 290, 291 (1995); *Farris Fashions, Inc.*, 312 N.L.R.B. 547, 564

*Co.*,<sup>147</sup> the Supreme Court held that while “threats” of closure violate the Act, there is no unfair labor practice liability if an employer predicts “on the basis of objective fact” that the “demonstrably probable consequence[]” of unionization is closure.<sup>148</sup> But the doctrine has not remained faithful to this distinction, and the Board on numerous occasions has permitted employers to imply a causal connection between unionization and plant closure without the kind of support that *Gissel* seems to require.<sup>149</sup>

Third, neither the employees nor the union involved in an organizing drive has a right to information about the actual financial condition of the firm.<sup>150</sup> Regardless of what claims an employer makes concerning the likely effects of unionization, it is under no obligation to

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(1993); *Ring Can Corp.*, 303 N.L.R.B. 353, 364 (1991). Assuming the employer challenges unfair labor practice liability, it will take an administrative law judge an average of about nine months to issue such an order; and again, by the time the order has issued the election has likely been held or the organizing effort terminated. See 72 NLRB ANN. REP., *supra* note 122, app. at 184 tbl.23. Even if a cease-and-desist order does issue, moreover, it merely requires the employer not to make *another* illegal threat of closing. In cases where the union proceeds to the election and loses (that is, in cases where organizing efforts are not abandoned prior to the election), an illegal threat of closure can also be the basis for a rerun election. These orders are relatively rare, however, and generally issue only when the threat of closure is coupled with other egregious unfair labor practices. See, e.g., BRONFENBRENNER, *supra* note 33, at 30. Win rates in rerun elections, moreover, are significantly lower than in first-run elections. Over the five years ending in 2007, the NLRB ran only 139 rerun elections. Unions were certified in 53 (38.1%). During the same five-year period, the NLRB conducted 12,357 first-run elections, and 54.82% resulted in the certification of a labor organization. These numbers were compiled from data provided in the NLRB’s annual reports from 2003–2007. For rerun election data, see 72 NLRB ANN. REP., *supra* note 122, app. at 154 tbl.11E (2007); 71 NLRB ANN. REP. app. at 156 tbl.11E (2006), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2006Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf); 70 NLRB ANN. REP. app. at 133 tbl.11E (2005), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2005Annual.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2005Annual.pdf); 69 NLRB ANN. REP. app. at 232 tbl.11E (2004), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual20Reports/2004%20WholeAnnualReduced.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual20Reports/2004%20WholeAnnualReduced.pdf); and 68 NLRB ANN. REP. app. at 157 tbl.11E (2003), available at [http://www.nlr.gov/nlr/shared\\_files/brochures/Annual%20Reports/Entire2003AnnualReportreduced.pdf](http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2003AnnualReportreduced.pdf). For first-run election data, see 72 NLRB ANN. REP., *supra* note 122, at 1 (2007); 71 NLRB ANN. REP., *supra*, at 2 (2006); 70 NLRB ANN. REP., *supra*, at 2 (2005); 69 NLRB ANN. REP., *supra*, at 2 (2004); and 68 NLRB ANN. REP., *supra*, at 1 (2003). In Bronfenbrenner’s 2000 study, unions won none of the rerun elections in which the employer had made a plant closing threat during the original election campaign. See BRONFENBRENNER, *supra* note 33, at 30.

<sup>147</sup> 395 U.S. 575.

<sup>148</sup> *Id.* at 618.

<sup>149</sup> For several particularly stark examples, see *Smithfield Foods, Inc.*, 349 N.L.R.B. 1225, 1226 (2006); *Stanadyne Auto. Corp.*, 345 N.L.R.B. 85, 88–89 (2005); and *Mt. Ida Footwear Co.*, 217 N.L.R.B. 1011, 1012–14 (1975).

<sup>150</sup> Employers have a duty to furnish information to the union during collective bargaining, but this obligation arises only when there is a duty to bargain — that is to say, *after* the union has been recognized as the exclusive representative of employees in the bargaining unit. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that 29 U.S.C. § 158(a)(5) imposes a duty to furnish information during bargaining). There is no obligation to bargain, and no obligation to provide information, during the organizing campaign.

provide employees with information to verify these claims. As such, if management raises the prospect that unionization will lead to closure or loss of jobs, employees have no way to know whether the suggestion is likely to be accurate — that is, whether it is a “prediction” or a “threat.”<sup>151</sup> When management intervention in the employee organizing process takes the form of discharge of union activists or the threat that unionization will result in closure of the firm, the intervention can be expected to influence employee choice on the union question. But these interventions influence employee preferences in ways that are inconsistent with autonomous choice, and thus, employer interventions in the organizing process that take this form make departing from the nonunion default more difficult in a manner that we cannot attribute to free employee choice.<sup>152</sup>

3. *Departing from the Nonunion Default.* — Because we must assume complete uncertainty regarding actual employee preferences on the union question, as long as the factors discussed above make it any more difficult for employees to choose union rather than nonunion bargaining (if these factors make a nonunion default even 1% more

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<sup>151</sup> See *Gissel*, 395 U.S. at 618.

<sup>152</sup> Deliberative democratic theory offers another useful lens through which we might assess employer intervention into the employee organizing process. See Barenberg, *supra* note 5, at 794–801 (explaining the relevance of deliberative democratic theory in the union context). Although anything approaching a full discussion is beyond the scope of this Article, a few quick points bear mention. Central to all conceptions of deliberative democracy is the view that autonomous preference-formation requires some measure of equality among the parties to the deliberative process. See, e.g., JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 29–30 (1991); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 137 (1993); Cohen, *supra* note 16, at 74. What kind of equality is required? Professor Joshua Cohen argues that parties must be both formally and substantively equal. As he writes, “participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation, nor does that distribution play an authoritative role in their deliberation.” *Id.* at 74; see also FISHKIN, *supra*, at 29 (arguing that political equality must be reflected not only in formal decision rules, but also in the “background conditions that set the stage for participation in those formal decision-rules”).

For these theorists, substantive equality among participants in the decisionmaking process is necessary to ensure that the decisions arrived at through that process are based on autonomous preferences. See Cohen, *supra* note 16, at 77–78. In the employment relationship, employees and employers are neither formally nor substantively equal. See, e.g., Barenberg, *supra* note 5, at 959. And although it may be impossible — perhaps not even desirable — to eliminate this form of inequality, deliberative democratic theory suggests that in order for a decisionmaking process like unionization to be anything like democratic, the process might have to be “insulated” from this asymmetric power differential. See, e.g., Harry Brighouse, *Egalitarianism and Equal Availability of Political Influence*, 4 J. POL. PHIL. 118, 120 (1996). To the extent that employees can conduct and complete the organizing process without managerial intervention, employee decisionmaking can be — at least in part — insulated from the employer’s power over their “short- [and] long-term fate.” Barenberg, *supra* note 5, at 935. Indeed, Barenberg predicts this argument, writing that “the ideal of egalitarian deliberation among workers casts doubt on the now-widespread and lawful managerial practice of deploying supervisors and other managerial personnel to campaign against unionization.” *Id.* at 801.

“sticky” than a union default), a preference-eliciting or reversible default approach is appropriate.<sup>153</sup> And, indeed, given the evidence we have on the effectiveness of employer interventions and given the asymmetric nature of the collective action problems discussed above, a 1% differential seems a conservative estimate.

Of course, in the context of a union default rule, we should expect unions to discourage employees from choosing nonunion bargaining just as — under the nonunion default — employers intervene to discourage unionization. In a unionized firm, for example, the union could deploy social sanctions against anti-union employees and might also decline to provide vigorous representation in grievance proceedings to employees who favor decertifying the union.<sup>154</sup> These dynamics could mitigate some of the asymmetric stickiness of the two default rules, but several factors suggest that they would not eliminate the asymmetry. First, whatever force these forms of union authority have, they are not as powerful as those possessed by the employer in the nonunion workplace — exemplified by the ability to control wages and working conditions, discharge employees, and credibly threaten to terminate operations.<sup>155</sup> Second, in considering the *comparative* stickiness of the different default rules, it is relevant that the employer’s authority in a unionized workplace — and thus its ability to encourage decertification — is far greater than the union’s authority in a nonunion workplace.<sup>156</sup> Finally, irrespective of the results of a campaign to certify or decertify a union, the employer will remain the employees’ employer. In contrast, the union’s existence at the firm is contingent on the outcome of the campaign, another asymmetric dynamic that increases the salience of threats made by an employer relative to those a union might deliver. As noted above, a preference-eliciting or reversible default approach is appropriate so long as there is a *slight* differential in the ease of departure between the two default rules. Accordingly, so long as the employer’s ability to deter unionization is slightly greater than the union’s ability to deter decertification, the approach advanced here is appropriate.<sup>157</sup>

<sup>153</sup> See ELHAUGE, *supra* note 6.

<sup>154</sup> Such conduct would likely constitute a breach of the union’s duty of fair representation. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 185–86 (1967).

<sup>155</sup> In the contemporary setting, the social sanctions available to unions are often notoriously weak. For a theoretical account, see generally SAMUEL B. BACHARACH ET AL., *MUTUAL AID AND UNION RENEWAL* 1–6 (2001).

<sup>156</sup> See discussion *infra* section IV.A, pp. 701–06. Even in a nonunion workplace, union organizers and some particularly located employees will possess certain forms of authority vis-à-vis other employees. These forms of authority, as I discuss below, are relevant to the question of whether an open decisional process is appropriate. See *infra* Part V, pp. 712–27. What matters here is merely the comparative point.

<sup>157</sup> In the context of a union default, an altering rule like card check would enable employees to minimize *union* intervention in their decertification efforts.

Before moving on, it is worth noting, by way of contrast, that Professor Barenberg concludes that setting union bargaining as the default rule might be appropriate, but his conclusion is based on the view that most employees likely prefer unionization.<sup>158</sup> As he writes, “on balance, the default state of unionization would more accurately reflect the undominated long-term subjective preferences of employees in the current economic environment.”<sup>159</sup> This rationale is different than the one offered here. The argument here assumes, as indeed the statutory regime requires us to assume, complete uncertainty about employee preferences. Thus, the argument here, unlike Barenberg’s, is that a union default maximizes employees’ ability to choose between union and nonunion bargaining, not that a union default better captures employee preference for unionization.<sup>160</sup>

4. *Maximizing Employee Choice with a New Altering Rule.* — As I have shown, the preference-maximizing aims of a preference-eliciting or reversible default regime can be accomplished in two ways. First, labor law could impose a default rule of union bargaining. Second, Congress could change labor law’s altering rule in a way that minimizes the asymmetric stickiness of the nonunion default. In our context, because the relevant asymmetry flows from management’s opposition to unionization and its ability to intervene in the employee organizing process, an altering rule that eliminates or minimizes man-

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<sup>158</sup> See Barenberg, *supra* note 5, at 960.

<sup>159</sup> *Id.*

<sup>160</sup> The analysis in this Part is based on the fact that nearly all employers oppose unionization. We should account for the situation where employers support unionization. In that setting, because of managerial support for unionization, management’s ability to overcome collective action problems, and the like, it might well be easier for employees to depart from the nonunion default than from a union default rule. As such, the nonunion default *is* the reversible default when an employer supports unionization, and there would be no need for an asymmetry-correcting altering rule. But there would be no harm from such an altering rule either, as long as it is properly constructed. Under card check and rapid elections, where an employer supports unionization, unions and employees will have no incentive to keep management out of the organizing process. To the contrary, they will keep management involved in order to encourage employees to support the move to unionization. As such, under either card check or rapid elections, organizing would proceed in the same manner as under traditional NLRA rules. If the workforce did choose to unionize, moreover, an altering rule like card check or rapid elections would enable employees who prefer nonunion bargaining to minimize employer and union interventions in their efforts to decertify the union.

As currently structured, however, card check does present a serious problem at the decisional moment when the employer is supportive of unionization. The vulnerabilities of an open decisionmaking process are exacerbated when both management and the union have an incentive to pressure employees to sign cards. So secrecy, of one form or another, becomes even more critical in the case of pro-union employers. As noted, and as explained below, I propose two variants of card check that preserve decisionmaking secrecy. See *infra* Part V, pp. 712–27.

agement's ability to intervene in the unionization effort can correct the relevant asymmetry.<sup>161</sup>

Although the argument here provides conceptual justification for either a new default of unionized collective bargaining or a new altering rule, several considerations point in the direction of adopting a new altering rule and not a new default. The first of these considerations flows from the dynamic nature of workforces. That is, even if a firm begins its life with a union default, each time a workforce decides to depart and choose nonunion bargaining, the "default" position for all future workforces at that firm becomes nonunion bargaining.<sup>162</sup> Without an asymmetry-correcting altering rule, this nonunion position will exhibit precisely the same problems vis-à-vis future workforces — precisely the same stickiness — as a nonunion default set by law. As such, even were we to adopt a union default rule, we would *also* need an asymmetry-correcting altering rule.<sup>163</sup>

Given dynamic workforces, therefore, the choice is not between adopting a union default or an asymmetry-correcting altering rule. Rather, to maximize employee choice we must choose between adopting either a union default *and* an asymmetry-correcting altering rule or

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<sup>161</sup> In his work on waivable employee rights, Sunstein raises the potential benefits of a union default rule. He neither endorses nor opposes such a rule, but writes that "[i]t is easy to imagine an unusual regime, in which workers are presumed to favor collective organization, but in which they are permitted to vote otherwise." Sunstein, *supra* note 11, at 256. For Sunstein, a union default would have the advantage of serving as an "information-forcing default rule" — that is, it would help us "untangle" the question of whether the "failures of unionization stem from worker preferences or from employer pressure." *Id.* at 257. While information-forcing default theory is distinct from both preference-eliciting and reversible default theory in important respects, Sunstein's observation is consistent with the benefits of a union default noted above. Sunstein does not discuss altering rules and thus does not assess the merits of adopting an asymmetry-correcting altering rule instead of changing the default.

<sup>162</sup> See, e.g., Barenberg, *supra* note 5, at 960 ("The appeal of mandating unionization as the workplace default position is somewhat (although, to my mind, not decisively) diminished so long as workers are allowed to choose authoritarian workplace governance.").

<sup>163</sup> Once a firm moves from the nonunion default to the union alternative, unionization becomes the effective default position for future workforces. In this setting, managerial opposition to unionization no longer hinders departure from the default position and, indeed, management may try to encourage workers to depart and return to nonunion bargaining. There is therefore no call for an altering rule that enables employees to minimize managerial intervention when the workplace is already unionized. But, again, there is no harm from such a rule either. Employees who wish to depart from this union default — to decertify the union, in the parlance of current NLRB rules — will have no incentive to keep management out of the process, and so "decertification" organizing under a card check or rapid elections regime would function essentially as it does today. To the extent that the union might be able to interfere with employee efforts to move to the nonunion position, however, a card check-like altering rule would enable employees to minimize *union* interference. In any event, because of both the union's and management's interest in the outcome of such a campaign, confidentiality at the moment of decision — as ensured by the proposals I offer below — would be crucial.

adopting just the new altering rule.<sup>164</sup> Although there is no conceptual reason to favor a nonunion over a union default — so long as either is paired with an appropriate altering rule — there are clear pragmatic reasons to favor the nonunion default coupled with an asymmetry-correcting altering rule. To state the obvious, under current conditions, a union default would encounter practical and political obstacles of such scale as to render the prospects for such a proposal exceedingly improbable.

The political obstacles in the way of a union default rule are profound. Indeed, it is unlikely that a proposal for a union default would garner a single vote in Congress. This observation led Barenberg to locate the prospects for a union default in the “political ozone.”<sup>165</sup> Beyond the lack of political potential, however, a union default would encounter practical problems that stem from current levels of union density. More than 92% of private sector workers in the United States are now nonunion.<sup>166</sup> Thus, a union default would require nearly all of the private employers in the country to reorganize their labor-management relations systems in relatively short order. Of equal concern, the imposition of default unionism would cause deep practical problems for workers and unions. If the new default unions were simply internal to individual firms — if they had “no outside power base or organizational structure” — they would be subject to capture by employers.<sup>167</sup> If the history of company unionism is any guide,<sup>168</sup> in order to ensure *effective* default unionism, the law would need to require representation by an organization that had an organizational existence “outside as well as inside the workplace.”<sup>169</sup> It is not, however, possible to impose through legislative change the organizational capacity that would be necessary for U.S. unions — or other institutions — to provide adequate representation for an additional one hundred million workers.<sup>170</sup> Unlike a change to a default rule of statutory

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<sup>164</sup> Bebchuk and Hamdani point out that in certain contexts an asymmetry-correcting altering rule may not be a perfect substitute for the reversible default. See Bebchuk & Hamdani, *supra* note 6, at 506. This is true where the coordination costs involved in departing from one default are greater than those involved in departing from the other default, even when an appropriate altering rule is in place. See *id.* In our context, the introduction of the asymmetry-correcting altering rule should minimize the asymmetry in these costs.

<sup>165</sup> Barenberg, *supra* note 5, at 961.

<sup>166</sup> See Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary (Jan. 28, 2009), <http://www.bls.gov/news.release/union2.nro.htm>.

<sup>167</sup> Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 363 (2005); see also *id.* at 364 (“Part of what makes unions effective . . . is that they exist both inside and outside the workplace . . .”).

<sup>168</sup> See generally Barenberg, *supra* note 5.

<sup>169</sup> Estlund, *supra* note 167, at 364.

<sup>170</sup> There are now approximately 8,000,000 workers in unions out of approximately 108,000,000 workers in the private sector labor force. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF

interpretation or corporate governance, a new default rule for labor law would depend upon a massive increase in the organizational and representational capacity of worker organizations, an increase that would not be achievable in the foreseeable future. Absent that capacity, the practical result of a new requirement that firms be union by default would likely be either sham representation — which would, in the end, mean unions captured by employers — or simply an inability to meet the law's requirement in the vast majority of workplaces.

An asymmetry-correcting altering rule that minimizes employer intervention in union organizing avoids these problems while accomplishing the same preference-maximizing aims. First, under card check or rapid elections, employers would only be required to recognize a union when the union demonstrates that it has support of the majority of the relevant workforce; change would be incremental, and there would be no requirement that 92% of the nation's private businesses do anything all at once. Similarly, union growth would be far more organic under a new altering rule than under a union default. This result is significant because, as is the case today, union growth would be constrained by unions' capacity to organize new workers. This constraint implies that as new workers are added to union membership, unions concomitantly will develop the organizational capacity to represent them effectively. And politically, of course, changing labor law's altering rule is far more viable than imposing a union default.<sup>171</sup>

Because we can maximize employee preferences with an asymmetry-correcting altering rule, and because a union default would not be sufficient, maximizing employee choice with a new altering rule makes pragmatic sense.<sup>172</sup> That is the approach I explore in the final Parts of this Article.

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LABOR, CURRENT POPULATION SURVEY tbl.42 (2008), available at <http://www.bls.gov/cps/cpsaat42.pdf> (reporting that in 2008, 108,073,000 private sector workers were employed in the United States while 8,265,000 private sector workers were union members).

<sup>171</sup> Future research might explore the contours of a union default rule, addressing questions including what form mandatory unionization would take and whether, specifically, workers might be given a menu of representational options.

<sup>172</sup> Professors Adrienne Eaton and Jill Kriesky recently conducted a survey of 430 workers who had participated in either an NLRB election or a card check campaign in 2003. See Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157 (2009) [hereinafter Eaton & Kriesky, *Results of a Worker Survey*]. They conclude that their data “point[] to the central role of management in making the decision to unionize more difficult for workers, and the success of card check procedures in reducing these obstacles.” *Id.* at 169. They also report, perhaps in tension with their overall findings, “that the percentage of workers who said they felt free to choose whether or not to support the union did not differ between elections and card checks.” *Id.* at 170. Because of the distinctions between the organizing contexts that Eaton and Kriesky studied and the proposed regimes examined in this Article, I do not rely on the Eaton and Kriesky data here. Eaton and Kriesky's study involved firms that had not only voluntarily agreed to accept the results of a card check process, but, in sixty-one of sixty-three cases, had also committed to some form of “neutrality” with respect to

5. *The Inadequacy of Traditional Enforcement.* — Before turning to that discussion, however, a few words about the possibility for a more traditional enforcement approach are in order. Might we alleviate the asymmetric impediment to departure from the nonunion default simply through better enforcement of the NLRA's existing prohibitions on anti-union conduct? For several reasons, more rigorous enforcement of existing law is unlikely to be sufficient. First, as discussed above, part of the relevant asymmetry flows from traditional collective action problems that inhibit unionization but would not hinder the move away from a union default. Again, employers control the "physical and communicational life of the workplace"<sup>173</sup> and may ban much speech about unionization on company property and prohibit union organizers from entering company property. Employees who wish to unionize therefore bear the coordination costs of identifying and contacting other employees during nonwork time and at nonwork locations. At the same time, management is entitled to use the workplace to discourage unionization through communications delivered in one-on-one meetings or to the workforce as a whole.<sup>174</sup> All of this conduct is entirely legal under current NLRA rules, and thus bet-

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their employees' decision to unionize. *Id.* at 163. Card check and neutrality agreements of this sort, unlike the card check regime I discuss in this Article, contain contractually negotiated restrictions on management behavior — ranging from full to partial neutrality on the union question — during organizing campaigns. *See, e.g.*, Brudney, *supra* note 29, at 824–27. Such agreements also quite often contain other relevant provisions, including the employer's commitment to allow union organizers access to employer property. *See id.* at 826.

Importantly, the ability of such agreements to minimize managerial intervention does not depend on employees' conducting the organizing campaign without managerial knowledge in the way that a pure card check regime — like the one contemplated by EFCA — does; indeed, in card check and neutrality agreements the union generally must inform the employer that the organizing is underway in order to trigger the neutrality commitment. *See, e.g.*, Verizon Info. Sys., 335 N.L.R.B. 558, 559 (2001) ("Shortly after execution of the [card check and neutrality] Agreement, the [union] contacted the Employer about organizing employees covered by the Agreement."); United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied-Indus. & SWIU, Case No. 18-CB-4586, 2007 NLRB GCM LEXIS 10, at \*2 (NLRB Office of Gen. Counsel May 31, 2007) ("[T]he Union invoked the Neutrality Agreement in order to begin organizing the . . . employees . . ."). Given these contextual differences, I do not rely on Eaton and Kriesky's 2009 survey for the analysis in this Article. I do note that in an earlier study, Eaton and Kriesky found that unionization success rates were higher under pure card check agreements (that is, voluntarily negotiated agreements between unions and employers that contained a card check recognition process but not a neutrality commitment) than under NLRB elections during the period of their study (62.5% versus 45.6%). *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 51–52, 52 tbl.3 (2001). In this earlier study, 8.1% of the agreements in the authors' sample contained a card check provision but not a neutrality commitment. *See id.* at 47 tbl.1.

<sup>173</sup> Barenberg, *supra* note 5, at 934.

<sup>174</sup> *See supra* p. 683.

ter enforcement would do nothing to alleviate this conduct's contribution to the asymmetric stickiness of the nonunion default.<sup>175</sup>

Several of the forms of managerial intervention I have described, however, are prohibited under current law. Discharging an employee for supporting a union campaign is an unfair labor practice, as is threatening to close the firm in response to unionization. Prohibitions on these forms of conduct are underenforced,<sup>176</sup> and greater enforcement by the NLRB would likely deter some of the illegal behavior. But even here, increased enforcement of existing law is unlikely to prove a sufficient deterrent. For example, discharging a union activist is an effective means of averting unionization, and management may therefore view such discharges as a potential — and quite significant — source of cost savings for the firm; by firing one or several union supporters now, management may be able to avoid, for example, the wage premiums associated with unionization over the long run.<sup>177</sup> The sanctions available to the NLRB under current law are insufficient to change this calculus. Thus, although the NLRB can order an employer to pay back wages to employees who are discharged for union activity, such awards must be exclusively compensatory. No punitive awards of any kind are available,<sup>178</sup> and employees must mitigate damages by attempting to find alternative employment.<sup>179</sup> As such, even in a world of perfect enforcement, the harshest penalty an employer can face for discharging a union supporter is payment of the wages the employee would have earned absent the discharge, minus what the employee earned through alternative employment. Thus, it often would remain the “economically rational choice”<sup>180</sup> to discharge union supporters, even with perfect enforcement of existing law.

Even complete enforcement of existing law, therefore, would not remove the asymmetric impediments to unionization that flow from managerial opposition. We might do better, of course, by changing some of the NLRA's substantive rules and by increasing the strength of the remedial regime. For example, the statute might be amended to allow fuller communicational rights for employees at work and greater

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<sup>175</sup> A new altering rule like card check would leave in place restrictions on union activity in the workplace, but it would minimize management's opportunity to use the workplace — like any location — to campaign against unionization while a campaign for unionization is underway.

<sup>176</sup> See, e.g., Sachs, *supra* note 121, at 2694–97; *supra* pp. 687–88.

<sup>177</sup> See David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, in *WHAT DO UNIONS DO?*, *supra* note 100, at 79, 82–83, 84 tbl.4.2.

<sup>178</sup> See, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970).

<sup>179</sup> See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198–200 (1941).

<sup>180</sup> Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 63 (1993).

workplace access for union organizers.<sup>181</sup> In addition to the current compensatory awards available to the NLRB, Congress might allow for enhanced or punitive damages.<sup>182</sup> And, to ensure that discharged union supporters are returned to work quickly, an amended statute could provide for preliminary injunctive relief<sup>183</sup> or perhaps allow for a private right of action.<sup>184</sup>

Some or all of these sorts of amendments to the NLRA would likely reduce the prevalence of the previously described forms of managerial intervention into the union organizing process, and such changes to the statutory regime might well be justified on the choice-maximizing grounds discussed above. To be sure, the argument here is not that a new default or altering rule is the *sole* means of increasing the satisfaction of employee preferences, just that it is a conceptually appropriate and potentially effective one. Indeed, certain changes to the traditional regime might be made in conjunction with a new altering rule: for example, enhanced damages and better access to preliminary injunctive relief could act as a backstop to the new altering rule and help ensure that where the organizing technology fails, management is nonetheless deterred from taking illegal action.<sup>185</sup>

Although a discussion of the relative merits of other approaches to maximizing employee choice is beyond the scope here, it is worth observing that a new altering rule may have certain advantages over even an enhanced version of the current regime. Unless union organizing campaigns can be conducted and completed outside the workplace — outside the purview of managerial intervention — employee choice will continue to depend on direct legal regulation of managerial conduct. As the seventy-year history of the NLRA itself suggests, however, it is exceedingly difficult to design an enforceable set of rules to directly prevent managerial intervention in union organizing. The problems are well known and well documented.<sup>186</sup> To start, en-

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<sup>181</sup> For recommendations along these lines, see, for example, Estlund, *supra* note 105, at 353–55.

<sup>182</sup> Indeed, EFCA contains enhanced remedies for certain unfair labor practices. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). Many academic observers have recommended enhancing the damages available under the NLRA. See, e.g., GOULD, *supra* note 46, at 166 (“Double or triple back-pay awards would reduce the incentive for employers to engage in unlawful discriminatory dismissals.”); WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 247–48; Gottesman, *supra* note 180, at 75 (“[T]he solution is punitive damages . . .”).

<sup>183</sup> For proposals along these lines, see, for example, Morris, *supra* note 37, at 358; see also WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 243.

<sup>184</sup> See Estlund, *supra* note 33, at 1551–58.

<sup>185</sup> As currently drafted, EFCA would increase backpay awards to an amount equal to three times what the employee would have earned absent the discharge. In cases of willful or repeat offenses, the bill would add a civil penalty of \$20,000 per violation. See Employee Free Choice Act of 2009, H.R. 1409.

<sup>186</sup> For a general account, see Estlund, *supra* note 33, at 1537.

forcement depends upon reporting by employees and therefore can be subject to some of the same sorts of managerial interference as is unionization itself.<sup>187</sup> In other contexts, the line between legitimate managerial discretion and illegal conduct can be hard to detect and police. The distinction between legitimate predictions and illegitimate threats of plant closures discussed above is one example; others include forms of retaliation less severe than discharge.<sup>188</sup> Next, the pace of organizing campaigns and the crucial role played by momentum in unionization efforts puts enormous pressure on the *speed* of legal relief, and in certain cases even preliminary injunctive relief can come too late.<sup>189</sup> Finally, in order to effectively discourage unfair labor practices like the discharge of union supporters, damages might have to approach — or perhaps exceed, if discounted for the likelihood of enforcement<sup>190</sup> — the long-run wage increases management predicts the union would secure for the entire bargaining unit. This level of sanction may be higher than is politically palatable.<sup>191</sup>

Adopting an altering rule like card check or rapid elections constitutes a different approach to employee choice. Rather than attempting to deter managerial intervention through ex post legal sanction, the new altering rule offers a structural solution. It seeks, that is, to structure the organizing process in order to minimize the possibility that violations can occur in the first place. When the altering rule is successful — when employees are able to minimize managerial intervention — the inevitable imperfections in the enforcement apparatus cannot cripple the legal regime's mechanism for ensuring employee choice.<sup>192</sup>

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<sup>187</sup> This dynamic is less acute when workers already have been discharged and thus have little left to lose from reporting an employer's unfair labor practices. But with respect to other conduct, including, for example, threats of discharge and threats of plant closings, the concern about future retaliation can inhibit reporting. See *Lambert v. Ackerley*, 180 F.3d 997, 1003–04 (9th Cir. 1999) (fear of retaliation inhibits FLSA complaints); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 952–53 (2007); cf. Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 526–27 (2005).

<sup>188</sup> See Barenberg, *supra* note 5, at 933.

<sup>189</sup> See, e.g., Morris, *supra* note 37, at 338; Sachs, *supra* note 121, at 2695.

<sup>190</sup> See, e.g., David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238 (2005) (exploring possible solutions to low enforcement rates of minimum wage laws).

<sup>191</sup> See, e.g., Gottesman, *supra* note 180, at 63–64.

<sup>192</sup> Here, card check — or either of the forms of “card check 2.0” I develop below — constitutes a more ambitious and potentially more effective approach than does a rapid elections regime. As discussed in section II.B, rapid elections provide a statutorily guaranteed window for employer intervention between the filing of a petition and election day. Violations committed during this period of time would need to be addressed through ex post sanctions. Unlike rapid elections, card check and card check 2.0 aim to close this window completely and thus to avert entirely the need for ex post remedies. Again, though, even under card check or card check 2.0, legal remedies provide a backstop when the organizing technology fails. See *supra* p. 699.

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#### IV. MAXIMIZING EMPLOYEE CHOICE BY MINIMIZING MANAGERIAL INTERVENTION

I have argued that an asymmetry-correcting altering rule that minimizes employer intervention can maximize employee choice. But enabling employees to conduct and conclude organizing campaigns with a minimum of managerial intervention raises a discrete set of questions. The first is whether Congress should provide employers an affirmative right to intervene in the employee organizing process. This question is implicated most starkly by card check which, again, aims to enable employees to complete organizational efforts before the employer is aware that a campaign is underway. But the question is also relevant for a rapid elections proposal. As noted above, a rapid elections regime would provide employers some minimum window of time during which they could intervene in unionization campaigns. Nonetheless, if management ought to enjoy an affirmative right to intervene in employees' organizing efforts, restricting the scope of that participation to a period as short as five days would require justification. Because, as I argue below, labor law need not provide employers an affirmative right to intervene, a decisional mechanism — like rapid elections — that limits the scope of such intervention does not deprive management of a right that it ought otherwise to possess. The second question, implicated by both card check and rapid elections, concerns the loss of information available to employees in an organizing effort conducted with less managerial involvement. In this Part, I address these two questions in turn.

##### *A. Providing an Affirmative Right To Intervene?*

With respect to the first question, the claim that employers should enjoy an affirmative right to participate in the employee organizing process is grounded in the view that a union representation election, like a political election, is a contest between management and the union over firm governance.<sup>193</sup> As Weiler puts it, under this view, “the employer is legitimately entitled to play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats.”<sup>194</sup> And indeed, if a union election actually resolved which party governed the firm, or if unionization amounted to a shift in firm governance from sole to joint sovereignty, the argument in favor of employer participation would be strong. But for better or worse, sovereignty in the workplace is not at

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<sup>193</sup> For a thorough treatment of the political election analogy in labor law, see Becker, *supra* note 5.

<sup>194</sup> Weiler, *Promises To Keep*, *supra* note 5, at 1813.

stake in a union election.<sup>195</sup> To the contrary, employees decide through the union representation process only whether they wish to bargain individually or collectively with their employer.<sup>196</sup> If employees choose to unionize, the law then imposes on the employer a duty to bargain “in good faith” with the union on behalf of the employees in the bargaining unit over “wages, hours, and other terms and conditions of employment.”<sup>197</sup> But that is all the law requires: good faith collective bargaining, instead of individual bargaining, over terms and conditions of employment. As many scholars already have observed, and as the scope and content of this duty make clear, employees’ decision to bargain collectively will undoubtedly have an impact on management, but collective bargaining amounts to neither sovereignty nor control.<sup>198</sup>

To start, the duty to bargain in good faith extends only to “mandatory subject[s] of bargaining.”<sup>199</sup> With respect to any topic that is not a mandatory subject — so-called permissive subjects — the employer is under no obligation to engage with the union in any way.<sup>200</sup> The Supreme Court, moreover, has interpreted this statutory list of mandatory subjects narrowly. Most importantly for our purposes, the Court has excluded from the duty to bargain precisely those decisions that most directly implicate control of the firm. In general terms, the Court has instructed that decisions that “lie at the core of entrepreneurial control” are definitionally beyond the scope of the bargaining obligation.<sup>201</sup> The NLRB is thus prohibited from requiring employers to bargain with a union if that bargaining would “significantly abridge [the employer’s] freedom to manage the business.”<sup>202</sup> Under this rule, the Board and the courts have held that an employer has no duty to

<sup>195</sup> See, e.g., Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1545–47 (1981). Professor Katherine Stone’s piece marked a departure from earlier scholarship that advanced a theory of industrial pluralism. See, e.g., *id.* at 1514–15 (citing WILLIAM M. LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* 55–56 (1959); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 1), 61 HARV. L. REV. 1, 1 (1947)).

<sup>196</sup> Again, this describes only the change in the relationship between employees and employers effected by unionization. See *supra* note 17.

<sup>197</sup> 29 U.S.C. § 158(d) (2006); see also *id.* § 158(a)(5); *id.* § 159(a) (making it an unfair labor practice to refuse to bargain in good faith). The law concurrently prohibits the employer from bargaining directly with individual employees. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944).

<sup>198</sup> See, e.g., WEILER, *GOVERNING THE WORKPLACE*, *supra* note 5, at 258–59; Becker, *supra* note 5, at 530–31, 581; Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 53 (2008); Stone, *supra* note 195, at 1545–47; Weiler, *Promises To Keep*, *supra* note 5, at 1813–14.

<sup>199</sup> *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). For a more recent discussion, see *Pall Corp. v. NLRB*, 275 F.3d 116, 119–20 (D.C. Cir. 2002).

<sup>200</sup> See *Borg-Warner*, 356 U.S. at 349.

<sup>201</sup> *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

<sup>202</sup> *Id.* at 213 (majority opinion).

bargain over investment decisions, financing decisions, advertising decisions, or product design decisions.<sup>203</sup> Nor does an employer have a duty to bargain over a decision to subcontract out bargaining unit work,<sup>204</sup> or to close part of its business.<sup>205</sup> Perhaps most profoundly, the employer has no obligation to bargain over a decision to cease operating entirely.<sup>206</sup> Thus, even if employees choose to unionize, when it comes to life-and-death decisions of the firm, not only does the union lack joint control over the decisionmaking process, but the employer also has no duty to engage with the union before making and implementing its decision.

Next, even regarding those subjects that fall within the scope of the bargaining obligation — for example, wages or work schedules — the rules concerning “management rights clauses” further clarify the nature of unionization’s impact on firm sovereignty. In short, although an employer is obligated to bargain in good faith over these mandatory subjects, the Supreme Court has held that an employer’s bargaining position may be to maintain unilateral control over the subject. Thus, in *NLRB v. American National Insurance Co.*,<sup>207</sup> the Court held that an employer does not violate its duty to bargain in good faith by insisting that certain mandatory subjects be deemed the “responsibility of management.”<sup>208</sup> This point is not a new one, and indeed it has been made repeatedly and emphatically in the literature. Professor Craig Becker, for example, in his exploration of the political election analogy in labor law, concludes that “[t]he union election vests labor’s representative with no sovereignty in the workplace,”<sup>209</sup> and that “the elec-

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<sup>203</sup> See *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676–77 (1981) (listing subjects that are clearly beyond the scope of the bargaining obligation because they “have only an indirect and attenuated impact on the employment relationship,” *id.* at 677).

<sup>204</sup> See *Fibreboard*, 379 U.S. at 217–26 (Stewart, J., concurring). If the subcontracting involves only “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,” then it does fall within the duty to bargain. *Id.* at 215 (majority opinion). Under any other circumstances, there is no duty.

<sup>205</sup> See *First Nat’l Maint. Corp.*, 452 U.S. at 680–86. If the partial closure is motivated by anti-union animus, and the union can prove as much, the Board will find an unfair labor practice. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 274–75 (1965).

<sup>206</sup> See *Textile Workers Union*, 380 U.S. at 271–72.

<sup>207</sup> 343 U.S. 395 (1952).

<sup>208</sup> *Id.* at 397; see also *Int’l Woodworkers Local 3-10 v. NLRB*, 458 F.2d 852, 857 (D.C. Cir. 1972) (upholding broad management rights clause). If a proposed management rights clause is extremely broad, covering all or nearly all mandatory subjects, and is coupled with other evidence of bad faith bargaining, an unfair labor practice charge may lie. See, e.g., *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 (11th Cir. 1984). The Board has also found an unfair labor practice where the employer insisted on incorporating its pre-unionization employment policies wholesale into the collective bargaining agreement. See *Radisson Plaza Minneapolis*, 307 N.L.R.B. 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993).

<sup>209</sup> Becker, *supra* note 5, at 581.

tion simply interposes the union as the agent of the employees for the limited purpose of bargaining with the employer.”<sup>210</sup> Weiler similarly explains that “the purpose of the representation process is to permit employees to decide whether collective bargaining or individual bargaining will better advance their own interests[, and] . . . [i]f they choose to deal with their employer collectively, the representation process enables them to license the union . . . to bargain on their behalf.”<sup>211</sup> But he concludes that “[a] trade union does not govern the employees in the unit. Unlike an elected legislature, the union does not have the authority to prescribe conditions in the workplace.”<sup>212</sup> And the Supreme Court has given voice to this same conclusion. In *Gissel*, the Court explained that “what is basically at stake” in the union election “is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee, and the employee’s union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined.”<sup>213</sup>

Labor scholars have proposed a slew of metaphors to describe what they view as the anomalous nature of the proposition that Congress should afford management an affirmative right to intervene in union organizing efforts. For example, Weiler suggests that an apt analogy to the employer in the unionization process is a foreign government in an American political election: although the domestic election may well have an impact on both the foreign government and its citizens, neither enjoys participatory rights in the American electoral process.<sup>214</sup>

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<sup>210</sup> *Id.* at 583.

<sup>211</sup> Weiler, *Promises To Keep*, *supra* note 5, at 1813.

<sup>212</sup> *Id.* at 1810. Stone likewise concludes that “the industrial pluralist metaphor of the plant as a mini-democracy” is a “mere illusion.” Stone, *supra* note 195, at 1566.

<sup>213</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969). The interest arbitration provisions of EFCA, should they become law, would not fundamentally alter these facts. Although a full discussion is beyond the scope here, those provisions would — in the case of a bargaining impasse — call on an arbitrator to derive the contract that the parties most likely would have reached based on the parties’ bargaining prior to the arbitrator’s intervention. The contract would then remain in effect for two years, at which point the parties would return to the table for a second round of negotiations — negotiations that would not be subject to arbitration in the case of impasse. Interest arbitration under EFCA would not enable a union to insist upon contract terms. Nor would it change any of the rules concerning mandatory subjects of bargaining or management rights clauses. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (2009).

<sup>214</sup> WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 259–60. Becker points to similar analogies proffered during the congressional debates over the Wagner Act, and in particular, over whether employers would have a role in administrative disputes over representation. Thus, the AFL’s counsel asked Congress: “[S]uppose the United States and Mexico were seeking to adjust a boundary matter by negotiation through commissioners. How would it be regarded if the United States sought to influence the selection of certain commissioners to represent Mexico?” Becker, *supra* note 5, at 531 (quoting *National Labor Relations Board: Hearings on S. 1958 Before*

Professor Gordon Lafer suggests that unionization is more like the formation of a new political party than the election of a representative<sup>215</sup> — the former a process in which individuals decide to advance their shared aims collectively and in which there is no call for intervention from or participation by an opposing side. Professor Matthew Bodie puts it most simply: “Whether I hire Joy to represent me in my negotiations with Earl is really no business of Earl’s.”<sup>216</sup> None of these analogies is perfect,<sup>217</sup> and others are available. For example, employers themselves routinely join “associations” and appoint the association as their agent for collective bargaining purposes.<sup>218</sup> Although an employer’s choice to join such an association will impact the course and content of negotiations, neither employees nor unions have a right to intervene in an employer’s decision to join an association and to appoint the association as its bargaining agent.<sup>219</sup> Another potentially useful analogy is to litigation, and the decision by a group of plaintiffs to proceed as a class. The defendant in any such litigation setting will be impacted by the plaintiffs’ decision to pursue class certification, but the defendant has no right to intervene in the plaintiffs’ deliberations in order to present the arguments against proceeding as a class. Indeed, such intervention would likely violate legal ethics rules.<sup>220</sup> The

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*the S. Comm. on Educ. and Labor*, 74th Cong. 150 (1935) (statement of Charlton Ogburn, Counsel, AFL) (internal quotation marks omitted).

<sup>215</sup> See Lafer, *supra* note 46, at 83.

<sup>216</sup> Bodie, *supra* note 198, at 53.

<sup>217</sup> Lafer himself writes that “[t]here is no act in national politics that is a perfect analogy to union formation.” Lafer, *supra* note 46, at 83.

<sup>218</sup> See, e.g., The Employers Council: Union Relations, <http://www.ecutah.org/union.htm> (last visited Nov. 22, 2009); United Employers Association, Labor Relations, [http://www.unitedemployers.org/home/labor\\_relations](http://www.unitedemployers.org/home/labor_relations) (last visited Nov. 22, 2009).

<sup>219</sup> Before the Board will certify a “multi-employer bargaining unit,” the consent of both the union and the employer is required. See, e.g., *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004). In such cases, the employees of several distinct employers are grouped together in a single bargaining unit and bargain for a single contract. See *id.* This doctrine is distinct from cases in which employers designate a collective representative, like an employer association, to bargain on their behalf for single employer units. In these cases, no union consent is required.

Corporations, of course, routinely make decisions of various kinds that have impacts on employees, consumers, and third parties. Yet the fact that corporate decisions have these impacts almost never gives those affected groups a right to intervene in corporate decisionmaking processes. Some commentators have argued that employees — whether unionized or not — should enjoy participatory rights in corporate governance. See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 335 (2008). However, the law is decidedly to the contrary. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573 (2003) (arguing that corporate governance is dominated by directors); Greenfield, *supra*, at 284–85.

<sup>220</sup> The ABA’s Model Rules of Professional Conduct prohibit, for example, defense lawyers from communicating with represented plaintiffs, see MODEL RULES OF PROF’L CONDUCT R. 4.2, (2008), and they prohibit defense counsel from giving any legal advice to unrepresented plaintiffs “other than the advice to secure counsel,” *id.* R. 4.3.

defendant can challenge, in court and after the plaintiffs have decided to proceed as a class, whether the plaintiffs have in fact met the requirements for class certification, just as an employer may challenge, for example, the eligibility of certain employees, the validity of ballots or cards, and the tally of the ballots or cards. But in the litigation context, the plaintiffs' decision to seek class status is theirs alone to make.<sup>221</sup>

Whatever analogy one favors, the relevant observation is that unionization is a process through which employees choose to bargain collectively, rather than individually, with their employers and through which employees designate an agent for these purposes. The law entitles unions to bargain (though not over many of the most important decisions a firm will make), but unionization is not a process through which employees decide whether to assume joint sovereignty in the firm. Although employers will be impacted by the choice employees make on the unionization question, that fact does not provide the basis for an affirmative right to intervene in the employees' decisionmaking process.<sup>222</sup>

### B. Information Loss

The second question raised by an altering rule that minimizes employer intervention concerns the loss of information available to em-

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<sup>221</sup> In certain circumstances, in order to avoid repetitious litigation, defendants can themselves move to have plaintiffs certified as a class. See *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981).

<sup>222</sup> The Supreme Court has held that the First Amendment protects, against state infringement, an employer's right to speak in opposition to unions and unionization. See *Thomas v. Collins*, 323 U.S. 516 (1945). These First Amendment rights were incorporated into the NLRA in 1947 through section 8(c), which dictates that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (2006). Professor Michael Gottesman has made the point that, even under a card check regime, employers remain free to express their views on unionization and that a First Amendment attack on card check would fail on state action grounds. He writes:

It's one thing to say that the government can't muzzle an employer from expressing its views. It's quite another to say that the government has to structure its laws to provide employers notice about when their speech might be most efficacious. Under EFCA, employers will remain free to voice their views about the downsides of unionization whenever and as often as they want. They can rail against unions on a continuing basis, so long as they refrain from threats or coercion. That's all the First Amendment guarantees them.

Posting of Michael H. Gottesman to American Constitution Society Blog, *The Improbable Claim that EFCA Is Unconstitutional*, <http://www.acslaw.org/node/12895> (Feb. 4, 2009, 09:39). It is also true that the Court's holding in *Thomas v. Collins*, 323 U.S. 516, was based on the fact that the union organizing process was structured by Congress as an electoral process. See Becker, *supra* note 5, at 543-47. If EFCA or subsequent legislation were to provide nonelectoral means through which employees could organize unions, the reasoning of *Thomas* may no longer hold. Under a rapid elections regime, management would have a statutorily guaranteed window — albeit a minimal one — to campaign against unionization before employees vote.

ployees. The argument here is that full employer participation is required in order to ensure that employee choice on the union question is fully informed. For example, Epstein argues that:

Employer speech provides valuable information to workers. Workers need to be able to form an educated view on the long-term implications of union representation, which includes some estimate as to how well employees think the union and employer will work together on points of common concern. Employees can form that judgment only by collecting information from all sides.<sup>223</sup>

Outside the legal academy, former NLRB member Charles Cohen contends that only the NLRB election process, with employer participation, can ensure a “fully informed electorate.”<sup>224</sup>

Provision of information is generally good,<sup>225</sup> and in an employee organizing campaign conducted with less employer intervention, employees may receive less information from their employer regarding management’s views on unionization.<sup>226</sup> Such information loss would constitute a cost of an asymmetry-correcting altering rule that minimizes employer intervention. But, for several reasons, the cost to employee choice from this information loss is likely to be low and unlikely to outweigh the choice-maximizing advantages that flow from an asymmetry-correcting altering rule.<sup>227</sup>

First, even under a card check regime, in which management would have no statutorily provided window to intervene prior to a demand for recognition, management would remain free to, and indeed would have a new incentive to, present its general views on unionization on a more continuous basis. Management, that is, could “weave a lawful ‘anti-union campaign’ into the organizational warp and woof of the enterprise,”<sup>228</sup> informing employees when they are hired, as well as during regular intervals, why it believes that unioni-

<sup>223</sup> Epstein, *supra* note 91, at 25.

<sup>224</sup> *Emerging Trends in Employment and Labor Law: Labor-Management Relations in a Global Economy: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce*, 107th Cong. 30 (2002) (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockius LLP) (testifying on behalf of the U.S. Chamber of Commerce).

<sup>225</sup> See *Estlund Testimony*, *supra* note 46, at 16 (“Information is good.”).

<sup>226</sup> In their 2009 study, Eaton and Kriesky asked workers if they had “enough information about three items to make an informed decision about union representation.” Eaton & Kriesky, *Results of a Worker Survey*, *supra* note 172, at 168. They found that “workers in card check campaigns were generally somewhat less satisfied with the amount of information they had than were workers in elections.” *Id.* The authors also report, however, that the “vast majority” of workers who actually signed authorization cards “felt they had enough information to make an informed decision.” *Id.*

<sup>227</sup> Weiler reaches the same conclusion. See WEILER, *GOVERNING THE WORKPLACE*, *supra* note 5, at 261 (“My reading of the evidence about how the current lengthy representation campaign has actually operated in practice leaves me quite unpersuaded of [the] net social value [of employer intervention].”).

<sup>228</sup> Barenberg, *supra* note 5, at 941.

zation is not in the interests of the firm. In this respect, card check would require management to change the timing of its information delivery — it could no longer wait until an organizing drive to state its views on unionization — but the new rule would not disable management from communicating its views at other moments.<sup>229</sup> In a rapid elections regime, management not only could conduct such ongoing anti-union efforts, but also would be entitled to campaign against unionization between the filing of the petition and election day. This window of time would be short — again, somewhere between five days and two weeks — but it would nonetheless provide management an opportunity to express its views.

Second, employers are not the only source of information for the “nonunion” side of the argument. To the contrary, there is a set of third-party organizations whose *raison d’être* is providing employees with information about and arguments against unionization. Organizations including the National Right to Work Committee (and its affiliated Legal Defense Foundation) and the Center for Union Facts offer comprehensive data about every major union in the United States along with reports that highlight the deleterious effects of unionization. The Center for Union Facts, for example, has compiled a database that “contains more than 12.5 million facts about the American labor movement[,] [f]rom the smallest local to the largest international union.”<sup>230</sup>

The Center also has made available profiles of each major U.S. union. Each profile contains background information (including membership levels, growth trends, and salary levels of staff and leadership), union budget information, spending levels on lobbying and political activity, unfair labor practices charges filed against the union (broken down by type of charge), the union’s win-loss record in NLRB elections, and the union’s history of decertification elections.<sup>231</sup> Each profile also contains a narrative account of the union’s history, highlighting what the Center finds most relevant.<sup>232</sup> For example, in its profile of the United Auto Workers, the Center reports that the union has “[n]egotiat[ed] for overly generous health benefits for union members

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<sup>229</sup> To be sure, if management must deliver anti-union messages on an ongoing basis, it would not be able to offer specific information about the particular union involved in an organizing campaign. But, as noted immediately below, even under current rules that permit management to deliver anti-union messages during the actual organizing effort, management often must rely on such generalized arguments about unionization. See *infra* notes 240–242 and accompanying text.

<sup>230</sup> Center for Union Facts, Find Your Union: Union Profiles, <http://www.unionfacts.com/unions> (last visited Nov. 22, 2009).

<sup>231</sup> See, e.g., Center for Union Facts, Union Profile: United Food and Commercial Workers (UFCW), <http://www.unionfacts.com/unions/unionProfile.cfm?id=56> (last visited Nov. 22, 2009).

<sup>232</sup> See, e.g., *id.*

[that] ha[ve] aided and abetted the decline of the auto industry.”<sup>233</sup> Other profiles detail allegations and reports of union corruption,<sup>234</sup> the prevalence of strikes and their deleterious effects on workers,<sup>235</sup> and union violence.<sup>236</sup> The focus of these profiles is similar to the themes most commonly highlighted by employers during organizing campaigns.<sup>237</sup> Finally, the National Right to Work Committee and its Legal Defense Foundation provide similar information to employees,<sup>238</sup> but, unlike the Center for Union Facts, these organizations engage in affirmative outreach to employees when they learn that an organizing campaign is underway.<sup>239</sup>

These third-party organizations usually cannot provide information about an individual firm or the particular impact that unionization

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<sup>233</sup> Center for Union Facts, Union Profile: United Auto Workers (UAW), <http://www.unionfacts.com/unions/unionProfile.cfm?id=149> (last visited Nov. 22, 2009).

<sup>234</sup> See Center for Union Facts, Union Profile: UNITE HERE (UNITHE), <http://www.unionfacts.com/unions/unionProfile.cfm?id=511> (last visited Nov. 22, 2009).

<sup>235</sup> See Center for Union Facts, *supra* note 231.

<sup>236</sup> See Center for Union Facts, Union Profile: AFL-CIO (AFLCIO), <http://www.unionfacts.com/unions/unionProfile.cfm?id=106> (last visited Nov. 22, 2009).

<sup>237</sup> See, e.g., Bodie, *supra* note 198, at 53 (“[Employers] look to disseminate information about the union that is negative from an employee’s perspective[, including] information about the union’s past ineffectiveness, its wastefulness of union funds, and its inability to live up to its campaign promises . . . .”); see also Alfred T. DeMaria, From the Editor, *Learning Lessons (Good and Bad) from a Real-Life Campaign*, MGMT. REP., Apr. 2001, at 3, 4–5 (listing the likelihood of strikes and the possibility of job loss as common employer themes).

<sup>238</sup> For example, the Foundation provides information to employees concerning their legal rights to oppose unionization. See National Right To Work Legal Defense Foundation, About Your Legal Rights: Private Sector Employee, <http://www.nrtw.org/about-your-legal-rights-private-sector-employee> (last visited Nov. 22, 2009); National Right To Work Legal Defense Foundation, What Are My Rights if the Union Is Conducting a “Card Check” Organizing Drive at My Workplace?, <http://www.nrtw.org/faq/what-are-my-rights-if-union-conducting-card-check-organizing-drive-my-workplace> (last visited Nov. 22, 2009) (detailing an employee’s legal rights in a card check process).

<sup>239</sup> In some cases, the Foundation mails literature directly to employees of the firm where the unionization effort is taking place. See, e.g., National Right To Work Foundation, Why Is Johnson Controls Giving Your Home Address and Telephone Number to Union Organizers?, [http://www.nrtw.org/neutrality/na\\_ad3.pdf](http://www.nrtw.org/neutrality/na_ad3.pdf) (last visited Nov. 22, 2009). In other instances, the Committee has garnered press attention for its efforts. For example, at the beginning of a campaign conducted by UNITE to organize Cintas laundry workers, the Committee issued a press release offering assistance to Cintas employees “who have been threatened by UNITE organizers or feel their rights have been violated.” News Release, Nat’l Right To Work Legal Def. Found., Legal Foundation To Assist Cintas Employees Harassed by UNITE Union Organizers (Sept. 17, 2003), available at <http://www.nrtw.org/en/press/2003/09/legal-foundation-assist-cintas-employees-harassed-unite-union-organizers>. The release detailed employee opposition to UNITE organizing efforts in other cities and reported that “in a recent National Labor Relations Board ruling, UNITE was stripped of its illegally obtained bargaining power for using coercive tactics in an organizing drive in New York.” *Id.* The *Cincinnati Enquirer* published a short article based on the Foundation’s press release and included the Foundation’s contact information. See *Group Says Unions Pressure Workers*, CINCINNATI ENQUIRER, Sept. 18, 2003, at 1D.

will likely have on that firm,<sup>240</sup> but the type of general information that third parties provide is the type that employers most often communicate during organizing campaigns.<sup>241</sup> This phenomenon is due largely to the fact that it is never possible to predict during an organizing campaign the specific impact that unionization will have on a firm. Thus, during the organizing phase, employers must rely primarily on general arguments about the effects of unionization, evidence gathered from past campaigns involving the same union, or more general information about the particular union involved in the campaign. Particularly when employers rely on consultants to direct their interventions, the information provided to employees follows something approaching a predesigned script focusing on these general themes.<sup>242</sup>

Third-party organizations are not a perfect substitute for employer intervention. Except in instances in which the organizations are successful in their outreach efforts, the information provided by third parties can be accessed only if an employee takes the initiative to access it. But for employees who seek out the information — and for those contacted through third-party organizational outreach — these nonprofit organizations can provide a substantial part of the information that otherwise flows from employer interventions.<sup>243</sup>

Third, as demonstrated most recently by Bodie, employers are not ideally suited to present to employees the “nonunion” side of the unio-

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<sup>240</sup> There are exceptions, as illustrated by the Foundation’s work on the Cintas and Johnson Controls organizing campaigns. See *supra* note 239.

<sup>241</sup> See sources cited *supra* note 237. For some illustrative accounts, see LAFER, *supra* note 34, at 13–28.

<sup>242</sup> For example, the Labor Relations Institute offers a set of thirteen preprinted posters that address “[t]he questions most commonly asked during a union organizing campaign,” campaign flyers designed to “help you to further focus on issues common to most organizing campaigns,” and union-specific publications that “highlight[] the many restrictive rules and regulations contained in the international unions [sic] constitution.” Labor Relations Institute, [http://www.lrionline.com/union\\_avoidance/campaign\\_literature.htm](http://www.lrionline.com/union_avoidance/campaign_literature.htm) (follow “add to cart” hyperlinks for “campaign posters,” “campaign flyers,” and “rules of the road”) (last visited Nov. 22, 2009). Similarly, the *Management Report for Nonunion Organizations* offers a “sample campaign flyer” regarding union misuse of member dues, LAFER, *supra* note 34, at 23 (internal quotation marks omitted), and a union avoidance manual prepared by a prominent labor law firm that provides employers with a detailed communication plan for an “Illustrative Election Campaign,” *id.* at 15 (internal quotation marks omitted). One management periodical offers a sample speech to be given at the first sign of union activity and another sample speech to be delivered the day before the campaign ends. See Lafer, *supra* note 46, at 86–87 (quoting Alfred T. DeMaria, From the Editor, *Speech to Employees at the First Sign of Union Activity*, MGMT. REP., Mar. 2004, at 3, 3–4; Alfred T. DeMaria, *Sample 25 Hour Speech*, MGMT. REP., Nov. 2004, at 6, 6).

<sup>243</sup> We might expect a dynamic effect should EFCA, in some form, become law. That is, as employer interventions decline, third parties might increase the scope of their efforts. By contrast, if the existence of union campaigns is not disclosed publicly, third parties may have more difficulty identifying firms for outreach efforts.

nization argument.<sup>244</sup> Bodie shows that employers have different incentives to convey information about the drawbacks of unionization depending upon the employer's view of the union's potential strength.<sup>245</sup> When the employer believes that the union is likely to be particularly strong — that it will effectively bargain on behalf of employees — the employer will have the “strongest incentive to defeat the union” and will “therefore put on the fiercest campaign.”<sup>246</sup> In contrast, when the employer estimates that the union is likely to be weakest — in Bodie's terms, when “the union will not be all that effective in improving terms and conditions” — the employer's incentives to provide information change in an important way.<sup>247</sup> Most important, when faced with an organizing campaign by a “sweetheart union” — one that has no intention of attempting to secure gains for employees but will merely collect dues — the employer may have an incentive to provide information to employees that encourages them to *support* the union drive.<sup>248</sup> This is so because when employees join a “sweetheart union” they may be foreclosed from electing a legitimate union for a significant period of time.<sup>249</sup> Bodie accordingly characterizes employers' incentives to provide information to employees about unionization as “inverse” to employees' interests.<sup>250</sup>

Two final points bear mention. First, although a decline in employer interventions will limit the amount of negative information about unions and unionization, employees will still have a great deal of information about the nonunion default, by virtue of living and working in a regime of nonunion bargaining prior to the organizing effort. Thus, “the employer that hired and has managed all its employees for a considerable time before the union even appeared on the scene has had ample opportunity to demonstrate the advantages of the individu-

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<sup>244</sup> See Bodie, *supra* note 198, at 51–55. Becker makes a related, though distinct, argument about employer participation in Board representation proceedings. See Becker, *supra* note 5, at 598.

<sup>245</sup> Bodie, *supra* note 198, at 51–55.

<sup>246</sup> *Id.* at 54. There is no reason to expect that employers will present either truthful or accurate information intended to assist employees in making an informed decision. The NLRB does not “probe into the truth or falsity of the parties' campaign statements, and . . . will not set elections aside on the basis of misleading campaign statements.” *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982).

<sup>247</sup> Bodie, *supra* note 198, at 54.

<sup>248</sup> *Id.*

<sup>249</sup> The recognition of a union bars a decertification vote — and hence the possibility for another organizing effort — for a period of one year. See 29 U.S.C. § 159(e)(2) (2006). The negotiation of a collective agreement bars decertification for the life of the contract or up to three years. *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962); see also G. Robert Blakey & Ronald Goldstock, “*On the Waterfront*”: *RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 344 (1980) (noting that contract bar doctrine is “sometimes more effective than an army of professional sluggers” in preventing organizing by legitimate unions).

<sup>250</sup> Bodie, *supra* note 198, at 51.

al employment relationship.”<sup>251</sup> Second, the type of information that employers and third parties provide during organizing campaigns is not likely to be new information for employees deciding whether to support unionization. Far from being novel, the arguments that unions are corrupt, that they charge high member dues and then waste them, that they are prone to violence, that they strike irresponsibly, and that they threaten the viability of the firm and cause job losses are part of our common cultural and political discourse. They are reflected in news media reporting on unions and unionization<sup>252</sup> and popular film and television accounts of unions.<sup>253</sup>

With less managerial intervention in the union organizing process, employees may receive less negative information about unions. But given the factors outlined here, the decline in the quantity of information is not likely to be great and the cost of limiting this information will not outweigh the choice-maximizing benefits that an asymmetry-correcting altering rule can offer.

## V. CARD CHECK 2.0

The appropriateness of curtailing managerial intervention in union organizing efforts is the central conceptual question raised by the debate over EFCA. But the EFCA debate also raises an institutional design question that merits consideration. If minimizing managerial intervention through an asymmetry-correcting altering rule enhances employee choice and is thus a legitimate goal for labor law, the relevant institutional design question is how best to construct such an altering rule. Central to this debate — and in particular the debate over card check — are the questions of, first, whether an open decisional mechanism is necessary to achieve the legitimate substantive goal of minimizing managerial intervention or, second, whether openness

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<sup>251</sup> WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 261. Given that the unionization rate among private sector workers is now below 8%, the vast majority of employees in the United States will have spent their entire careers in the nonunion setting. See Economic News Release, Bureau of Labor Statistics, *supra* note 166.

<sup>252</sup> For a particularly rich contemporary example of the media’s portrayal of the alleged waste of union member dues, see Steven Greenhouse, *At Labor Gathering, Luxury, Jockeying and Applause for Secretary*, N.Y. TIMES, Mar. 8, 2009, at A22. The article noted that “[u]nemployment may be soaring and the stock market tanking, but that did not stop the A.F.L.-C.I.O.’s leaders from gathering at the Fontainebleau hotel-resort last week, where rooms often run \$400 or more a night.” *Id.* See generally WILLIAM J. PUETTE, THROUGH JAUNDICED EYES: HOW THE MEDIA VIEW ORGANIZED LABOR (1992).

<sup>253</sup> For contemporary television examples, see *The Sopranos: No Show* (HBO television broadcast Sept. 22, 2002); and *The Wire* (Season Two) (HBO television broadcast June 1–Aug. 24, 2003). For an example from cinema, see ON THE WATERFRONT (Columbia Pictures 1954). Certainly not all film depictions are negative, perhaps most notably NORMA RAE (Twentieth Century Fox 1979).

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might be justified on other grounds. In this Part, I argue that the answer to both questions is no.

Although rapid elections preserve secrecy in decisionmaking, I also argue here that rapid elections are not the optimal approach to minimizing managerial intervention. Accordingly, in this Part, I propose two new decisional mechanisms, alternatives to both card check and rapid elections, that achieve the legitimate asymmetry-correcting function of eliminating or minimizing managerial interference while at the same time preserving confidentiality in decisionmaking. First, by drawing on the technology used in union elections in the airline and railway industries, I offer a model of confidential phone and internet voting. Second, by drawing on a practice increasingly prevalent in U.S. political elections, I offer models of continuous in-person and mail ballot voting.

*A. Preserving Confidentiality in Decisionmaking*

As I have argued, an altering rule that minimizes managerial intervention in the employee organizing process is appropriate because it mitigates specific asymmetries in employees' ability to depart from the nonunion default. But an open decisional mechanism is not necessary to this purpose. To the contrary, what is required for the asymmetry-correcting function of minimizing managerial intervention is a decisional mechanism that enables employees to register their choice on the union question without providing notice to management that the campaign is underway. Although such a mechanism must enable employees to vote at home or in some other nonworkplace location, openness in decisionmaking is unrelated to this requirement.

Accordingly, an open decisional mechanism cannot be justified on the ground that it is necessary to eliminate managerial intervention in unionization efforts. Nor is openness justified on other grounds. Notably, almost none of card check's public advocates offer a defense of openness. One exception is Lafer, who argues that the act of forming a union involves, at its core, "workers' pledging to each other their commitment to work together to secure a fair contract."<sup>254</sup> He notes that union organizers often encourage workers to "act like a union" prior to the time that they actually express their preference on the union question, which requires a series of public solidaristic acts, like sharing wage data that would otherwise have been kept secret and providing mutual support in trying to resolve workplace disputes.<sup>255</sup>

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<sup>254</sup> Lafer, *supra* note 46, at 84.

<sup>255</sup> *Id.* at 85 (internal quotation marks omitted).

For these reasons, Lafer concludes that unionization “makes most sense as a public act.”<sup>256</sup>

Granting that public manifestations of mutual support and lived solidaristic experience are crucial for union success,<sup>257</sup> it is not clear what connection an open decisional mechanism at the end of the campaign has to such conduct and experience. Indeed, in traditional secret ballot elections workers are free to, and routinely do, state publicly their support for unionization.<sup>258</sup> Nothing about the secret ballot interferes with workers’ ability to “stand up and be counted” during an organizing drive.<sup>259</sup> Similarly, it has been during NLRB secret ballot campaigns that organizers have developed and implemented the strategy of encouraging workers to act like a union prior to voting.<sup>260</sup> In short, an open decisionmaking mechanism is not necessary to these forms of community-building work, nor does a confidential voting process disable them.

Outside the specific context of union organizing campaigns, John Stuart Mill famously argued in favor of open balloting in political elections.<sup>261</sup> Mill’s argument was based on two premises. First, Mill believed that “[i]n any political election . . . the voter is under an absolute moral obligation to consider the interest of the public.”<sup>262</sup> Second, Mill thought that an open ballot would ensure that voters did in fact exercise the franchise in the interest of the public good, rather than in a manner meant to further their individual interests.<sup>263</sup> In Mill’s familiar words, when citizens vote in the open — “under the eye and criticism of the public”<sup>264</sup> — they will exhibit the “best side of their character”<sup>265</sup> by eschewing selfish motives and voting “on public grounds”<sup>266</sup> alone.

There are, however, two reasons to doubt the force of Mill’s arguments here. The first concerns our context. Unlike political elections

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<sup>256</sup> *Id.* at 84.

<sup>257</sup> See generally FANTASIA, *supra* note 17.

<sup>258</sup> See Lafer, *supra* note 46, at 84–85.

<sup>259</sup> *Id.* at 84.

<sup>260</sup> See *id.* at 85.

<sup>261</sup> See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 190–203 (London, Parker, Son, & Bourn 1861); see also NADIA URBINATI, *MILL ON DEMOCRACY* 104–22 (2002) (discussing Mill’s defense of the open ballot); Annabelle Lever, *Mill and the Secret Ballot: Beyond Coercion and Corruption*, 19 *UTILITAS* 354 (2007) (same).

<sup>262</sup> MILL, *supra* note 261, at 193; see also *id.* at 202–03; URBINATI, *supra* note 261, at 112–13; Lever, *supra* note 261, at 355 (“Mill believes that [voters] ought to be voting solely with considerations of the public good in mind.”).

<sup>263</sup> See MILL, *supra* note 261, at 203 (“People will give dishonest or mean votes . . . more readily in secret than in public.”); URBINATI, *supra* note 261, at 113–15.

<sup>264</sup> MILL, *supra* note 261, at 193.

<sup>265</sup> *Id.* at 203.

<sup>266</sup> *Id.* at 202–03.

— which assume some polis or public in whose good the voter might act — the question at issue in a union election is whether the workers wish to create such a collective. It is less obvious, therefore, that workers have an obligation to vote to further the “public” good at a moment when they are being called on to decide whether to constitute a public.<sup>267</sup> Indeed, such an obligation would predict the result that the decisional process is meant to determine.

Second, even were we to posit a public whose good ought to be furthered by workers voting in a union election,<sup>268</sup> it is not clear that Mill is correct that voters are more likely to pursue the public good when voting in the open.<sup>269</sup> Mill understood that public voting would subject citizens to psychological pressure from fellow constituents, and he believed that this pressure would require them to eschew private interests and vote in the interests of the whole. Mill is undoubtedly correct that an open decisional mechanism increases the pressure on each voter that can be brought to bear by other voters. But whether this increased pressure will necessarily incline voters toward some public good seems more debatable.

Indeed, an open decisional process in union campaigns seems less likely to incline workers to vote according to what they think the common good might be and more likely to incline them to conform their votes to the views of two particular groups: union organizers and the most influential of their coworkers. Here, Sanders’s work on open deliberative processes is instructive.<sup>270</sup> Sanders shows the disproportionate influence that follows from certain statuses — including race, gender, and levels of education — and from behaviors often correlated with these markers — like speaking ability, confidence in interpersonal interaction, and the like.<sup>271</sup> In the union-organizing context, and most acutely in low-wage organizing efforts, paid organizers may have had more extensive educational opportunities than have the workers themselves.<sup>272</sup> They are also trained in, and likely to have extensive experience with, precisely the sort of interpersonal dynamics involved in

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<sup>267</sup> As Professor Nadia Urbinati puts it, Mill thought “openness was meant to protect the polis,” not the individual. URBINATI, *supra* note 261, at 112. Where there is yet no polis to protect, the argument for openness loses force.

<sup>268</sup> For example, the “public” might be all employees currently employed at the firm.

<sup>269</sup> See, e.g., URBINATI, *supra* note 261, at 112 (“[T]here is no necessary connection between voting as duty and the open ballot. The public good argument can justify voting as a duty, but does not in itself authorize openness.”).

<sup>270</sup> See Sanders, *supra* note 19, at 362–69.

<sup>271</sup> See *id.* at 364–66.

<sup>272</sup> See, e.g., Steven Greenhouse, *Lessons in Labor: A Course for Summer*, N.Y. TIMES, Aug. 9, 1996, at B1; Steven Greenhouse, *Students Looking to Unions for Careers in Social Change*, N.Y. TIMES, Mar. 11, 1996, at B1.

discussing the signing of an authorization card,<sup>273</sup> sources of what Sanders calls “epistemological authority.”<sup>274</sup>

Moreover, as organizers and union organizing guides routinely recognize, workplaces have a core of “natural leaders” among the workforce — employees who by virtue of their location within the firms’ division of labor have particular influence over other workers.<sup>275</sup> These workplace leaders are called on during organizing drives to form the organizing committee, which is often active in card-gathering efforts. Even without exerting physical pressure, such workplace leaders may be able to exercise more subtle but perhaps equally effective forms of influence — if the decisional moment is a public one.<sup>276</sup>

A related concern is that if voting is open, workers will know that when the organizing campaign is concluded, their decision whether to sign an authorization card will be available to the union, to coworkers, and — if the union gathers a card majority — to the employer. Given this fact of publicity, some workers may decide to sign an authorization card out of a desire to avoid displeasing coworkers (or the subset of coworkers most involved in the unionization effort). Some may decline to sign a card out of a desire to avoid displeasing management. Others will be influenced by their predictions about the likely outcome of the campaign: if a worker thinks that the union will win, she may be influenced to sign out of a desire to avoid losing favor with the union that will eventually negotiate her contract and represent her at work. In short, and even if the result is not to incline workers toward a single decision, public access to each worker’s decision introduces “posture-preferences” into the decisionmaking process — strategic voting based not on the state of affairs the worker would most like to bring about, but on defensive calculations geared toward the response that others will have to a public voting record.<sup>277</sup>

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<sup>273</sup> Developing these skills is at the heart of organizer training. *See, e.g.*, AFL-CIO, FAQs About the Organizing Institute, <http://www.aflcio.org/aboutus/oi/faqs.cfm> (last visited Nov. 22, 2009) (“Organizers mostly visit workers on a one on one basis, maybe in their homes or other places outside of work where they feel comfortable . . . . The organizer builds relationships with them . . . .”); *id.* (“During the training, participants will learn one on one communication skills, campaign and strategic planning skills.”).

<sup>274</sup> Sanders, *supra* note 19, at 349 (internal quotation marks omitted).

<sup>275</sup> *See, e.g.*, AM. FED’N OF STATE, COUNTY & MUN. EMPLOYEES, *supra* note 27, at 1–10; INT’L BHD. OF TEAMSTERS, *supra* note 28, at 13 (instructing organizers to identify “natural leaders” in the workplace who have the most “influence among co-workers”).

<sup>276</sup> It is only in an open process that workplace leaders — or others — can “verify” the way a particular worker votes, and thus these forms of pressure can function only in an open voting process. Secrecy makes commitments to vote one way or the other inherently unverifiable. *See Vermeule, supra* note 45, at 417.

<sup>277</sup> Geoffrey Brennan & Philip Pettit, *Unveiling the Vote*, 20 BRIT. J. POL. SCI. 311, 322 (1990). It is also relevant that Mill himself believed the appropriateness of open voting to be highly contextual: even Mill saw the need for secrecy in contexts in which intimidation and other forms of undue pressure were a concern. For example, thirty years before he wrote his defense of open

A more recent defense of open voting comes from political scientists Professors Geoffrey Brennan and Philip Pettit. Much of Brennan and Pettit's defense follows Mill.<sup>278</sup> But Brennan and Pettit add a new line of argument, contending that in large-scale electorates it is not feasible for voting systems to elicit voters' actual preferences on the matter being decided. Because the chance of any individual's vote being decisive is close to zero, these authors argue that voters will lack an incentive to vote their preferences and will instead vote according to other considerations — for example, a desire to secure social acceptance.<sup>279</sup> For Brennan and Pettit, because preference voting is infeasible, voting systems should be designed to secure a Millian public or “judgment ideal” and should, following Mill, be open.<sup>280</sup>

voting he admitted that “the main evil to be guarded against was that which the [secret] ballot would exclude — coercion by landlords, employers, and customers.” MILL, *supra* note 261, at 195. By the time of *Considerations on Representative Government*, however, Mill thought that the possibility for undue influence from landlords and employers had subsided enough to allow for open voting, *see id.*, an empirical conclusion that one commentator finds “preposterous.” URBINATI, *supra* note 261, at 121.

Eaton and Kriesky report that only 5.6% of the workers in their survey who signed cards in the presence of a union organizer or coworker felt “pressured to sign the card” by the presence of the card solicitor. Eaton & Kriesky, *supra* note 172, at 164. These results may provide a basis to question the degree of influence actually brought to bear at the moment of decision, at least in the context of voluntary card check and neutrality agreements that Eaton and Kriesky investigate. Several points, however, warrant mention. First, and as noted above, Eaton and Kriesky's sample was drawn from card check campaigns conducted pursuant to voluntary agreements between unions and employers, and, in all but two of the campaigns studied, the employer had also agreed to remain neutral on the question of unionization. *See id.* at 163. It is not clear whether the incentives to apply undue pressure at the moment of decision, and the actual prevalence of such pressure, would remain the same in the context of a card check process that was legally mandated and that did not require employer neutrality. Second, the authors report that 16.8% of workers felt pressure to support the union from coworkers, and 14% felt pressure from union staff, during the organizing campaign. *See id.* at 165 tbl.2. As noted, because openness allows the verification of commitments — including commitments elicited during the campaign — the authors' findings regarding workers' perception of pressure at the moment of signing may underreport the effects of an open decision process. Finally, and perhaps most important, Eaton and Kriesky's survey may not adequately capture the types of influence that concern Sanders (that is, the exercise of epistemological authority) or, as discussed *infra* p. 718, Brennan and Pettit (that is, “the warping influence of . . . posture-preferences,” Brennan & Pettit, *supra*, at 323).

<sup>278</sup> These authors divide their analysis into a discussion of two different “ideals of voting”: a preference ideal and a judgment ideal. Brennan & Pettit, *supra* note 277, at 313. In the preference ideal, individuals vote according to their overall assessment of the options available to them, taking into account whatever private and public interests they have. *Id.* In the judgment ideal, which is Mill's approach, voters vote solely according to “what is best for all.” *Id.* Brennan and Pettit then argue that only the judgment ideal is feasible and, as Mill contended, that openness in voting will incline voters to support the public good. *See id.* at 326.

<sup>279</sup> *See id.* at 321–22. Thus, voters may vote for candidates who favor the poor if doing so will endear them to peers for whom helping the poor is an important goal. *See id.* at 322.

<sup>280</sup> Like Mill, however, Brennan and Pettit also admit of a “practical” problem with open voting. *See id.* at 328–32. They write that where blackmail and intimidation are possible, secrecy is called for. *See id.* at 331.

In union elections the electorate is far smaller than it is in large-scale political elections: nearly a quarter of bargaining units consist of fewer than ten workers, and the majority have fewer than thirty.<sup>281</sup> Brennan and Pettit's basic premise is therefore inapposite in our context. The chance of an individual's vote being decisive will not be close to zero, and individuals will have an incentive to vote their actual preferences.<sup>282</sup> As these authors admit, moreover, where the preference ideal is possible, openness is to be avoided: "Things would actually be worse for the preference ideal if voting were open. The openness of the vote would expose the voter even more effectively to the warping influence of his desire for social acceptance and, more generally, of his posture-preferences."<sup>283</sup>

The arguments in support of an open decisional mechanism specific to union organizing are not convincing, while the arguments for openness in political elections lack weight in this context. Accordingly, after taking up the prospects for rapid elections, I develop two sets of decisional mechanisms designed to achieve the legitimate asymmetry-correcting function of minimizing managerial interference while providing employees a confidential process through which to register their choices on the union question.

### B. *Proposals for Reform*

1. *Rapid Elections.* — Before developing these new suggestions for institutional design, it is first necessary to assess rapid elections — the longstanding proposal for reform that Congress is now considering as a potential alternative to card check.<sup>284</sup> As noted above, a rapid elections regime would preserve the rules for union organizing currently in effect, including the election petition process and the secret ballot decisional mechanism. But a rapid elections regime would mandate that

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<sup>281</sup> See 73 NLRB ANN. REP., *supra* note 133, at 130 tbl.17 (reporting that 22% of bargaining units had fewer than 10 employees, 19.7% had between 10 and 19 employees, 11.6% had between 20 and 29 employees, 8.5% had between 30 and 39 employees, 5.2% had between 40 and 49 employees, 10.9% had between 50 and 79 employees, 5.8% had between 80 and 99 employees, 9.4% had between 100 and 199 employees, 3.3% had between 200 and 299 employees, and 3.6% had 500 or more employees).

<sup>282</sup> For example, the probability of casting the decisive vote in an electorate of nine employees — the probability that the eight "other" employees split four-four — is approximately 27%. And, again, 22% of bargaining units had fewer than ten employees in 2008. The probability of casting the decisive vote in an electorate of twenty-nine employees is approximately 15%, and a majority of bargaining units in 2008 were smaller than thirty employees. (In these calculations, each employee has a (random) 50% chance of voting yes.)

<sup>283</sup> Brennan & Pettit, *supra* note 277, at 323. Such dynamics will have equal or greater force in union elections where the size of bargaining units is, again, generally very small.

<sup>284</sup> See Greenhouse, *supra* note 3. See generally WEILER, GOVERNING THE WORKPLACE, *supra* note 5, at 255–56; William B. Gould IV, *How Obama Could Fix Labor Law*, SLATE, Aug. 29, 2008, <http://www.slate.com/id/2198736>.

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the NLRB conduct the representation election within some set period of time after the petition is filed — generally between five days and two weeks. To the extent that a statutory rapid elections mandate could, in fact, minimize the amount of time management has to intervene in union organizing efforts, the proposal finds support in the analysis here. Because such a regime also ensures confidentiality in decisionmaking, the proposal would constitute an improvement over the status quo.

Despite these merits, however, there are reasons not to be entirely satisfied with rapid elections. These reasons concern the proposal's mechanism for minimizing managerial interference and the extent to which the proposal could, even if successful, minimize such interference. First, a rapid elections regime depends upon the NLRB to ensure that elections are carried out within the statutorily prescribed time frame. And while legislation could mandate that the NLRB conduct elections within five or ten days, for example, it is far from certain that the agency would be able to run elections that rapidly. Indeed, the last fifty years of experience suggest strongly that there is nothing "rapid" about the NLRB, and despite repeated attempts to speed up various Board proceedings, the agency remains plagued by delay.<sup>285</sup> A new congressional mandate — if paired with the substantial increases in funding that such a mandate would require — might improve the situation. But, as with relying on the Board to carry out the statute's remedial regime,<sup>286</sup> there is ample reason for skepticism about depending on the Board to ensure speedy elections.

Second, the extent to which rapid elections can minimize managerial intervention in employee organizing efforts is inherently limited. In a rapid elections regime, as under current law, once employees file a petition for an election, the employer is given notice of the organizing campaign and thus has a statutorily guaranteed window of time to campaign against unionization. Should the employer become aware of organizing efforts before the petition is filed, of course, managerial intervention could begin at that point. Like traditional card check, neither version of card check 2.0 can ensure in all instances that employees will be able to complete organizational efforts without managerial interference. A rapid elections regime, however, ensures that this goal is never met.

More robust institutional reform is both desirable and possible. In the remainder of this Part, I develop two proposals that better achieve

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<sup>285</sup> See, e.g., Sachs, *supra* note 121, at 2695–96 & n.35. NLRB General Counsel Fred Feinstein, for example, made it a priority of his administration to increase the use of the Board's injunctive power to speed up the process of reinstating employees discharged for union activity but was largely unable to succeed. See Estlund, *supra* note 33, at 1566–67.

<sup>286</sup> See Estlund, *supra* note 33, at 1562–69.

card check's organizing technological function, preserve secrecy in decisionmaking, and depend on more feasible expectations of NLRB performance.

2. *Confidential Phone or Internet Voting: Borrowing from the NMB.* — Although the NLRB has jurisdiction over nearly all private sector union elections, labor organizing and labor relations in the airline and railroad industries are governed by a different statute, the Railway Labor Act,<sup>287</sup> and a different administrative agency, the National Mediation Board (NMB).<sup>288</sup> And while the basic structure of the representation process is the same in both regimes, the NMB relies on different voting technologies when conducting representation elections. Until recently, the NMB conducted union elections exclusively by mail ballot.<sup>289</sup> Under its mail balloting procedures, the NMB sends a ballot to each employee in the bargaining unit three weeks before the ballot count is to take place.<sup>290</sup> Although all voting takes place in the employees' homes (or wherever employees choose to complete their ballots), the NMB has repeatedly stressed the importance of secrecy in mail ballot elections. In order to ensure secrecy and to prevent the submission of unauthorized ballots,<sup>291</sup> the NMB assigns each employee a "unique key number," which is recorded on the NMB's eligibility list and on the return envelope sent with the employee's ballot but is never disclosed to the union or the employer.<sup>292</sup>

Critically, the NMB also bars unions (and employers) from gathering ballots from employees or even from handling the ballots.<sup>293</sup> In *United Air Lines, Inc.*,<sup>294</sup> for example, the NMB held that if a union collects ballots from employees, even if employees have already sealed

<sup>287</sup> 45 U.S.C. §§ 151–188 (2006).

<sup>288</sup> See *id.* § 154. One commentator has recommended using NMB voting technologies in the NLRA election context, following the filing of a traditional election petition. See Labor Law Blog, A Proposal for Telephone & Internet Voting, <http://traditionallaborlaw.blogspot.com/2008/09/proposal-for-telephone-internet-voting.html> (Sept. 14, 2008, 23:48).

<sup>289</sup> See *In re* Representation of Employees of the American Airlines, Inc., 1 N.M.B. 371, 371 (1944); NATIONAL MEDIATION BOARD REPRESENTATION MANUAL 24–28 (2009) [hereinafter NMB REPRESENTATION MANUAL], available at <http://www.nmb.gov/representation/representation-manual.pdf>; Pam Ginsbach, *NMB Will Launch Telephone Balloting in Representation Elections* Sept. 30, [2002] Daily Lab. Rep. (BNA) No. 187, at A-7 (Sept. 26, 2002).

<sup>290</sup> See NMB REPRESENTATION MANUAL, *supra* note 289, § 14.202, at 21.

<sup>291</sup> See, e.g., *Transp. Workers Union*, 26 N.M.B. 195 (1999); *United Air Lines, Inc.*, 22 N.M.B. 288 (1995); see also NMB REPRESENTATION MANUAL, *supra* note 289, § 14.203, at 21, § 14.305-1, at 23.

<sup>292</sup> NMB REPRESENTATION MANUAL, *supra* note 289, § 14.203, at 21. Each ballot also contains a "non-reproducible" NMB seal. *Id.* § 14.201, at 21.

<sup>293</sup> See, e.g., *Transp. Workers Union*, 26 N.M.B. 195; *United Air Lines*, 22 N.M.B. 288; see also NMB REPRESENTATION MANUAL, *supra* note 289, § 14.202, at 21, § 14.303–304, at 23. According to NMB rules "only NMB agents [are to] handle ballot packages." *Id.* § 14.202, at 21.

<sup>294</sup> 22 N.M.B. 288.

their ballots in the NMB-provided return envelopes, the union commits objectionable conduct that can warrant setting aside the results of the election.<sup>295</sup> Further, although representatives from the union and employer are entitled to observe the ballot count, the NMB has adopted a rule to ensure secrecy in this process as well. Thus, “[a]ll materials which might disclose whether particular employees cast ballots or refrained from voting must be secured from view prior to permitting any non-NMB employees to observe the final tabulation of the ballots.”<sup>296</sup>

In recent years, the NMB has modernized its voting technology by adopting “telephone electronic voting”<sup>297</sup> and internet voting.<sup>298</sup> Although the voting technologies have changed, the commitment to secrecy remains. Thus, as in the mail balloting process, under the new systems employees vote at the time and in the place of their choosing. With both telephone and internet voting, each eligible employee is given a “voter identification number” (VIN) that is confidential and known only to the voter and the NMB.<sup>299</sup> When voting, the employee either calls a toll-free telephone number or goes to a designated website. In telephone voting, employees are given a series of voice prompts that ask them to verify their identity by entering their VIN, and then to enter their vote. On the internet, the website instructs the voter to follow a similar series of steps.<sup>300</sup> Although the NMB conducts the official vote count once the voting period closes, both technologies allow a continuous tallying of the votes.<sup>301</sup> In both the telephone and internet processes, the voting is entirely confidential — neither the employer nor the union is aware of how (or whether) any employee votes.<sup>302</sup>

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<sup>295</sup> *Id.* at 320 (such conduct “compromises the secret ballot process”); *see also Transp. Workers Union*, 26 N.M.B. 195. In *United Air Lines*, union stewards collected already-completed and sealed ballots from employees. The NMB held that this activity compromised the secrecy of the election. *See United Air Lines*, 22 N.M.B. at 320. Because the ballot-collection activity was not “systematic,” *id.*, the NMB certified the election results but reduced the length of the certification bar (the period of time during which the union is insulated against any attempts at decertification) by six months, *see id.* at 321.

<sup>296</sup> NMB REPRESENTATION MANUAL, *supra* note 289, § 14.303, at 23.

<sup>297</sup> Ginsbach, *supra* note 289.

<sup>298</sup> *See National Mediation Board To Allow Internet Voting in Representation Elections*, [2007] Daily Lab. Rep. (BNA) No. 185, at A-7 (Sept. 25, 2007).

<sup>299</sup> *Id.*

<sup>300</sup> *See* NMB REPRESENTATION MANUAL, *supra* note 289, § 13.204, at 17.

<sup>301</sup> *See* Ginsbach, *supra* note 289.

<sup>302</sup> In the context of a practice election, the NMB general counsel instructed voters that “[y]our VIN and PIN are confidential numbers, known only to you and the NMB. To maintain the confidentiality and integrity of the voting process, do not share your VIN or PIN with anyone.” Letter from Mary L. Johnson, Gen. Counsel, Nat’l Mediation Bd., to All Carriers and Labor Organizations (Jan. 29, 2007), available at <http://www.nmb.gov/representation/deter2007/34no13.pdf>.

The phone and internet voting procedures currently used in NMB elections constitute one potential substitute for card check or rapid elections, and developing an asymmetry-correcting decisional mechanism out of the NMB process would be relatively straightforward. The mechanics of the procedure would be administered either by the NLRB or by a neutral private agency certified by the NLRB for these purposes (for simplicity's sake, I will refer to the administering body as the "agency").<sup>303</sup> As they do under current NLRA procedures for election petitions, unions would gather names of employees they believe work in the relevant bargaining unit. As the union gathered names it would submit them to the agency.<sup>304</sup> The agency would then send these employees confidential VINs along with instructions regarding registering their votes via phone or internet.<sup>305</sup> The agency would not inform the employer that the organizing effort was underway or that VINs had been issued.<sup>306</sup> Although union organizers and union sup-

<sup>303</sup> In some private recognition agreements, for example, an outside arbitrator conducts secret ballot elections in lieu of the NLRB. *See, e.g.,* *Serv. Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 980 n.3 (9th Cir. 2003); *Tenet Healthcare, Inc.*, Case Nos. 32-CA-21266-1, 32-CB-5769-1, 2005 NLRB GCM LEXIS 10, at \*14-15 (NLRB Office of Gen. Counsel Feb. 23, 2005). If a private agency were chosen in this context, the NLRB would need to exercise some continuing oversight of the process. A complete discussion is beyond the scope here, but for a description, along with both support for and criticism of reliance on private agencies to perform government functions, see *GOVERNMENT BY CONTRACT* (Jody Freeman & Martha Minow eds., 2009). *See generally* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

<sup>304</sup> This procedure would in many ways mirror the NLRA election-petition process: under NLRA rules, it is the union's responsibility to construct a list of employees it presumes to be eligible to vote, and to submit authorization cards signed by what it believes to be at least 30% of the eligible voters. After the union submits its cards, the NLRB must then confirm that the union has in fact identified 30% of the eligible bargaining unit. At this point, the employer is notified of the unionization effort and must turn over to the NLRB a current payroll list of employees — in order that the Board can confirm that the union has made its 30% showing. *See* 29 U.S.C. § 159(c)(1)(A) (2006); 29 C.F.R. § 101.18(a) (2009); *see also* 1 SECTION OF LABOR AND EMPLOYMENT LAW, AM. BAR ASS'N, *THE DEVELOPING LABOR LAW* § 10.I.A.1, at 543 (John E. Higgins, Jr. et al. eds., 5th ed. 2006).

<sup>305</sup> In low-wage industries, in which home addresses can be unreliable, it is possible that the Board would need to communicate this information via telephone. *See generally* Dayna L. Cunningham, *Who Are To Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 391-95 (1991) (noting that low-income voters are more mobile than wealthier voters and that mail is less likely to be delivered to their homes).

<sup>306</sup> The discussion of employers' affirmative right to intervene provides support for this aspect of the proposal. *See supra* Part IV, pp. 701-12. Moreover, while the Government in the Sunshine Act applies to meetings of the NLRB's five-member adjudicatory body, it does not require openness in agency activity below this level. *See* 5 U.S.C. § 552(b) (2006). As noted immediately below, employers would have the right to challenge the results of the voting as soon as it was completed, and would thus ultimately be entitled to access all of the information that is currently made available under NLRB rules. Nonetheless, to prevent a practice of continuous Freedom of Information Act (FOIA) requests designed to discover election information while voting was underway, an additional specific exception to FOIA might be in order. The analysis — and the applicability of FOIA — might change depending on whether it is the NLRB or a private agency

porters would remain free to visit employees at their homes, neither the union nor any other employee would be involved in soliciting or recording the employees' votes. As under NMB rules, union representatives (and employers) would be barred from assisting employees in entering their votes and would be barred from being present when employees did enter their votes. Violation of these rules would form the basis for objectionable conduct, and ultimately for an invalidation of the results of the election.

Because both phone and internet technologies allow constant tallying of results, moreover, the agency could inform the union when it had reached a certain level of support among (what the union believes to be) the relevant bargaining unit. Importantly, this voting technology would allow the agency to inform the union of this support level without disclosing the votes of any individual employee to the union. Once the union believed that it had the support of more than 50% of the bargaining unit, it could demand recognition. The employer would then be entitled to challenge — in proceedings before the NLRB — the eligibility of any employee included among the voters and the definition of the bargaining unit, and it would be entitled to the information necessary to mount these challenges (as it is under current NLRA rules).<sup>307</sup> If, in the end, more than 50% of the employees in the bargaining unit signaled their support for the union, the NLRA would certify the union as the employees' collective bargaining representative.<sup>308</sup>

3. *Continuous Early Voting: In-Person and Mail Balloting.* — In contemporary American political elections, traditional secret ballot voting on election day remains dominant, but an increasing percentage of citizens now participate through “early voting.”<sup>309</sup> There are two forms: under early voting rules, citizens either mail their ballot to election officials prior to election day, or vote early and in person at a tra-

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running the election. *See id.* § 551(1) (definition of “agency”); *see also* Forsham v. Harris, 445 U.S. 169, 171 (1980) (holding that FOIA does not apply to recipients of federal grants); *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051, 1054–57 (9th Cir. 1981) (holding that the Red Cross is not an “agency” for FOIA purposes despite receipt of government funds and government's power to appoint board members); Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT, *supra* note 303, at 241, 449 n.51 (citing *Irwin Mem'l*, 640 F.2d at 1053). *But see* *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508 (D.C. Cir. 1996) (holding that FOIA applies to a division of the National Institutes of Health).

<sup>307</sup> *See* 29 C.F.R. § 102.66 (2009); *Cooking Good Div. of Perdue Farms, Inc.*, 323 N.L.R.B. 345, 348 (1997) (setting out evidentiary standard).

<sup>308</sup> The requirement that a union obtain the votes of 50% of the actual bargaining unit — rather than 50% of those employees who vote — means that any eligible employee who does not vote is effectively a vote against unionization. This requirement will prevent unions from benefiting from limiting their list of eligible voters to those employees they believe support unionization.

<sup>309</sup> *See, e.g.*, JOHN C. FORTIER, ABSENTEE AND EARLY VOTING 38–39 (2006).

ditional polling place.<sup>310</sup> These two forms of early voting now account for more than one-fourth and possibly as many as one-third of all votes cast nationally in political elections.<sup>311</sup> And, during the 2008 election, the proportion of early voters was much higher in a number of states: 58% of the total votes in both Nevada and Tennessee were cast through early in-person voting,<sup>312</sup> while 100% of Oregon voters voted by mail in 2008, as did 64% of voters in Colorado and 43% of voters in California.<sup>313</sup>

Early in-person voting offers precisely the same guarantees of secrecy as does traditional secret-ballot voting on election day. The decisional technology is exactly the same, as is the official oversight of the process. Only the timing has changed. Because mail ballots are completed offsite — generally in the home of the voter — states have taken a number of steps to ensure secrecy and prevent fraud. These measures, which I discuss immediately below, range from printed instructions and warnings on ballot forms to outright prohibitions on anyone other than the voter being present when ballots are completed.

Early voting suggests a second asymmetry-correcting decisional mechanism, and again, adapting these voting procedures for union organizing would be relatively straightforward. As under the previous proposal, unions would be required to submit to the NLRB or a neutral private agency certified for these purposes the names of presumptively eligible voters. In the in-person variant of the proposal, once the union reached a certain threshold of support, the agency would establish a polling place within reasonable proximity to the bargaining-unit

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<sup>310</sup> All fifty states and the District of Columbia allow mail voting, and forty-six states allow early in-person voting. Mail voting can be either “excuse” or “no excuse.” The Early Voting Information Center at Reed College, Absentee and Early Voting Laws, <http://earlyvoting.net/states/abslaws.php> (last visited Nov. 22, 2009). Twenty-eight states now allow no-excuse absentee voting by mail, while twenty-two states and the District of Columbia allow voting by mail when the voter has a legitimate excuse for not voting in person on election day. *Id.*

<sup>311</sup> Twenty-five percent of voters voted before election day in 2006. See Paul Gronke et al., *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 440 (2008). Although no rigorous study is yet available, Gronke estimates that 30–33% of voters voted prior to election day in 2008. See Stan Greenberg et al., Democracy Corps, *The 2008 Early Vote 2* (2009), <http://www.democracycorps.com/wp-content/files/databaseearlyvotefinal.pdf> (citing *All Things Considered: Early Voting Grows in Popularity* (NPR radio broadcast Nov. 7, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=96756705&ft=1&f=1003>). In the 2008 election, at least 10% of voters nationally voted through an early in-person process. See United States Elections Project, (Nearly) Final 2008 Early Voting Statistics, [http://elections.gmu.edu/Early\\_Voting\\_2008\\_Final.html](http://elections.gmu.edu/Early_Voting_2008_Final.html) (last visited Nov. 22, 2009). The tally is not entirely complete. For example, Connecticut, Illinois, Michigan, Texas, and Utah have submitted incomplete reports; early voting figures for Missouri and Pennsylvania are based on estimates; and Massachusetts, Mississippi, and Wisconsin have not reported early votes yet. *Id.*

<sup>312</sup> United States Elections Project, *supra* note 311. Similarly, 55% of the votes in North Carolina, 44% in Georgia, 42% in New Mexico, and 41% in Texas were cast through early in-person voting. See *id.*

<sup>313</sup> See *id.*

members.<sup>314</sup> The polling place would remain open during the organizing phase of the unionization campaign, and employees could, if they so desired, go to the polling place and cast a ballot in favor of or in opposition to unionization. The agency would not inform the employer of the existence of the campaign or of the opening of the polling place.<sup>315</sup>

Polling place regulations — including restrictions on electioneering at or near the polling place — could be borrowed from current Board rules. The NLRB has declared that it is “especially zealous in preventing intrusions upon the actual conduct of its elections,”<sup>316</sup> and prohibits campaigning in and around polling places.<sup>317</sup> The Board also prohibits comments by either union or management representatives directed toward employees who are in the polling area or in line to vote.<sup>318</sup> In addition to prohibiting electioneering near polling places, the Board bars both union and managerial representatives from keeping a list of employees who have voted — or even from taking actions that may lead employees to believe that their names are being recorded — in order to ensure the secrecy of the votes cast.<sup>319</sup> Because the voting would be in person, the agency would not need to issue VINs, but would instead be charged with validating the identity of the employees who came to cast ballots to ensure that the person voting was in fact on the list of eligible voters submitted by the union.<sup>320</sup>

In the mail voting variant, the agency would be required to print ballots upon a threshold showing by the union. The ballots either would be sent directly to the workers identified by the union or would be made available to the union to distribute to workers in the prospec-

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<sup>314</sup> In many cases, the regional office of the Board would suffice; in other cases, where the organizing campaign is more remote, an alternative location might be needed. If practical in the particular circumstances, a local department of motor vehicles or other public facility might function.

<sup>315</sup> See 5 U.S.C. § 552(b) (2006); *supra* note 306.

<sup>316</sup> *Claussen Baking Co.*, 134 N.L.R.B. 111, 112 (1961).

<sup>317</sup> See, e.g., *id.*; *Cont'l Can Co.*, 80 N.L.R.B. 785 (1948).

<sup>318</sup> See *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981); *Milchem, Inc.*, 170 N.L.R.B. 362 (1968). Although innocuous comments are oftentimes not sufficient to set aside the results of an election, the Board has held that “sustained conversation [between a union representative and] prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.” *Id.*

<sup>319</sup> See *Cross Pointe Paper Corp.*, 330 N.L.R.B. 658, 661–62 (2000); *Southland Containers, Inc.*, 312 N.L.R.B. 1087 (1993); *Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 737 (1992); *Cerock Wire & Cable Group, Inc.*, 273 N.L.R.B. 1041 (1984); *Masonic Homes of Cal., Inc.*, 258 N.L.R.B. 41, 48 (1981).

<sup>320</sup> Again, procedures could be developed based on rules used in political elections. See, e.g., *Spencer Overton, Voter Identification*, 105 MICH. L. REV. 631, 638–44 (2007).

tive bargaining unit.<sup>321</sup> To prevent interference and ensure secrecy, union representatives would again be barred from assisting employees in the completion of the ballot and from being present when employees do so. Election results would be invalidated if this rule were breached.

State election law could again be instructive in designing appropriate rules regarding interference and confidentiality.<sup>322</sup> For example, the California Elections Code prohibits people working for a candidate, a candidate's committee, or "any other group or organization at whose behest the individual designated to return the ballot is performing a service" from collecting completed ballots from absentee voters.<sup>323</sup> Nevada prohibits anyone but the voter and his immediate family from handling a completed absentee ballot, except in limited situations.<sup>324</sup> Missouri instructs absentee voters to "mark the ballot in secret,"<sup>325</sup> New Mexico instructs the absentee voter to "secretly mark his ballot,"<sup>326</sup> and North Carolina prohibits anyone from "be[ing] in the voter's presence" when he marks an absentee ballot.<sup>327</sup> Finally, some states require warnings printed somewhere on the absentee ballot about coercion and fraud; Colorado's required language is typical.<sup>328</sup>

In both in-person and mail balloting, the agency would be required to keep a running tally of the voting and to inform the union if and when support for unionization crossed the 50% threshold. Again, once the union believed that it had support from a majority of the workers in the bargaining unit, it could demand recognition, at which point the employer would be entitled to challenge — before the NLRB — the

<sup>321</sup> In the latter case, ballots could be presented in their own sealed envelopes to be opened only by the voting worker. Opening or otherwise tampering with the ballot could be grounds for setting aside the election results. For examples of similar state rules, see *infra* p. 726.

<sup>322</sup> NMB regulations concerning mail balloting could also be helpful in this context. See NMB REPRESENTATION MANUAL, *supra* note 289, § 14.202, at 21 (prohibiting anyone other than the NMB agent from "handl[ing]" a ballot).

<sup>323</sup> CAL. ELEC. CODE § 3017(d) (West 2003).

<sup>324</sup> NEV. REV. STAT. ANN. § 293.330(4) (LexisNexis 2008).

<sup>325</sup> MO. ANN. STAT. § 115.291(1) (West 2003).

<sup>326</sup> N.M. STAT. § 73-14-31 (1999).

<sup>327</sup> N.C. GEN. STAT. ANN. § 163-226.3(7) (LexisNexis 2007). A number of states require that a voter completing an absentee vote "shall mark the ballot in such a manner that no other person will know how the ballot is marked." IOWA CODE § 53.15 (2007); see also MICH. COMP. LAWS § 168.761 (2004); MINN. STAT. § 203B.03 (2008); S.D. CODIFIED LAWS § 12-19-7 (2004); VA. CODE ANN. § 24.2-707 (2006). North Carolina explicitly allows a family member to assist an absentee voter. N.C. GEN. STAT. § 163-226.3. Minnesota prohibits an individual from "solicit[ing] the vote of an absentee voter while in the immediate presence of the voter during the time the individual knows the absentee voter is voting." MINN. STAT. § 203B.03.

<sup>328</sup> See, e.g., COLO. REV. STAT. ANN. § 1-7.5-107(3)(b) (West 2009) ("WARNING: Any person who, by use of force or other means, unduly influences an eligible elector to vote in any particular manner or to refrain from voting, or who falsely makes, alters, forges, or counterfeits any mail ballot before or after it has been cast, or who destroys, defaces, mutilates, or tampers with a ballot is subject, upon conviction, to imprisonment, or to a fine, or both."); see also OR. REV. STAT. § 254.470(5) (2007).

eligibility of employees who had cast votes in the election along with the definition of the bargaining unit.

4. *The Cost of Confidentiality.* — Both the early voting and the NMB-type proposals offer a feasible way to accomplish the asymmetry-correcting function of minimizing managerial intervention while avoiding the problems inherent in an open decisional mechanism. Confidentiality does not come for free, however, and ensuring secrecy in decisionmaking involves some costs. In particular, the proposals set out here might make it more difficult for workers to vote in a union election than it would be for them to register their choices under a traditional card check regime. In the NMB-type proposals and the mail-in early voting proposal, workers are required either to complete a mail ballot or to vote via the phone or internet. More acutely, in the in-person early voting proposal, workers must travel to the polling site to vote, a requirement that is not imposed by a traditional card check regime.

Such “confidentiality costs” could imply that card check 2.0 will mitigate the asymmetric stickiness of the nonunion default less fully than a traditional card check regime. That is, the proposals might be as successful as card check in eliminating the impediments to unionization that flow from managerial intervention, but might create different impediments in the form of voting transaction costs. While these costs are a limitation of the card check 2.0 proposals, they do not alter the proposals’ overall merit. First, the actual costs of confidentiality are not likely to be high, and in most cases are de minimis. Completing a mail-in ballot, calling a toll-free voting line, or voting via the internet are simple enough and similar enough to the routine tasks we complete on a daily basis that they are unlikely to dissuade a significant number of workers from voting. The need to travel to a polling site might discourage a nontrivial number of voters, although as in “get-out-the-vote efforts” in political elections, unions’ ability to transport voters to the polling place could temper this effect. But second, and more fundamentally, any transaction costs imposed by card check 2.0’s voting mechanisms are costs that flow from the need to ensure that the substantive goal of minimizing managerial intervention is accomplished with a decisional mechanism that provides for confidentiality. Because a confidential decisional mechanism is necessary to avoid jeopardizing choice in the manner discussed above, the goal of advancing employee choice necessitates the bearing of costs associated with ensuring confidentiality.

## VI. CONCLUSION

Maximizing employee preferences on the question of unionization, and the appropriateness of managerial intervention in the union-organizing process, are issues that have long been central to federal la-

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bor law. This Article has offered a new way to approach these questions. By building on contemporary theories of default rules, and developing the concept of the “asymmetry-correcting altering rule,” this Article has shown how a decisional mechanism like card check, or an alternative like rapid elections, can advance employee choice. Managerial opposition to unionization, along with the collective action problems involved in employee efforts to unionize, make it more difficult for workers to unionize than it would be for employees to depart from a union default and choose individual employment contracting. The legal regime can address these asymmetries — and thereby maximize employee choice — by adopting an altering rule that minimizes employer intervention in the employee organizing process.

Of course, the union organizing process is not the only context in which law attempts to ensure choice — or maximize preferences — in the face of asymmetric power relationships and other asymmetric impediments to departure. As this discussion has shown, statutory interpretation and corporate governance are two other contexts in which asymmetric impediments to departure exist, and there are others. In each such context, we might continue to advance our understanding of how best to ensure choice by applying and developing the concept of the asymmetry-correcting altering rule presented here.

In our context, identifying and defending the asymmetry-correcting function of minimizing managerial intervention has required an examination of the decisional mechanisms that are best able to achieve that goal. Here, this Article has argued that while limiting managerial intervention serves a legitimate asymmetry-correcting function, openness in decisionmaking is unrelated to this function and is not justified on other grounds. This Article has therefore offered two potential alternative decisional mechanisms. Both of the suggestions preserve secrecy in voting while enabling employees to minimize managerial intervention in the union organizing process. Both accordingly offer a way to redesign the rules of employee decisionmaking consistent with contemporary legal theory on maximizing choice.