TRYING THE CARROT AND SPARING THE STICK: AN INCENTIVE BASED REFORM PROPOSAL FOR NLRB ELECTIONS, VOLUNTARY RECOGNITION, AND WITHDRAWAL OF RECOGNITION

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The relationship between organized labor and management in the United States has always been conflict-laden. Both groups have simple and predictable objectives: organized labor wishes to increase the prevalence of unionized workplaces, while management desires precisely the opposite. For many years, this struggle between organized labor and management has focused on how a labor organization becomes the collective bargaining representative of employees and how such a relationship is terminated. This article proposes a compromise solution, designed to be politically viable and resilient to changes in the political composition of the National Labor Relations Board (NLRB). Specifically, this article proposes an incentive-based solution that would encourage the use of NLRB elections to establish collective bargaining relationships by barring unilateral withdrawal of recognition in cases where the union was certified as a result of such an election.

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Introduction

The relationship between organized labor and management in the United States has always been conflict-laden. Both groups have simple and predictable objectives: organized labor wishes to increase the prevalence of unionized workplaces and bargaining power within these workplaces, while management desires precisely the opposite. The regulatory framework for navigating this relationship is premised on trying to wring mutually beneficial outcomes from this seemingly zero-sum game. Efforts to shift the balance of power typically revolve around changing the rules to either make one side's objectives easier to achieve or make it more difficult for the other to do the same.

For many years, this struggle between organized labor and management has focused on how a labor organization becomes the collective bargaining representative of employees and how such a relationship is terminated.[1] At stake is not only the likelihood of a

1. *See, e.g.*, Lamons Gasket Co., 357 N.L.R.B. No. 72, slip op. at 1 (Aug. 26, 2011) (providing history of NLRB policy with respect to selections of representatives and asserting that *Dana Corp*., *infra*, was a flawed decision in reversing historical practices); Dana Corp., 351 N.L.R.B. 434, 434 (2007) (reversing long-established "recognition-bar doctrine," which had provided a waiting-period that barred election petitions to replace recently selected representatives); Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717, 717 (2001) (reconsidering "whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incum-

union obtaining recognition, but also, because of the threat of withdrawal of recognition, the continued bargaining power within that relationship. As described in greater detail in Part I, relationships can be formed and terminated through informal, non-electoral processes (voluntary recognition and withdrawal of recognition, respectively), which are typically quicker and easier for the initiating party. The alternative is a formal election, which carries with it procedural safeguards that may aid the non-initiating party. In seeking recognition, labor prefers a non-electoral or "voluntary" process to the formal election process favored by management. When management seeks to terminate that relationship, the procedural protections of a formal election, as opposed to a unilateral revocation of recognition initiated by management, are essential to labor. Laid atop the obvious motivation for these seemingly inconsistent stances, the justification for a favored policy is that it minimizes unfair, bad faith, or even fraudulent practices, and ensures democratic representation of workers' preferences.

Efforts to effectuate the respective desires of management and labor as described above have, for the most part, focused on protecting one side's own options or limiting those of their opposition, with these changes to be established either through adjudication by the National Labor Relations Board (NLRB) or through federal legislation.[2] Labor would prefer a system with "card check" recognition where unions can gain voluntary recognition from employers, or by resorting to the elections process enshrined in Section 9 of the National Labor Relations Act (NLRA).[3] Management has attempted to limit, if not elimi-

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bent union" given historical practice); *see also Lamons Gasket Co. – Invitation to file briefs*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/node/384 (last visited June 23, 2012) (providing accepted amicus briefs in the *Lamons Gasket Co.* case).

2. *See* Secret Ballot Protection Act, H.R. 972, 112th Cong. § 101 (2011) (eliminating voluntary recognition); Employee Free Choice Act of 2007, H.R. 2971, 107th Cong. § 101 (2007) (requiring the NLRB to certify a labor organization as the collective bargaining representative upon presentation of evidence of majority status); *Levitz*, 333 N.L.R.B. at 719–20 (noting that labor organizations would prefer to eliminate withdrawal of recognition altogether, and arguing on behalf of management against the elimination of withdrawal of recognition); Brief for AFL-CIO as Amicus Curiae Supporting Petitioners at 5, Lamons Gasket Co., 357 N.L.R.B. No. 72 (Aug. 26, 2011) (arguing that voluntary recognition should be available to labor organizations), *available at* http://www.nlrb.gov/sites/default/files/documents/236/afl-cio_amicus_brief.pdf; Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents at 8–9, Lamons Gasket Co., 357 N.L.R.B. No. 72 (Aug. 26, 2011) (arguing that card check recognition is an unreliable measure of employee free choice), *available at* http://www.nlrb.gov/sites/default/files/documents/236/uscoc_amicus_brief.pdf.

3. *See* Brief for AFL-CIO as Amicus Curiae Supporting Petitioners, *supra* note 2, at 4 (arguing in favor of reversing *Dana Corp.* and a return to more widespread voluntary recognition).

nate, voluntary recognition, thereby forcing labor organizations to proceed through the elections process under the NLRA.[4] Conversely, organized labor has sought to eliminate management's ability to unilaterally withdraw recognition by requiring an election under the auspices of the NLRB.[5] Management has sought to preserve its ability to unilaterally withdraw recognition and avoid the elections process in terminating a collective bargaining relationship.[6] With efforts at federal legislation so far unsuccessful for either side, the legal framework has most often been only as stable as the shifting makeup of the NLRB itself.

The purpose of this article is to propose a compromise solution, designed to be politically viable and resilient to changing NLRB composition. Rather than eliminating the existing options, this proposal would use incentives to accomplish some of the goals sought by both management and labor, while better serving the ideal of democratic representation to which both sides rhetorically aspire. The proposal encourages NLRB elections for establishing collective bargaining relationships (an objective sought by management) by barring unilateral withdrawal of recognition in cases where the union was certified as a result of an NLRB election (an objective sought by organized labor). Due to the prospect of protection from withdrawal of recognition, unions would have an incentive to proceed through the NLRB elections process, but still could choose to seek voluntary recognition outright. Management would gain the reliability of the NLRB supervised elections process that it has previously sought in exchange for giving up the right to unilaterally terminate a collective bargaining relationship without an election.

Part I of this article describes the existing legal framework in greater detail, explaining how it affects the respective parties and informs their policy preferences. Part II describes how these policy preferences have manifested in past reform efforts, and offers reasons for why they did or did not ultimately succeed. Finally, Part III introduces the incentive-based reform proposal in greater depth, and evaluates its merits and possible shortcomings.

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4. *See* Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents, *supra* note 2, at 8–9 (arguing that misuse of voluntary recognition has necessitated such countermeasures).

5. *See Levitz*, 333 N.L.R.B. at 717.

6. *See id.* at 719–20 ("The employers also contend that they must be able to withdraw recognition, at least when unions have been shown to lack majority support, in order to avoid violating Section 8(a)(2) by continuing to recognize minority unions.").

I.
THE POSITIONS OF THE PARTIES

A. How Unions Become the Representatives of Employees

There are two basic methods by which a union comes to represent employees. The first is through the NLRB elections process. Under Section 9 of the NLRA, once a minimum of thirty percent of the employees in an appropriate "collective bargaining unit" demonstrates interest in electing a representative, the NLRB can direct that an election be held.[7] The election, known as a Representation Certification (RC) election, is supervised by the NLRB.[8] If a majority of the employees casting ballots vote in favor of representation by the labor organization, the NLRB certifies the union as the workers' collective bargaining representative.[9] The labor organization would then negotiate with the employer for a collective bargaining agreement governing the terms and conditions of employment.[10] The union is ordinarily protected from challenges to its status as the collective bargaining unit representative for one year following certification.[11]

The second method by which a union can become the collective bargaining representative of a group of employees is by gaining vol-

7. 29 U.S.C. § 159(e) (2006) ("Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer."); 29 U.S.C. § 159(b) (granting the Board broad authority to define appropriate units for the purposes of collective bargaining "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act", subject to narrow limitations); *see also* 29 C.F.R. § 102.60–102.72 (2012); NAT'L LABOR RELATIONS BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 127–44 (2008) (defining appropriate unit principles); NAT'L LABOR RELATIONS BD., CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS §§ 11020–11042 (2007) [hereinafter CASEHANDLING MANUAL] (discussing "showings of interest" in advance of conducting an election).

8. 29 C.F.R. §102.69(a) ("Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.").

9. 29 U.S.C. §159(c)(1)(B); 29 C.F.R. §102.69(b).

10. 29 U.S.C. §§ 158(d), 159(a); *see* 29 U.S.C. § 158(a)(5w), (b)(3) (requiring employers and labor organizations to negotiate in good faith); *see also infra* notes 53–63 and accompanying text.

11. Lamons Gasket Co., 357 N.L.R.B. No. 72, slip op. at 10 n.35 (Aug. 26, 2011) (describing a one-year bar to election petitions as a benefit of Board certification); *see also* Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944) ("[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.").

untary recognition from the employer.[12] Voluntary recognition necessarily predates[13] the passage of the NLRA in 1935, which established the aforementioned means for labor representatives to gain recognition via election. Traditionally, a union presents evidence to management that a majority of the employees in an appropriate collective bargaining unit desire representation by the labor organization.[14] This evidence normally consists of authorization cards, signed by employees, that designate the labor organization as the employees' collective bargaining representative.[15] Voluntary recognition occurs in two stages. First, the employer needs to agree to review the labor organization's evidence of majority support; second, the employer (or a third party designated by the parties) reviews the evidence. The employer may either recognize the labor organization if the evidence shows majority support or force the union to invoke NLRB election procedures.[16] The more common practice is to have a third party review the evidence of majority support from the labor organization and some evidence provided by the employer for verifying the bona fides of the evidence provided.[17]

Since the 1990s these recognition agreements have also gone hand-in-hand with an agreement that the employer will not campaign against the union.[18] Employers tend to enter into these agreements because of pressure brought to bear by labor organizations through corporate campaigns and consumer boycotts, or perhaps to seek

12. *See, e.g.*, United Mine Workers v. Ark. Oak Flooring Co., 351 U.S. 62, 72 n.8 (1956) (acknowledging that elections are not the only means of recognizing a union's majority); NLRB v. Bradford Dyeing Ass'n., 310 U.S. 318, 338–39 (1940) (cited by *United Mine Workers* and allowing that voluntary recognition pre-empted an election).

13. *See* Dana Corp., 351 N.L.R.B. 434, 436 (2007) ("Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.").

14. *See* James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IND. L. J. 147, 152 (2012) ("If the union is able to get an uncoerced majority, it presents the cards to the employer; the employer has the option of voluntarily recognizing the union, or it can demand a Board election.").

15. *Id.* ("The union distributes authorization cards to sympathetic employees; it is trying to get a majority of the employees to state that they want the union to be their bargaining agent.").

16. *See* Linden Lumber v. NLRB, 419 U.S. 301, 310 (1974) (allowing that while an employer cannot be forced to grant recognition to a labor organization absent the commission of unfair labor practices by the employer, the employer can nonetheless agree to grant recognition).

17. GERALD MAYER, CONG. RESEARCH SERV., RL32930, LABOR UNION RECOGNITION PROCEDURES: USE OF SECRET BALLOTS AND CARD CHECKS 11 (2007) ("A neutral third party often checks, or validates, signatures on authorization cards."), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/561/.

18. *See* Moore & Bales, *supra* note 14, at 157–58.

forbearance from union strikes.[19] The Board has long recognized, with court approval, that voluntary recognition was not historically supplanted by the enactment of NLRA election machinery; rather, the two methods continue to exist side by side.[20] In contrast to the one year of protection from challenges that follows NLRB elections, however, a labor organization's representative status is only protected for a "reasonable period of time" following voluntary recognition, which the Board has defined as a period of six months to one year.[21]

1. Management Opposes Voluntary Recognition and Wants Elections

In response to the increased use of voluntary recognition over the past decade, management has grown increasingly hostile to the practice, citing several avenues by which the support of workers and acquiescence of management is obtained in illegitimate or problematic ways. One objection is the lack of oversight in how authorization cards are procured. Employers argue that authorization cards may be forged, signed under duress, or otherwise be inaccurately indicative of employee preferences in some cases.[22] Equally problematic is the matter of what employees may be told in order to get them to execute an authorization card. Employees may be influenced by misleading information or even be pressured, intimidated, or coerced into signing.[23] The second area of objection is in the methods by which labor organizations are inducing employers to enter into agreements allowing for recognition by evidence of majority support. Labor organizations have increasingly engaged in corporate campaigns to convince employers

19. ZEV EIGEN & SAMUEL ESTREICHER, LABOR AND EMPLOYMENT LAW INITIATIVES AND PROPOSALS UNDER THE OBAMA ADMINISTRATION 260 (2011); James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for New Paradigms*, 90 IOWA L. REV. 819, 835–40 (2005) (discussing reasons why employers agree to neutrality and card check agreements).

20. *See supra* notes 14–17 and accompanying text.

21. *Compare* Lamons Gasket Co., 357 N.L.R.B. No. 72, slip op. at 10 (Aug. 26, 2011) (returning "to the previously settled rule that an employer's voluntary recognition of a union . . . bars an election for a reasonable period of time" and offering that such time may be "no less than 6 months after the parties' first bargaining session and no more than 1 year."), *with id.* at 10 n.35 ("Such benefits [of Board certification] include a 12-month bar to election petitions . . . .").

22. *See* Moore & Bales, *supra* note 14, at 159–60 (relating the worries of the *Dana Corp.* court with regard to fraud and coercion, as well as misinformation and lack of information); *see also* JULIUS G. GETMAN, STEPHEN B. GOLDBERG & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY, 131–32 (1976) (elaborating employer concerns about the degree to which employees are informed or unduly influenced when signing cards).

23. *See* Moore & Bales, *supra* note 14, at 159.

to enter into these agreements.[24] Tactics include hand billing, picketing, and consumer boycotts.[25] Labor organizations have also become more sophisticated and involved in political lobbying, opposing business objectives through zoning and permitting challenges, shareholder activism, and other regulatory proceedings.[26] In exchange for the labor organization ceasing its corporate campaign, management sometimes enters into agreements in which they commit to voluntarily recognizing the union upon a showing of majority support.[27] The agreement also may govern conduct by the parties following recognition, like during negotiations over the initial collective bargaining agreement.[28] The Service Employees International Union (SEIU) has exemplified this move away from NLRB elections towards voluntary recognition agreements, and in doing so, has successfully organized large numbers of building services employers.[29]

Management and its supporters typically heap praise on the NLRB elections process in advocating against voluntary recognition,[30] and often argue that the NLRB election process is the "crown jewel" of the NLRA.[31] As management supporters correctly note, the NLRB elections process provides oversight of the conduct of the parties, as well as methods of addressing misconduct, including some of the problems identified above.[32] For example, the NLRB elections process provides for a system of hearings to resolve issues concerning the appropriateness of the proposed collective bargaining unit or the inclusion or exclusion of certain groups in the unit, and after elections, the NLRB provides a hearing process for resolving disputes involving

24. JAROL B. MANHEIM, TRENDS IN UNION CORPORATE CAMPAIGNS: U.S. CHAMBER OF COMMERCE BRIEFING BOOK 22–24 (2005).

25. *Id.* at 16–17.

26. *Id.* at 17–18.

27. *Id.* at 24–25.

28. *See* Brudney, *supra* note 19, at 835–36 (explaining why employers may agree to neutrality when faced with organizing campaigns).

29. 1 ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY 1230 (Eric Arneson ed. 2007).

30. *See* Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents, *supra* note 2, at 8–9.

31. Brief for the Chamber of Commerce of the United States of America and the Council of Labor Law Equality as Amici Curiae Supporting Petitioners at 6, Dana Corp., 351 N.L.R.B. 434 (2004), *available at* http://www.nlrb.gov/case/08-RD-001976; Brief for Members of the United States House of Representatives as Amici Curiae Supporting Petitioners at 3, Dana Corp., 351 N.L.R.B. 434 (2004), *available at* http://www.nlrb.gov/case/08-RD-001976; Brief for the Tennessee Chamber of Commerce and Industry as Amicus Curiae Supporting Petitioners at 12, Dana Corp., 351 N.L.R.B. 434 (2004), *available at* http://www.nlrb.gov/case/08-RD-001976.

32. 29 C.F.R. §§ 102.60–.72 (2012); CASEHANDLING MANUAL, *supra* note 7, §§ 11360–11438 (detailing NLRB post-hearing objections procedures).

conduct and employee eligibility that may affect the outcome of the election.[33]

2. *Labor Wants Voluntary Recognition*

In recent years labor has strongly campaigned in favor of voluntary recognition,[34] arguing that this alternative is necessitated by the shortcomings of the NLRB elections process itself, which allows employers to engage in voter intimidation and exacerbates structural inequalities between management and labor. Both of these problems are enabled by the delay between reporting and any possible remedy, and compounded, according to the unions, by the paucity of remedial authority under the NLRA.[35]

Labor organizations contend that the NLRB elections process all but encourages illegal voter intimidation by employers, through such conduct as threats, promises, and outright discrimination.[36] The NLRB process also builds in numerous opportunities to delay the process, both in the period prior to an election being held and afterwards due to the appeals process.[37] Most unfair labor practice proceedings and post-election proceedings challenging such conduct can take years to fully resolve.[38] The resulting delay undermines employee support for the labor organization and renders the negotiation of a collective bargaining agreement more difficult if not impossible.[39]

Setting aside the potential for illegal conduct, labor organizations also point to the structural inequalities exacerbated by the NLRB elections process.[40] Employers are allowed to require employees to attend meetings, under pain of discipline, in which the employer lobbies employees to vote against representation, while union organizers do not

33. 29 U.S.C. §159 (2006); CASEHANDLING MANUAL, *supra* note 7, at §§ 11180–11299.

34. *See* Moore & Bales, *supra* note 14, at 161–62.

35. *See id.* at 153–54; Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA Section of Labor & Employment Law, 2nd Annual CLE Conference (Sept. 10–13, 2008), *available at* http://www.abanet.org/labor/lelannualcle/08/materials/data/papers/153.pdf); *Why Stronger Penalties Are Needed*, AMERICAN RIGHTS AT WORK, http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/why-stronger-penalties-are-needed.html (last visited Apr. 17, 2013).

36. *See* sources cited *supra* note 35.

37. *See* Moore & Bales, *supra* note 14, at 153–54.

38. *See* Brudney, *supra* note 19, at 834 & n.65.

39. *Id.*

40. JOHN LOGAN ET AL., UNIV. OF CAL., BERKELEY CTR. FOR LABOR RESEARCH AND EDUC., NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE (2011), *available at* http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf.

have corresponding access.[41] Since neutrality agreements provide labor organizations with greater access to employees, they can compensate for these disadvantages in the NLRB elections process.[42] And, because card-check recognition agreements are often accompanied by neutrality agreements, labor organizations enjoy a higher rate of success.[43]

B. How Unions are Removed as Representatives of Employees

There is also the choice between an electoral method and a non-electoral method for the removal of a labor organization as the collective bargaining representative of a group of employees.[44] As a result of the Taft-Hartley amendments to the NLRA passed into law in 1947 over President Truman's veto, two electoral methods were created for ousting a union.[45] The first is a Representation Decertification election, known in NLRB parlance as an RD election.[46] Analogous to Representation Certification elections, in an RD election, a group of employees presents evidence that at least thirty percent of the employees either no longer wish to be represented by the labor organization or want to have an election to decide the issue.[47] This triggers a vote on continued representation. If a majority of the voters casting ballots vote against continued representation, the union is decertified and no longer represents the employees.[48]

The second type of election is called a Representation Management (RM) petition.[49] It is identical to the RD election, except that it is filed by management upon becoming aware of a good faith uncer-

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41. GORDON LAFER, AMERICAN RIGHTS AT WORK, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NLRB ELECTIONS 17 (2007), *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/NeitherFreeNorFair.pdf.

42. *See* Brudney, *supra* note 19, at 822–23.

43. *See id.* at 828 (noting that between 1998 and 2003 the AFL-CIO organized only one fifth of newly organized members through the NLRB elections process).

44. There is a third method where an employer polls employees to determine if they wish to continue to be represented by a labor organization. *See* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967). However, this is incredibly rare.

45. 29 U.S.C. § 159(c)(1)–(2) (2006); *see also* William S. White, *Bill Curbing Labor Becomes Law As Senate Overrides Veto, 68-25; Unions To Fight For Quick Repeal*, N.Y. TIMES, June 23, 1947, at A1 (describing the vote to override President Truman's veto of the bill).

46. NAT'L LABOR RELATIONS BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 41 (2008).

47. *See id.* at 43–52.

48. CASEHANDLING MANUAL, *supra* note 7, § 11470.

49. 29 U.S.C. § 159(c)(1)(B).

tainty as to continuing majority support for the labor organization.[50] Evidence of good faith uncertainty can be manifested, for example, in the form of first-hand statements by employees to the employer of dissatisfaction with their union or with their union's performance at the negotiating table.[51] Often the evidence of loss of support is the same for RD petitions and RM petitions: the question is whether employees are initiating the procedure, as in the case of RD, or an employer is filing the petition, as in the case of an RM election.[52]

The non-electoral method of removing a union as a representative is by withdrawal of recognition.[53] Under current law, if an employer is presented with evidence that a union has lost majority support of the employees, the employer is then free to unilaterally sever the collective bargaining relationship.[54] Due to the procedural rules applied by the NLRB to restrict when challenges to a union's majority status can be mounted, most withdrawals of recognition and elections to oust a union occur no earlier than one year following the initial certification by the NLRB or after a collective bargaining agreement has been in effect for three years.[55] Unlike voluntary recognition, which requires management's consent to worker demands, this is a unilateral decision. However, the evidentiary requirements are meant to reflect the desires of employees. Under current Board rules, the most common evidence of loss of majority support will be a petition signed by a majority of the employees in the collective bargaining unit stating that they no longer wish to be represented by their union.[56] In the alternative, as discussed above, the employer could use this same evidence to file an RM petition and seek an election.[57] If a union wants to chal-

50. Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717, 721 (2001); CASEHANDLING MANUAL, *supra* note 7, § 11042.

51. *See Levitz*, 333 N.L.R.B. at 728.

52. *Compare* CASEHANDLING MANUAL, *supra* note 7, § 11042.1 (noting that petitions are a valid source of evidence of loss of support), *with id.* § 11022.2 (noting that a petition signed by thirty percent of the employees is sufficient evidence).

53. *See Levitz*, 333 N.L.R.B. at 720–23 (tracing the historical development of the good faith doubt standard for withdrawing recognition).

54. *Id.* at 723–25.

55. *See* Gen. Cable Corp., 139 N.L.R.B. 1123, 1125 (1962) (noting that elections are barred during the duration of a three-year contract of definite duration); *see also* Brooks v. Nat'l Labor Relations Bd., 348 U.S. 96, 98–99, 104 (1954) (describing and upholding the "certification bar," which requires certifications to be honored for one year absent unusual circumstances).

56. *See* Memorandum from Ronald Meisburg, General Counsel, Nat'l Labor Relations Bd. to All Regional Directors, Officers-in-Charge, and Resident Officers (Nov. 26, 2008) (noting that the Board's standard post *Levitz* requires more than circumstantial evidence of loss of majority status), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458019183d.

57. *See supra* notes 52–56.

lenge the employer's withdrawal of recognition, it must file an unfair labor practice charge with the NLRB—a process that may take several years to resolve.[58]

1. *Labor Wants to Eliminate Withdrawal of Recognition and Wants Elections*

Organized labor has always opposed withdrawal of recognition.[59] The possibility of such a withdrawal undermines the stability of collective bargaining relationships because it can be done unilaterally without any requirement of prior consultation with the labor organization.[60] In this sense, it provides a much greater advantage than voluntary recognition, in which labor must obtain the assent of an employer to be recognized. The collective bargaining relationship ceases and is not reinstated unless the employer agrees to do so or the NLRB orders the employer to rescind the withdrawal as a result of a meritorious challenge through the unfair labor practice charge process.[61] In the meantime the union is shown to be ineffectual, and its support is undermined among employees.[62] Given these concerns regarding fairness and stability, labor organizations argue that the elections process is more reliable than withdrawal of recognition.[63] Labor has also argued that the ability of employees to file a petition for decertification themselves sufficiently protects worker choice.[64]

2. *Management Wants to Preserve Withdrawal of Recognition*

Management's arguments in favor of preserving withdrawal of recognition usually focus on effectuation of employee free choice rather than on their possible desire to rid themselves of a union.[65] They contend that if employees present legally sufficient evidence to management that the union no longer represents employees, management should effectuate the desire as quickly as possible. In fact, man-

58. *See Levitz*, 333 N.L.R.B. at 725 (noting that the employer has the burden of proving that the labor organization has lost their majority in order to establish an affirmative defense to a charge that the employer committed an unfair labor practice by withdrawing recognition).

59. *See id.* at 719.

60. *Id.* at 723.

61. *See supra* note 58.

62. *See, e.g.*, Brown v. Pac. Tel. & Tel., 218 F.2d 542, 544 (9th Cir. 1955) (noting the irreparable harm "unions may suffer by the drifting away of their members" while challenging a withdrawal or continuing refusal of recognition).

63. *Levitz*, 333 N.L.R.B. at 719.

64. *Id.*

65. *Id.*

agement argues that it is legally obligated to do so.[66] If an employer is presented with evidence that the labor organization has lost majority status and fails to withdraw recognition, it runs the risk of violating section 8(a)(2) of the NLRA, which prohibits an employer from recognizing a union in circumstances where it does not enjoy majority support.[67] The difficulty, however, lies in distinguishing between when an employer decisively knows that a union has lost majority support, and when it merely has doubts or uncertainty about the level of support, but nevertheless withdraws recognition.

Management also prefers withdrawal of recognition to the election route because they believe that labor organizations are able to drag the process out through frivolous appeals, thereby lengthening the period in which employee choice is not being respected.[68] Significant to political arguments regarding the balance of power, management has also contended that, because they were not required to go through the NLRB elections process to recognize a labor organization, the same should apply with respect to withdrawal of recognition.[69] However, it is worth noting again that this process is entirely unilateral, while voluntary recognition still requires an agreement by both parties.

II.
Legislative and Policy Efforts by Management and Labor

As important as the National Labor Relations Act has been since its passage in 1935, it has been remarkably resistant to change. The NLRA has undergone substantial changes only twice, with the last occurring in 1959.[70] While the Board is vested with rulemaking authority to enact rules necessary to fulfill their obligations under the Act, the Board has been extraordinarily reluctant to engage in notice and comment rulemaking pursuant to the Administrative Procedures Act until its recent proposals requiring employers to notify employees

66. *Id.*

67. *Id.* at 726; *see also* 29 U.S.C. § 158(a)(2) (2006); ILGWU v. NLRB, 366 U.S. 373 (1961).

68. *Levitz*, 333 N.L.R.B. at 719.

69. *Id.* at 719–20.

70. 29 U.S.C. § 411 (2006); *Employee Free Choice Act: Strengthening America's Middle Class Through the Employee Free Choice Act*, *Hearing on H.R. 2971 Before the H. Comm. on Educ. & Labor: Subcomm. on Health, Emp't, Labor & Pensions*, 107th Cong. 1 (2007) (statement of Charles I. Cohen, U.S. Chamber of Commerce), *available at* http://www.uschamber.com/sites/default/files/issues/labor/files/chuckcohencardchecktestimony2807.pdf.

of their rights under the NLRA.[71] With this background in mind, we now turn our consideration to legislative and policy reforms associated with withdrawal of recognition and elections.

A. Legislative Reforms

The framework discussed above reveals a number of points at which the ease of establishing and terminating collective bargaining agreements could be affected. There are NLRB elections, and a variety of designs for "informal" alternatives. These processes, in turn, may be unilateral or require mutual consent. The thresholds for initiating these processes, in percentages and in strength of belief, can be raised or lowered. There are procedures for appeal, and potential sanctions for violating terms. There are constraints on conduct, or time periods in which challenges are limited or prohibited. Some of these are clearly more high-stakes than others, but this reveals the complex array of potential tradeoffs in any reform policy, and sketches out the extreme poles of labor-favorable and management-favorable policies. In fact, the legislative proposals of each side have sought to secure advantages at many of these levels. This Part reviews two recent efforts—the Employee Free Choice Act, and the Secret Ballot Protection Act.

1. Employee Free Choice Act

With the election of President Obama in 2008, and with substantial Democratic majorities in both chambers of Congress, the number one legislative priority of organized labor and its supporters became the passage of the Employee Free Choice Act (EFCA).[72] EFCA was a comprehensive overhaul of the National Labor Relations Act, which, as noted above, was last substantively amended in 1959, by the pas-

71. *See* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT'L U. L. REV. 411, 414 (2010) (cataloging academic criticism of Board's preference for making law through adjudication instead of through rulemaking); *see also* Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

72. *See, e.g.*, Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 28, 2008, at A33; *American Rights at Work Hails Introduction of Employee Free Choice Act*, AMERICAN RIGHTS AT WORK (Mar. 10, 2009), http://www.americanrightsatwork.org/press-center/2009-press-releases/american-rights-at-work-hails-introduction-of-employee-free-choice-act-20090310-711-374-374.html; *National Ad Campaign for Employee Free Choice Act Intensifies*, AMERICAN RIGHTS AT WORK (Apr. 28, 2009), http://www.americanrightsatwork.org/press-center/2009-press-releases/national-ad-campaign-for-employee-free-choice-act-intensifies-20090409-747-374-374.html.

sage of the Landrum-Griffin Act.[73] The centerpiece of EFCA was a "card check provision," which would have allowed the NLRB to certify a labor organization as the collective bargaining representative of a group of employees upon presentation of evidence of majority status.[74] No election would be necessary,[75] meaning that a labor organization would no longer be required to persuade an employer to agree to recognize a union with majority support; instead the labor organization could force the situation through the NLRB.[76] Unions would no longer be dependent on employers agreeing to enter into voluntary recognition agreements, and would not have to expend resources to convince employers to do so. They also would not be forced into the NLRB elections process and the attendant delays discussed previously.[77] Union resources dedicated to securing a voluntary recognition agreement could instead be expended on negotiating a more favorable collective bargaining agreement. This process would most closely resemble the right of withdrawal currently enjoyed by management.

Predictably, management opposed EFCA as a whole, and the card check provision in particular.[78] It was assailed as undemocratic and an assault on the secrecy of the ballot box. Opponents argued that employees would be denied their right to vote and that employers would be denied the opportunity to make their case to employees prior to employees signing the authorization cards that could later be used to support a card check recognition.[79] Labor organizations pushed back against this argument maintaining that the current NLRB elections process was broken and grossly favored management.[80] As discussed previously, employers may, without violating federal law, require employees to attend meetings, under pain of discipline and thereby campaign against representation, whereas union organizers do not have corresponding access.[81] EFCA did not pass during the

73. *See* 29 U.S.C. § 411 (2006).

74. Employee Free Choice Act of 2007, § 2 H.R. 2971, 107th Cong. (2007).

75. *Id.*

76. *Id.*

77. *See* discussion *supra* Part I.A.2.

78. *See Employee Free Choice Act: Grassroots Toolkit*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/chambers/employee-free-choice-act-grassroots-toolkit (last visited Mar. 27, 2013).

79. *See* JAMES SHERK & PAUL KERSEY, HERITAGE FOUND., EXECUTIVE SUMMARY: HOW THE EMPLOYEE FREE CHOICE ACT TAKES AWAY WORKERS' RIGHTS (2007), *available at* http://www.heritage.org/research/reports/2007/04/how-the-employee-free-choice-act-takes-away-workers-rights.

80. *See* Steven Greenhouse, *Union Legislation Drive Begins in Congress*, N.Y. TIMES (Mar. 10, 2009), http://thecaucus.blogs.nytimes.com/2009/03/10/union-legislation-drive-begins-in-congress.

81. *See* LAFER, *supra* note 41, at 2.

2008–2009 term, and, with the current divided Congress, prospects for pro-labor legislative reform do not look particularly good going forward.[82] Whether EFCA failed to pass because of strong opposition or due to other legislative priorities is still up for debate.[83]

2. Secret Ballot Protection Act

Largely as a response to EFCA, Republicans in Congress introduced the Secret Ballot Protection Act.[84] If passed into law, the bill would have prohibited employers from recognizing or bargaining with a labor organization unless it was certified by the NLRB through an election.[85] The bill sought to prohibit labor organizations from causing or attempting to cause an employer to recognize or bargain collectively with a labor organization unless the labor organization had been certified by the NLRB in an election.[86] Existing withdrawal of recognition procedures were not affected by this proposal.[87] This legislation would have been very asymmetric compared to the status quo: the bill would have required an election for a labor organization to become the collective bargaining representative, but an employer would still be permitted to terminate a collective bargaining relationship without an election. Management forces supported this measure as necessary to prevent employees from being coerced by labor organizations into supporting voluntary recognition, to force unions to utilize the more reliable NLRB elections process discussed above, and to prevent the NLRB from enacting a card check provision through rulemaking.[88]As of March, 2013, neither this nor any similar bill has made it past the committee stage in either the House of Representatives or the Senate.[89]

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82. *See* Steven Greenhouse, *Answers About the Nation's Labor Laws and Unions, Part 2*, N.Y. TIMES (Mar. 25, 2011), http://cityroom.blogs.nytimes.com/2011/03/25/answers-about-the-nations-labor-laws-and-unions-part-2.

83. *See id.*

84. *See RSC Q & A: The Secret Ballot Protection Act*, REPUBLICAN STUDY COMMITTEE, http://rsc.jordan.house.gov/Solutions/SecretBallotProtectionAct.htm (last visited June 23, 2012).

85. Secret Ballot Protection Act, H.R. 972, 112th Cong. § 3 (2011).

86. *Id.*

87. *Id.*

88. *See* Phil Roe, *The Secret Ballot Protection Act*, HILL'S CONGRESS BLOG (Mar. 25, 2011, 12:21 PM), http://thehill.com/blogs/congress-blog/labor/148653-the-secret-ballot-protection-act.

89. Secret Ballot Protection Act, H.R. 972, 112th Cong. (2011); Secret Ballot Protection Act of 2011, S.972, 112th Cong. (2011).

B. Regulatory Reforms

The legislative landscape has effectively remained unchanged for over fifty years, but actual policy has changed through executive action. The NLRB, composed of five members, appointed by the President to five-year terms, is tasked with interpreting, applying, and adjudicating the policies embodied in the NLRA.[90] Although it is empowered to engage in notice and comment rulemaking under the Administrative Procedure Act, the Board has traditionally used adjudication to set policy.[91] Changes at the regulatory level have the potential to substantially alter the balance of power between management and labor, and have in fact done so in recent years. Some agency interpretations have been exposed to the changing political balance of the Board across successive Presidential administrations. Most of these policy shifts have endured, however. The following Part evaluates two decisions especially relevant to my proposal, and analyzes why these rulings did or did not endure.

1. Levitz Furniture of the Pacific

In 2001, the Board issued its decision in *Levitz Furniture Co. of the Pacific*.[92] In *Levitz*, the Board reconsidered the standard for withdrawal of recognition and the filing of an RM petition.[93] Prior to the decision in *Levitz*, the standard for both was governed by the Board's 1951 decision in *Celanese Corp.*, which required a good faith doubt based on objective evidence of the union's continued majority status.[94] Management took the position that the standard for withdrawal of recognition should be maintained as it was.[95] Management argued to the Board in this case that withdrawal of recognition served to immediately effectuate employee free choice when management is presented with evidence that a majority of employees no longer wished to be represented.[96] Management also noted that because they are free to voluntarily recognize a union, they should not be required

90. *See generally* NAT'L LABOR RELATIONS BD., http://www.nlrb.gov.

91. 29 U.S.C. § 155 (2006).

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

93. *Id.*

94. Celanese Corp., 95 N.L.R.B. 664 (1951). Additionally, the meaning of this standard had been rendered unclear by a 1998 Supreme Court decision, issued while *Levitz* was pending, which held that "good-faith doubt" must be interpreted as reasonable uncertainty of majority status, rather than the Board's interpretation of "good-faith disbelief." *Levitz*, 333 N.L.R.B. at 722–23 (citing Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998)).

95. *Levitz*, 333 N.L.R.B. at 719–20.

96. *Id.* at 719.

to proceed with an election to oust a union.[97] Organized labor argued that withdrawal of recognition should be banned outright and that the standard for RM petitions should be maintained.[98] In so arguing, unions maintained that elections are the preferred method of resolving disputes concerning majority status.[99] Unions also noted that employees could effectuate employee free choice on their own by filing an RD petition.[100]

In 2001 the NLRB opted by a three-to-one majority to ratchet up the threshold for withdrawal of recognition, and to lower the threshold for filing an RM petition.[101] For an employer to file an RM petition, the standard of proof was lowered from "good faith doubt" (or disbelief) to "good faith uncertainty."[102] The Board reasoned that lowering the standard for filing an RM petition would encourage employers to file RM petitions rather than unilaterally withdraw recognition.[103] They also recognized that the change in standard would allow an employer to file an RM petition when an employer is confronted with conflicting evidence of a union's majority status.[104] For example, the good faith uncertainty standard could be met where the employer is presented with two petitions, the first showing a majority of employees no longer wish to be represented and a second showing otherwise.[105]

With respect to withdrawal of recognition, the Board elevated the standard to actual loss of majority from the prior good faith doubt standard.[106] With the outright removal of the good faith component, the costly risk of wrongly withdrawing recognition due to a mistaken good faith belief was eliminated.[107] The net effect was to make it easier for an employer to file for an RM petition, which would trigger an election, and more difficult to defend a unilateral withdrawal of recognition against a challenge.[108] The Board's stated intent was to encourage employers, when confronted with evidence that called into

97. *Id.* at 719–20.
98. *Id.* at 719.
99. *Id.*
100. *Id*.
101. *See id.* at 717.
102. *See id.* at 727.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 725.
107. *Id.* at 725.
108. *Id.*

question a labor organization's continued majority status, to seek an RM election rather than withdraw recognition.[109]

2. Dana Corporation

In 2007, the Board modified the doctrine governing when management can challenge a union's recognition in *Dana Corp.*[110] Prior to *Dana Corp.* being decided, a labor organization was protected from challenges to its majority status for a reasonable period of time after it was voluntarily recognized by management.[111] In a three-to-two decision, the Board decided in *Dana Corp.* that additional procedural safeguards were necessary to protect employee free choice by steering parties towards the NLRB elections process.[112] The Board held that once the union and the employer agree to voluntary recognition, they must notify the Board and post a notice (prepared by the Board) to employees.[113] The purpose of the notice was to inform employees that voluntary recognition had been granted, and that they had the right to file an RD petition within forty-five days of voluntary recognition in order to overturn the recognition if they so desired.[114] The Board further held that, absent the notice posting, the recognition bar and any subsequent contract bar that would ensue from the entry of a collective bargaining agreement would not apply.[115]

The Board's decision in *Dana Corp.* did not last for long. In 2011, after a shift in composition, the Board issued its decision in *Lamons Gasket* overruling *Dana Corp*.[116] The Board restored the pre-*Dana Corp.* rule that a union that receives voluntary recognition is protected from challenges to its majority status by an election petition for a reasonable period of time.[117] In addition to rejecting the arguments of the majority in *Dana Corp.*, the new majority reviewed the experiences of the NLRB under the new rule in *Dana Corp.* and concluded that the additional procedures propounded by the then-majority were unnecessary based upon the very low rejection rate of represen-

109. *Id.*

110. Dana Corp., 351 N.L.R.B. 434 (2007).

111. *See* Franks Bros. v. N.L.R.B., 321 U.S. 702, 705 (1944); Keller Plastics Eastern, 156 N.L.R.B. 583 (1966).

112. *Dana*, 351 N.L.R.B. at 438.

113. *Id.* at 441.

114. *Id.*

115. *Id.*

116. Lamons Gasket Co., 357 N.L.R.B. No. 72, (Aug. 26, 2011).

117. *Id.* at 10.

tation under *Dana Corp*.[118] The Board thus returned to the status quo prior to the issuance of *Dana Corp.*[119]

3. Understanding the Board's Rulings

Dana Corp. was one of the most important cases to be decided under Chairman Battista's leadership; nevertheless it was overruled less than five years after it was decided.[120] While traditional reasons for the new Board to have overruled this decision have focused on stare decisis and the decision being bad policy, another reason should be considered.[121] There was nothing but sour persimmons in it for organized labor. Compare and contrast the now overruled decision in *Dana Corp.* with the decision in *Levitz*. Neither decision was unanimous and both were criticized.[122] So why did *Levitz* survive and why was *Dana Corp.* overturned?

There are mundane explanations to be sure. For example, the management-friendly Board during Chairman Hurtgen's and Chairman Battista's tenures may not have presented the right vehicle to overrule *Levitz*. This seems doubtful given the number of invitations by various Board members in footnotes of decisions over this time period, which strongly hinted at a desire to revisit *Levitz*.[123] Indeed, during Chairman Battista's tenure, a majority of the five-member

118. *Id.* at 4–5.

119. *Id.* at 10.

120. *Id.* at 1.

121. *See id.* at 4–10.

122. Mastronardi Mason Materials, 336 N.L.R.B. 1296, 1296 n.1 (2001) (Chairman Hurtgen noting that he dissented in *Levitz* but finding that the decision was correctly applied); Eden Gardens Nursing Home, 339 N.L.R.B. 71, 71 n.1 (2003) (Member Schaumber only); Badlands Golf Course, 350 N.L.R.B. 264, 265 n.6 (2004) (Chairman Battista and Members Schaumber and Kirsanow expressing no view as to whether *Levitz* was correctly decided); Alpha Assocs., 344 N.L.R.B. 742, 745 n.10 (2005) (Chairman Battista and Member Schaumber expressing no view as to whether *Levitz* was correctly decided); Seaport Printing & Ad Specialties, 344 N.L.R.B. 354, 354 n.2 (2005) (Chairman Battista and Member Schaumber expressing no view as to whether *Levitz* was correctly decided); Siemens Bldg. Techs., 341 N.L.R.B. 1108, 1108–09, 1009 n.5 (2005) (Chairman Battista and Member Schaumber expressing no view as to whether *Levitz* was correctly decided); Highlands Regional Med. Ctr., 347 N.L.R.B. 1404, 1406 n.12 (2006) (Chairman Battista only); HQM of Bayside, 348 N.L.R.B. 758, 759 n.10 (2006) (Member Schaumber only); Parkwood Developmental Ctr., 347 N.L.R.B. 974, 975 n.6 (2006) (Chairman Battista and Member Schaumber expressing no view as to whether *Levitz* was correctly decided); B.A. Mullican, 350 N.L.R.B. 493, 494–95 (2007) (Chairman Battista noting his substantial doubts about the continued validity of *Levitz*); Madison Indus., 349 N.L.R.B. 1306, 1307 n.6 (2007) (Chairman Battista and Member Schaumber expressing no view as to whether *Levitz* was correctly decided).

123. *See supra*, note 122.

Board actively expressed no view about the validity of the holding in *Levitz*.[124]

A more likely hypothesis is that both organized labor and management gained something in *Levitz* and stood to lose something if it were overturned. This point is underscored by the impact of ideology on decisions of the NLRB on important issues.[125] Much of the scholarship in the area of Board decision-making has concluded to varying degrees that ideology has a large influence on Board decisions.[126] This role of ideology makes the survival of the Board decision in *Levitz* all the more difficult to explain. Under *Levitz*, management now has an easier route to filing an RM election,[127] but labor organizations gained better protection from withdrawal of recognition thanks to the implementation of the "actual loss" standard for withdrawal of recognition.[128] While both sides arguably lost something as well, the crucial aspect is that the outcome wasn't clearly partisan, and therefore wasn't vulnerable to the loss of that political party's majority on the board. The marginal deciding vote would not automatically be lost when majorities shifted, contributing to the stability of this decision under Democratic and Republican majorities on the NLRB. By contrast the Board's decision in *Dana Corp.* served only to promote the interests of management in making it more difficult for unions to organize employees, and extended no benefit to unions.

In a shift from a Republican to a Democratic majority, there would be no incentive for a union supporter to join the two remaining management-friendly votes in upholding it. While a coalition that opposed the ruling could develop, this might require an agreement across party lines that would be more difficult to form.[129] This could not be explained by one-directional partisan preferences, and therefore would not be triggered merely by a change in majorities.[130] The rationale

124. *See, e.g.*, *Badlands*, 350 N.L.R.B. at 265 n.6.

125. *See* Ronald L. Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LABOR & EMP. L. 707 (2006).

126. *See id.* at 711–12 nn.28–30.

127. *See supra* text accompanying notes 101–105.

128. *See supra* text accompanying notes 106–109.

129. Presumably, political costs to establishing a coalition are higher than maintaining a party line, which could make it more difficult to institute such policies for the same reason that they are more resistant to being overturned. It is possible, however, for the perceived mutual benefit to be greater in one direction than the other, such that a mutually beneficial policy is more easily implemented than reversed.

130. While it is true that *Levitz* was decided by a three-to-one vote, this divided vote was not indicative of an era of bipartisanship, but rather simply reflected the political composition of the Board at the time *Levitz* was decided; there were three Democratic appointees and one Republican appointee.

provided in adjudication might also be a source of this stability, by tying the policies together through a common justification.[131]

The Board has enacted other policies that have enjoyed long term stability like the decision in *Levitz*, and which provide further support for the theory that policies which marry a benefit for one side to a benefit for the other are more durable. The "certification bar" announced in *Kimberly Clark Corp*. offers one poignant example. After a union wins an election and is certified as the collective bargaining representative for the employees, the union enjoys a certification bar that protects the union from challenges to its majority status for a year following certification.[132] This bar allows the union breathing room to negotiate a first contract with the employer without the need to produce immediate results or else be voted out immediately.[133] At the same time, the certification bar allows employees to revisit their decision to select a collective bargaining representative if the union cannot secure a contract during the certification year.[134] The certification bar has been in place since 1945 and has not been substantially changed since.[135] Both management and labor benefit from this rule. Management knows that if no contract is reached in the first year, the union is subject to being ousted. Unions gain protection for a fixed period in order to obtain results for the employees they represent.

Other bars to elections have not enjoyed the same level of stability. In addition to *Dana Corp.* discussed above, the Board has attempted to bar elections for a reasonable period of time following an employer taking over the operations from another employer.[136] The Board first decided in *St. Elizabeth's Manor* that a union should be shielded from challenges to its majority status for a reasonable period of time when a successor employer assumes the operations of a predecessor employer.[137] A scant three years later, however, the Board,

131. This would imply something more than just a quid-pro-quo, where each side's benefits were at least justified by those provided to the other side, or are solutions to the same issue. For instance, both changes in *Levitz* are addressed to the problem of calibrating management's response to the strength of belief or evidence in a perceived change in support.

132. *See* Brooks v. N.L.R.B., 348 U.S. 96, 101 (1954).

133. *Id.* at 100.

134. *Id.*

135. Kimberly Clark Corp., 61 N.L.R.B. 90 (1945) (holding that petition for an election, filed less than seven months after a union was certified as the collective bargaining representative for the employees, was subject to the one-year certification bar).

136. *See* NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 276–81 (1972) (upholding the Board's ruling that under certain circumstances a successor employer is obligated to bargain with a union that represented the employees of the predecessor employer).

137. St. Elizabeth's Manor, Inc., 329 N.L.R.B. 341 (1999).

with a new majority, overruled *St. Elizabeth's Manor* and returned to the status quo ante.[138] Following yet another shift in the Board majority, the Board reinstated the successor bar first announced in *St. Elizabeth's Manor*.[139] In each of these instances, only one side was benefiting, and consequently the successor bar has been instated, rejected, and then reinstated by successive Boards.

III.
The Incentive-Based Proposal

As discussed above, this article proposes denying management the right to withdraw recognition in circumstances where the labor organization is certified as the collective bargaining representative by the NLRB. This would leave the existing options of labor and management intact, but would shift the incentives of labor towards recognition through elections and, in doing so, obligate management to proceed through elections instead of withdrawal of recognition. Two factors strongly suggest this proposal would be implementable and would effect an improvement over the status quo. First, it is politically viable. The nature of compromise makes it more politically palatable than the legislative reforms discussed above, and the balanced effects suggest the rule would be resilient in the face of changing NLRB majorities. Second, given the importance the opposing sides place on the strategic options at stake, the incentive structure would likely succeed in inducing them to choose this path. This compromise option is not good for these reasons alone, however. Developing a less contentious process aligns with the principles underlying the NLRA and, more importantly, may better fulfill the important democratic ideals that each side purports to value.

A. Political Viability

The first reason the proposal works is that it is a politically and practically viable compromise. Management gets to have more recognition campaigns proceed through the NLRB. Unions get protection from withdrawal of recognition, but only if they are certified by the NLRB. Unlike most reform attempts, both organized labor and management have something to gain by this reform. While no policy is inviolate, it is readily apparent that certain policies of the NLRB have switched back and forth every time a new Board majority comes to power. Examples of this phenomena include *Weingarten* rights for un-

138. MV Transp., 330 N.L.R.B. 770 (2002).
139. UGL-UNICCO Serv. Co., 357 N.L.R.B. No. 76 (Aug. 26, 2011).

represented employees,[140] the employee status of graduate assistants at private universities,[141] the recognition bar,[142] the inclusion of contingency employees in collective bargaining units of permanent employees,[143] and the successor bar,[144] to name a few. What is significant about my incentive-based proposal is that it ties the opponent-preferred options together, allowing labor to choose whether it favors a fractious process or a *relatively* amicable one. From the perspective of the political actors on the NLRB, the proposal is also viable because the policy has no obvious partisan character, and leaves alternatives available to both management and labor. In a larger sense, creating a system that benefits both sides is an overriding principle of labor law.[145]

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140. *See* Materials Research Corporation, 262 N.L.R.B. 1010 (1982) (finding that unrepresented employees had a right to the presence of a representative during an investigatory interview); Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985) (overruling *Materials Research*); Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 92 (2000) (overruling *Sears Roebuck & Co.* and returning to the rule set forth in *Material Research*), *aff'd*., 268 F.3d 1095, 1097 (D.C. Cir. 2001); IBM Corp., 341 N.L.R.B. 1288, 1294 (2004) (overruling *Epilepsy Found.*); *see also* Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111, 114 (2005) (noting that the NLRB has over the years changed its position on whether *Weingarten* rights apply to non-union employees on four occasions).

141. *See* N.Y. Univ., 332 N.L.R.B. 1205 (2000) (finding graduate students at private universities to be employees within the meaning of Section 2(3) of the National Labor Relations Act); Brown Univ., 342 N.L.R.B. 483 (2004) (overruling *New York University* and returning to the pre-*New York University* precedent that graduate students are not employees within the meaning of the NLRA); N.Y. Univ., 356 N.L.R.B. No. 7 (Oct. 10, 2010) (granting petition for review concerning, in part, whether *Brown University* should be overruled).

142. *See supra* text accompanying notes 110–119.

143. *See* Greenhoot, Inc., 205 N.L.R.B. 250 (1973) (finding that, in workplaces employing both full-time and temporary employees, a labor organization must have the permission of the temporary agency as well as the employer who hired the temporary employees before including the temporary employees in the same collective bargaining unit as the full-time employees); Lee Hosp., 300 N.L.R.B. 947 (1990) (holding that, in workplaces employing both full-time and temporary employees, a labor organization must have the permission of the temporary agency as well as the employer who hired the temporary employees before including the temporary employees in the same collective bargaining unit as the full-time employees); M.B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000) (overruling *Lee Hospital* and clarifying that *Greenhoot* stands for the limited proposition that employer consent is only necessary where two or more discrete employers hire employees from the same supplier-employer and the union seeks to represent the employees in a single collective bargaining unit in negotiations with the discrete employers); Oakwood Care Ctr., 343 N.L.R.B. 659 (2004) (overruling *M.B. Sturgis* and returning to the pre-*M.B. Sturgis* precedents).

144. *See supra* text accompanying notes 137–139.

145. NLRB v. United Food & Commercial Workers Union, Local 23, 487 U.S. 112, 127–28 (1987) ("Congress was aware that settlements constitute the 'life blood' of the administrative process, especially in labor relations.").

B. Practical Viability

Where both sides stand to gain and lose, the acceptability of the policy to interested actors will depend, in part, on how "fair" of a compromise it is. Management's opposition to voluntary recognition and discontent with the often publicly visible tactics of such campaigns is strong, as evidenced by the legislation produced by their lobbying (namely, the Secret Ballot Protection Act). The loss of withdrawal of recognition, however, may be substantial, as it may strengthen labor's negotiating position by requiring the employer to proceed through an election, rather than acting unilaterally. Similarly, while labor has much to gain from the removal of the unilateral withdrawal threat, unions will be required to proceed through the NLRB elections machinery and must tolerate the delays that may result.

The proposal is also practically viable because it does not mandate a one-size-fits-all approach. The size of the collective bargaining unit may determine whether the incentivized path is appealing. For example, a union trying to organize a large group of employees may decide that the size of the unit may insulate the union from a challenge to its majority status, while a smaller collective bargaining unit might opt for an election due to the relative instability of a small number of voters. Put another way, the shifting preferences of a single employee in a ten-person collective bargaining unit is much more likely to tilt the balance than in a thousand-person unit. The existence of majority support for representation is likely to be more variable, and challenges to this status would be more likely to succeed.

The most immediate concern with this proposal is the dissatisfaction of management and organized labor. Organized labor does not get an easier path to voluntary recognition, nor does management get further restrictions on voluntary recognition. Organized labor does not get unconditional protection from withdrawal of recognition and management would have a restriction on its use of withdrawal of recognition. In short, neither organized labor nor management will be entirely happy with the proposal made in this article. But that is the point. In fact, the shared allocation of burdens and benefits is one of the strengths of the proposal. Both sides need to give up something to get something, an idea that is central to the process of labor-management relations. The lack of support can be countered by showing the stability of the arrangement. For all of the management satisfaction with *Dana Corp.* decision, it lasted about as long as there was a Republican majority on the NLRB. Organized labor, on the other hand, only has to

look to the successor bar reversals and wonder how long it will be before a Republican-led NLRB overrules this decision yet again.[146]

There is certainly an argument to be made that no incentive will be sufficient to induce unions to utilize the NLRB election process.[147] However, the Board has proposed rule changes designed to expedite the election process, thus addressing a serious shortcoming of the current regulatory regime that has disfavored labor.[148] Additionally, as long as the voluntary recognition process remains in its current state there will be employers able to weather corporate campaigns, thereby leaving unions with the only option of proceeding through the NLRB election process. Given the difficulties in negotiating a first contract following a successful RC election, a union would do well to have some extra protection to challenges to its majority status.[149] From a practical perspective, even if unions don't opt into this path to recognition in every case, the policy would still effect an overall improvement. In fact, this may be the best solution currently available, given that further reforms would require a change to the NLRA itself, which is unlikely because of the currently divided Congress.[150] Given the disarray of the Board, less dramatic policy changes stand a better chance of being enacted in the short term and surviving in the long term.[151]

C. Improved Outcomes

A third reason this incentive-based proposal may gain traction is that it relies upon a virtue espoused by both labor and management. Management has traditionally extolled the virtues of the NLRB elections process when faced with a labor organization's attempt to organize their employees.[152] Labor organizations on the other hand have

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

147. *See supra* notes 34–43 and accompanying text.

148. *See Election procedure rule changes that took effect April 30 are suspended*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/node/3990 (last visited Apr. 10, 2013) (discussing the status of the proposed changes to the NLRB election process).

149. *See* Memorandum No. GC 06-05 from Ronald Meisburg, Gen. Counsel of Nat'l Labor Relations Bd. to All Regional Directors, Officers-in-Charge, and Resident Officers (Apr. 19, 2006) (discussing the frequency in which unfair labor practices are committed during initial contract negotiations).

150. *See supra* note 82 and accompanying text.

151. *See* Noel Canning v. NLRB, 705 F.3d 490, 506–07, 515 (D.C. Cir. 2013) (invalidating the recess appointments to the NLRB); *see also NLRB To Seek Supreme Court Review in* Noel Canning v. NLRB, NAT'L LABOR RELATIONS BD. (Mar. 12, 2013), http://www.nlrb.gov/news-outreach/news-releases/nlrb-seek-supreme-court-review-noel-canning-v-nlrb (announcing the NLRB's intention to seek review of the aforementioned decision before the U.S. Supreme Court).

152. *See* MANHEIM, *supra* note 24, at 16–17.

emphasized the strength of the NLRB elections process when faced with the prospect of an outright withdrawal of recognition.[153] Though these arguments in favor of elections have been made in different contexts, they represent appeals to the same values of securely achieving democratic representation. In both of these situations, both sides are correct in viewing the elections process as the preferable and more reliable solution. The Board, with Supreme Court approval, has long recognized that authorization cards are a valid method of ascertaining whether employees want to be represented by a union.[154] However, the Board has also recognized that the Board's election procedure is a more reliable method of ascertaining employee free choice.[155] Differing Board majorities have relied upon the fact that the Board's election machinery is more reliable—in *Levitz* to justify restricting withdrawal of recognition[156] and in *Dana Corp.* to restrict voluntary recognition.[157] While the Board acknowledges non-electoral methods of gaining recognition and withdrawing recognition, the reform proposed in this article does not ban either outright. Essentially, a more reliable RC election is the quid pro quo for taking away the right of the employer to withdraw recognition at a later point.

As was the case when the *Levitz* decision was issued, an argument can be made that denying an employer the opportunity to withdraw recognition from a union certified by the NLRB, infringes on employee free choice.[158] If an employer were to be presented with evidence that the union has lost its majority status, withdrawal of recognition presents the fastest way to effectuate the sentiments of employees. By forcing an employer to file a petition for an election to decertify the Union, the effectuation would come more slowly. But the delay would not be unworkable. The NLRB's own statistics show that eighty-five percent of all representation cases are resolved within one-hundred days of filing.[159] By contrast only 72.5% of all unfair labor practices are resolved within 120 days and, of the cases found to be prosecutable, eighty-three percent were resolved within one year.[160] And while it can be argued that the unions can delay RD and RM

153. *See supra* note 63 and accompanying text.
154. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969).
155. *See id.* at 596 & n.8.
156. Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717, 719 (2001).
157. Dana Corp., 351 N.L.R.B. 434, 438 (2007).
158. *See supra* note 96 and accompanying text.
159. NAT'L LABOR RELATIONS BD., PERFORMANCE AND ACCOUNTABILITY REPORT 19 (2011), *available at* http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2011_par_508.pdf.
160. *Id.* at 20.

elections, this same problem arises in the RC elections.[161] Thus, while arguments can be made that incentivizing labor and management to choose NLRB elections can cause delay, both sides have regularly praised the virtues of election procedures, and the NLRB's statistics demonstrate that disputes over elections are adjudicated more quickly than unfair labor practices claims.

D. Special Circumstances and Exceptions

There are circumstances in which it would be inappropriate to require an employer to file an RM petition. The first is with respect to accretions. The accretion doctrine arises when an employer or a union argues that two separate bargaining units should be considered to be one unit for purposes of collective bargaining. As a practical matter it most often occurs when an employer reorganizes its workforce or acquires another employer and as a result either the union is seeking to add employees to its bargaining unit or an employer is seeking to merge a group of union-represented employees into a group of unrepresented employees, thereby eliminating the union. "The Board described its test as requiring that the group to be accreted have 'little or no separate group identity' and 'have an overwhelming community of interest with the unit.'"[162] While it could be argued that under the policy proposed in this article, an election should be required instead of allowing an accretion to occur, accretion presupposes a commonality of representation,[163] and thus no determination of employee support of any kind—let alone an election—is required.[164] Thus, the policy change advocated in this article would not interfere with or be interfered with by the accretion doctrine.

There are other areas that may not be amenable to an election. For example, the Board has traditionally held that a collective bargaining unit with only one employee is not appropriate for collective bargaining.[165] Thus, it is normally a defense to a withdrawal of recognition charge that the collective bargaining unit has been rendered inappropriate because it only has one employee. These types of

161. CASEHANDLING MANUAL, *supra* note 7, §§ 11730–11734 (discussing the Board's policy of not holding elections when unfair labor practices may taint the outcome of the election).

162. NAT'L LABOR RELATIONS BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 139 (2008) (quoting Safeway Stores, 256 N.L.R.B. 918, 918 (1981)).

163. *Id.* at 69.

164. Passavant Ret. & Health Ctr., Inc., 313 N.L.R.B. 1216, 1218 (1994).

165. Roman Catholic Orphan Asylum, 229 N.L.R.B. 251, 252 (1977) (citing Sonoma-Marin Publ'g Co., 172 N.L.R.B. 625 (1968)).

situations do not present an obstacle because the Board has consistently recognized that a unit must be appropriate for collective bargaining in order to hold an election. Therefore, if no election *can* be held, withdrawal of recognition should still be permitted, even if the union was certified by the NLRB, presumably at a time when the collective bargaining unit was appropriate.

A thornier problem is what to do when a labor organization is certified as a collective bargaining representative and the number of employees in the bargaining unit changes dramatically. The argument that an election conducted amongst a few employees should hold any special sway in a larger unit at first seems problematic. However, the Board has held that an RD election should ordinarily be held in the recognized or certified bargaining unit.[166] This is also true when a collective bargaining unit is integrated into a larger collective bargaining unit.[167]

CONCLUSION

The proposal contained in this article is not a panacea. While the prospects for grander legislative reform remain at an impasse, and the overall direction of labor law reform continues to be a matter of debate, this reform proposal seeks to improve the functioning of the law as it is today. It is a modest proposal that requires management and labor to give and take, and if history is any guide, these are precisely the types of reforms that have the best chance of survival because both sides are getting a portion of what they want.

166. *See* Mo's West, 283 N.L.R.B. 130, 130 (1989); Newhouse Broad. Corp., 198 N.L.R.B. 342, 344 (1972); Bell & Howell Airline Serv. Co., 185 N.L.R.B. 67, 68 (1970); W. T. Grant Co., 179 N.L.R.B. 670, 670 (1969); Campbell Soup Co., 111 N.L.R.B. 234, 235 (1955).

167. *See* Wis. Bell, Inc., 283 N.L.R.B. 1165, 1165–66 (1987); Green-Wood Cemetery, 280 N.L.R.B. 1359, 1360 (1986); Gibbs & Cox, Inc., 280 N.L.R.B. 953, 954 (1986); Gen. Elec. Co., 180 N.L.R.B. 1094, 1095 (1970).