



Neither Free Nor Fair

The Subversion of Democracy Under National Labor Relations Board Elections

Gordon Lafer, Ph.D., University of Oregon

A N A M E R I C A N R I G H T S A T W O R K R E P O R T

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About the Author

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American Rights at Work is a nonprofit, nonpartisan organization committed to ensuring that workers can exercise their democratic rights to join or form a union and engage in collective bargaining.

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Executive Summary

From its inception in 1935, the National Labor Relations Act (NLRA) held out the promise that Americans may enjoy democratic rights in the workplace similar to those we count on as citizens. When the bill was passed, the U.S. Senate explained that its purpose was to guarantee rights to “a worker in the field of industry” similar to those provided to “a citizen in the field of government.”

Unfortunately, however, in the 70 years since the law was established, Americans’ democratic right to represent themselves through a union has increasingly become a right that exists on paper only, as aggressive employers and ineffective laws have effectively denied most employees the ability to exercise this right in practice. Over the years, the National Labor Relations Board (NLRB) has interpreted the law in ways that allow employers to deny free speech in the workplace, pervert the political process, and intimidate workers who are voting on the question of unionization. Many forms of employer intimidation that are banned in elections to public office are permitted in NLRB elections. Furthermore, since the penalties for violating labor law are so minimal, it has become commonplace for employers to break the law as part of their efforts to prevent employees from forming unions; thousands of Americans every year are either fired, suspended, or otherwise financially punished for backing the “wrong side” in union elections.

In new research, University of Oregon professor Gordon Lafer, Ph.D., lays bare the realities of how workers’ rights to democratic process and freedom of association have been effectively eliminated under the NLRB system, exposing the myriad ways in which workers are denied the most basic tenets of democracy. This research illustrates just how far NLRB elections fall short of the standards that we rely on in elections to Congress and other public offices. Finally, this report addresses head-on the claim that the NLRB election process guarantees workers a truly secret ballot — the central claim of anti-union advocates who seek to keep the current NLRB system in place. Lafer’s work shows instead that NLRB elections fail to safeguard workers’ right to keep their opinions private; and that, on the contrary, the NLRB system results in workers being forced to reveal their political preferences long before they step into the voting booth — thus turning the “secret ballot” into a mockery of democratic process.

Employers’ Foremost Goal: No Elections at All

In presentations to Congress, business lobbies have sometimes argued that the NLRB system is critical to maintaining workers’ democratic right to a secret ballot election. But in their own internal publications, employer organizations routinely promote a strategy of “union avoidance,” which aims above all to prevent workers from ever having a vote of any kind related to forming a union. The near-universal mantra of management consultants is “You can’t lose an election that never takes place.” Or, as attorneys from the celebrated labor law firm Jackson Lewis advise, “winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!”

“Union avoidance” consultants — employed by a majority of large- and medium-sized employers facing the prospect of a union election — counsel employers to conduct an aggressive, intimidating offensive as soon as any workers begin discussing unionization. Since an NLRB election is held only after 30 percent of employees sign cards calling for a vote, employers’ foremost strategy is to prevent employees from signing cards that would trigger an election. The thousands of efforts to form unions that have been defeated through such intimidation tactics don’t show up in any government statistics, because employees are scared into silence before any election can be scheduled. But in weighing the arguments of “union

avoidance” proponents, it is critical to understand that these are aimed not at safeguarding anyone’s democratic rights, but in guaranteeing that workers never have the right to democratic self-representation.

NLRB Elections: A Model for Authoritarian Regimes Abroad

This report describes what has become standard employer practice in response to workers’ desire to represent themselves through a union. The pages that follow detail the myriad strategies — both legal and illegal — that typically comprise employers’ efforts to deny their workers’ the right to collective bargaining. Many of these entail practices that our government routinely denounces when practiced by foreign regimes. But they have become commonplace in the American workplace. Among the most disturbing of these practices are:

Denial of free speech

At the heart of American democracy is the principle that both voters and candidates must be guaranteed the right to free speech, including equal access to information from all sides of a political debate. But this most fundamental principle is ignored by the NLRB. While management is permitted to plaster the workplace with anti-union posters, leaflets, and banners, pro-union employees are prohibited from doing likewise. Union organizers are banned from ever entering the workplace — or even publicly-used but company-owned spaces such as parking lots — at any time, for any reason. Employees of the company are banned from talking about forming a union while they are on work time, and are banned from distributing pro-union information except when they are both on break time and in a break room. Management consultants typically advise employers on how to maximize the impact of these one-sided advantages, resulting in an election environment that more closely resembles the sham “elections” of one-party states than anything we would call American democracy.

Economic coercion and intimidation

When employers speak out, employees always listen carefully for even the subtlest hints as to what kind of behavior will be rewarded or punished. This is all the more true in an economy where so many Americans feel insecure about their economic future. For this reason, federal election law maintains a blanket prohibition on private companies telling their employees which candidate they should support. Even making more nuanced statements — such as suggestions that if one party or the other triumphs, business may suffer and workers may have to be laid off — is illegal under federal law.

However, under standard “union avoidance” strategy, supervisors are forced, on pain of termination, to engage each of the people under them in intimidating one-on-one anti-union conversations. Workers commonly report illegal threats being made in these meetings, since there are no witnesses present.

But even without illegal threats, supervisor one-on-one meetings undermine democracy. In these conversations, the person who has the most immediate control over your hiring and firing, promotion or demotion, scheduling, duties, hours, and all other aspects of your work life, explains why they believe so strongly that a union would be destructive to the workplace.

Because such conversations are *inherently* coercive, they are completely banned in elections to Congress or the President. But what is prohibited in federal elections is standard practice under the NLRB and at the heart of employer’s anti-union campaigns.

Ostracism and defamation of union supporters

The NLRB allows employers to make almost any type of threatening or derogatory statement to employees, as long as it doesn’t contain an explicit *quid pro quo* threat. Workers who have earned

their way to good standing with the company are often ostracized and belittled by management after publicly asserting their support for the union. In one example, a worker was followed to restaurants on days off by security guards with walkie-talkies. A member of management was assigned to work with her eight hours a day, five days a week, and was told he was there solely to work on her to change her ideas about unions. She was timed going to the bathroom. Other employers have referred to pro-union employees as “the enemy within,” publicly questioned their personal morality, or isolated them with heavy-handed and heavily-visible security forces. If we imagine a workplace where all Democrats or all Republicans were singled out for such treatment, we would correctly view such tactics as un-American.

There is no such thing as a secret ballot under NLRB elections

Much has been made about the importance of the secret ballot in NLRB elections. But, as this report documents, the NLRB safeguards the secret ballot in name only. The principle of the secret ballot in the American democratic tradition encompasses more than the fact of casting one’s ballot in a private booth on election day. More broadly, it is the principle that voters have the right to keep their political opinions to themselves, and that they cannot be forced to reveal which party they’re supporting before, during or after election day.

But this principle has been eviscerated by the NLRB. Federal law allows anti-union managers to force individual employees into repeated, intimidating one-on-one conversations with their personal supervisors that are designed to make employees reveal their political leanings long before election day. “Union avoidance” consultants typically script supervisors’ conversations, train them how to read employees verbal and non-verbal reactions, and have them ask indirect questions without explicitly asking employees how they will vote. Supervisors often adopt a sophisticated grading system to mark the political tendencies of each of their subordinates; for those whose leanings are unclear, consultants require that supervisors go back for repeated conversations until employees’ political sentiments have been flushed to the surface. Unlike political elections, employee voters have no right to walk away from such conversations or to insist that they don’t want to discuss union-related issues with their supervisor. They can be forced to engage in such conversations daily, or multiple times a day, in an atmosphere of dramatically increasing pressure.

Unsurprisingly, all but the most skilled actors end up revealing their union preferences in these conversations with supervisors. One management consultant recalls that he would commonly initiate a pool among managers, in which each supervisor would predict the number of anti-union votes, with a \$100 prize for the closest guess. “It was amazing,” he reports. “In pool after pool the supervisors were astonishingly accurate.”

To the extent that such tactics are effective, the technically secret ballot has ceased to provide any meaningful protection to voters subject to the intense scrutiny of those who control their work lives.

Lack of meaningful enforcement results in pervasive lawlessness

Because labor law lacks any punitive sanctions — no fines, no loss of license, no possibility of prison time — employers are free to break the law with near-total impunity. Over the period of 2000-05, there were an average of just over 19,000 charges filed per year alleging employer violations of federal labor law; of these, 40% — or 8,500 cases per year — presented sufficiently strong evidence that the Labor Board either issued a complaint or oversaw an informal settlement between the parties (NLRB complaints are the equivalent of criminal indictments, and both complaints and settlements represent cases in which the Board judges a charge to have merit). While both unions and employers violate the law, the vast majority of charges stem from employer behavior. In 2004, for example, 88.5 percent of all complaints issued by the Board, and over 90 percent of all cases tried in hearings of the full Board, addressed illegal behavior by employers.

The most egregious form of illegal behavior is the firing, suspension, or demotion of employees. On average over the past 10 years, nearly 23,000 workers per year received backpay from employers after accusing them of violating labor law — and this only includes the cases adjudicated to the point that employers were forced to provide backpay to their victims.

While the regularity with which pro-union employees suffer financial punishment is shocking, it is often only the tip of the iceberg of illegal employer behavior. Much of this employer behavior remains hidden from legal authorities. But a glimpse into such practices was provided in 2004, when a South Carolina manufacturer sued Jackson Lewis — one of the country's preeminent labor law firms — for advising illegal tactics in "a relentless and unlawful campaign to oust the union." These included spying on workers, firing union activists, organizing a bogus "employee" anti-union committee, writing supposedly employee-authored fliers calling union activists "trailer trash" and "dog woman," and supplying cash-filled envelopes to anti-union employees. What was unusual about this case is not the tactics employed, but simply that the internal tension between the company and its attorneys led to a public record of management's tactics.

Conclusion

The NLRB election system has come to be defined by intimidating, coercive, and undemocratic employer behavior — both legal and illegal. Current federal law fails to protect the rights that the U.S. Congress thought it had bestowed to workers more than 70 years ago. If we're serious about having a truly democratic process for American workers, we must guarantee that workers have access to a fair electoral system, and that must begin by amending existing federal law. Passage of the Employee Free Choice is critical to addressing these failures.

Introduction

When most Americans hear talk of “union elections,” they assume that these must run more or less the same way as elections for Congress or the President. As a nation, we have a deep-seated understanding of how fair choices are made, and we rightly expect that these standards of fairness apply to the workplace as much as to any other type of election.

Unfortunately, the process through which American workers choose whether or not to represent themselves through a union looks nothing like normal elections for public office. The election system established by the National Labor Relations Act fails to meet the most fundamental standards of American democracy.

This report is the second in an ongoing series of investigations. An earlier report (*Free and Fair? How Labor Law Fails U.S. Democratic Election Standards, American Rights at Work*, June 2005) compared the election process overseen by the National Labor Relations Board with the standards that are normally taken to define “free and fair” elections in the American democratic tradition. That report found federal labor law standards fell far short of American norms for democratic elections — and in fact were more similar to the sham votes conducted by rogue regimes abroad.

The first report focused on the law — comparing the electoral system created under federal labor law with that established by federal and state electoral statute. However, the report did not address how these sets of laws are applied in reality.

This report extends the analysis into the real world of NLRB elections, examining how the law is applied in the context of union organizing campaigns. In what follows, I again compare NLRB election procedures with American democratic norms, in order to measure the extent to which NLRB elections can truly be termed “democratic.” This time, however, American democratic norms are used not simply to evaluate federal law, but to evaluate the actual practices that characterize a typical NLRB election as it is experienced by American workers. While both unions and employers seek to influence workplace voters, this report focuses primarily on the campaign strategies of employers. As detailed previously, federal labor law grants employers a series of lopsided advantages in workplace election campaigns that no party enjoys in elections to public office. In order to understand how these departures from the principles of American democracy impact the quality of workplace elections, this study focuses on how employers make use of those advantages in the course of real-life campaigns.

Unfortunately, it turns out that NLRB elections are even less democratic in practice than on paper. This is so for several reasons.

First, employer practices aim at exploiting the most undemocratic loopholes in labor law, and thus maximize the unfairness of NLRB elections. Federal labor law provides management a variety of avenues for campaigning against union organizing. Some of these avenues would produce an even playing field with the pro-union campaign; others take advantage of unequal powers in order to create a lopsided campaign. Unfortunately, standard practice for employers — and the unanimous counsel of anti-union consultants and attorneys — is to concentrate the employer campaign on exactly those aspects of the law that provide management the most unequal of powers. Thus, standard management practice maximizes the undemocratic nature of labor elections.

Second, while labor law provides flimsy protection for the democratic rights of workers, the law is even weaker in practice than it is on paper. For instance, labor law requires that, once an election date is set, the employer must provide union supporters with only a list of workers' names and addresses. This law fails to meet democratic standards even if perfectly upheld — it allows management to use the list of eligible voters for many months before pro-union employees have it. Even then, the list provides the union with only names and addresses, without apartment numbers, zip codes, telephone numbers, or email addresses. However, the law in practice is often worse still. What happens if an employer does not provide even the minimal information required by law? In theory, the NLRB could establish a "zero tolerance" policy, mandating that elections be rerun if a complete voter list is not provided. In practice, however, the NLRB only requires "substantial compliance" of employers. Thus, an employer who omits five percent of the employees' names from the voter list it provided to the union may nevertheless be deemed to have been "substantially compliant" with the law.¹ If a county registrar of voters withheld five percent of voters' names from one candidate while providing a complete list to the other, no authority would regard this as legitimate. But in NLRB elections, this is not considered grounds to overturn the results of an election. In this and other ways, the NLRB has adopted a standard of enforcement that is even lower than the already anemic standards enshrined in law.

Last, elections are marred by a huge number of out-and-out illegal actions. Because the penalties for violating the NLRA are so weak, employers have little incentive to avoid illegal tactics if they will succeed in intimidating workers into abandoning the union effort. Indeed, some executives were known to refer to the NLRB's backpay remedy for firing union supporters as their "hunting license."² In 2004, there were nearly 30,000 charges filed alleging illegal behavior; of the complaints issued by the NLRB based on these charges, nearly 90 percent were against employers, with just under 10 percent concerning illegal actions by unions.³ If we compare the number of illegal actions per eligible voter in workplace and federal elections, using Federal Election Commission (FEC) violations and NLRB charges as a measure of the "dirtiness" of contests, the data suggest that workplace elections are 3,500 times "dirtier" than elections to federal office.⁴

Much of employers' illegal behavior involves threats of layoffs, promises of benefits for anti-union employees, or spying on or interrogation of employees. However, even the most serious type of illegal activity — actually firing, suspending, or cutting the hours of employees in retaliation for supporting the creation of a union — is extremely common. In 2004, an estimated 15,400 employees were illegally fired, suspended, or otherwise financially penalized for supporting a union in an election context.⁵ In that same year, the total number of potential voters in NLRB elections was approximately 260,000; by this count, one employee was illegally fired or suspended for every 17 eligible voters.⁶ By comparison, the FEC reports 565 cases of illegal activity for all elections to federal office during the 2001-02 campaign cycle, the most recent for which complete data is available.⁷ If federal campaign law were broken as commonly as labor law, the number of FEC violations would increase from 565 to over 7.5 million. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Every neighborhood, and almost every workplace, would include several people who had suffered this fate. Under such a system, the majority of citizens would quickly become too fearful to participate in any public show of support for opposition candidates. All but the bravest would be deterred from ever speaking out against those in power. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent an expression of popular will, but rather simply a reaffirmation of the fear that ruled the country. None of us would call this democracy.

In the debate surrounding proposals for federal labor law reform, business lobbyists and employer associations have often insisted on maintaining the current NLRB election process, declaring it the "gold standard" of workplace democracy.⁸ So too, some of the most virulently anti-union employers promote the NLRB election system as the preferred method for settling the question of unionization. For instance, Yale-New Haven Hospital spent nine years resisting employees' organizing efforts and working hard to prevent employees from signing union authorization cards in order to avoid ever having to hold a union election. Finally, under pressure from the local community and city government, the hospital in 2006 signed an agreement with the workers' union, committing to hold a secret ballot election free of coercion,

intimidation, or misinformation. As the date of the vote approached, however, the hospital ignored this agreement, and was ultimately found by an arbitrator to have engaged in multiple acts that violated federal law as well as its agreement with the union. Facing mounting political pressure and the possibility that the arbitrator might require it to recognize the union on the basis of signed statements from a majority of employees, the hospital instead called for an NLRB vote. “The only thing that the Hospital has consistently wanted for our employees,” claimed CEO Marna Borgstrom, “was the right to vote in an election.”⁹ Given the conduct during NLRB elections — as detailed in the report that follows — it is unsurprising that even the most unscrupulous employers engage in such heartfelt support for the NLRB system. But such statements are disingenuous; anti-union employers wax so eloquently in defense of the NLRB system not because it protects employees’ democratic rights but the opposite: because it subjects them to a system of political repression that mirrors that of totalitarian states, and that makes it nearly impossible for workers to effectively exercise their supposed right to organize a union.

Methodology: Establishing What a “Typical” NLRB Election Looks Like

In theory, the ideal means for establishing what a “typical” National Labor Relations Board election looks like would be through systematic data collected on every stage of the campaign cycle. Unfortunately, however, no such data exists. The NLRB itself collects only the most general information regarding elections: the names of the employer and union, the number of employees involved, and the date and outcome of the vote. While the NLRB also collects data on illegal firings and other unfair labor practices, it does not specify which of these occurred in the course of an election campaign. Thus, there is no way of telling from NLRB data how many of the illegal acts occurred during election campaigns, as opposed to in the context of an already established collective bargaining relationship.

Even if the NLRB had more perfect data, this would still only capture the legal and bureaucratic milestones of an election — the procedural steps of petitions, votes, and charges of illegal behavior. No government agency tracks the range of activities that truly make up a campaign — the mandatory anti-union meetings, the use of supervisors to influence their subordinates, the use of workplace media such as leaflets and bulletin boards, the implicit threats made in individual or group meetings, the legal maneuverings to control the campaign’s timing and momentum, and the general social dynamics that animate an election campaign. These elements — all of which are critical to assessing the democratic nature of NLRB elections — are neither monitored by nor reported by any authority.

In this context, the most rigorous methodology for social scientists is to assemble the best known data from a multiplicity of sources, and track the extent to which it converges on a consensus description of the facts. This is the method used for this study. The analysis that follows draws on a host of overlapping sources. First, I have examined both published and unpublished data from the NLRB, including a comprehensive survey of both elections and unfair labor practices committed over the past five years. Second, I have drawn on a number of government reports, most importantly including those of the federal Dunlop Commission on the Future of Worker-Management Relations, the most recent federal commission to have examined these issues in depth. Third, I have brought together data from each of the major studies of NLRB election campaigns that were performed by social scientists on statistically significant samples. The most comprehensive analyses of employer anti-union campaigns have been conducted by Kate Bronfenbrenner, the most recent of which was commissioned by the U.S. Trade Deficit Review Commission. Two additional studies, while smaller in scope, use similarly rigorous methods to update Bronfenbrenner’s findings.¹⁰ Fourth, I have taken data from surveys of both union and non-union employees, in order to measure their experience of and response to common campaign strategies. Most important among these studies is the national survey described in Freeman and Rogers’ *What Workers Want*, and the work of Phil Comstock’s Wilson Center, which over a period of 14 years interviewed 150,000 employees at companies where union organizing efforts were underway.

Finally, I have paid special attention to the advice of the nation’s premier anti-union attorneys and consultants — as spelled out in books, newsletters and seminars — regarding the standard campaign

tactics they have proposed to the thousands of employers whose election strategies they guide. The union-avoidance industry, which remained relatively modest throughout the 1950s and 1960s, is estimated to have grown by 1,000 percent in the 1970s.¹¹ By 1990, one insider estimated that anti-union campaign strategy had become a \$1 billion industry, providing work for 10,000 consultants and attorneys. The most recent data suggests that over three-quarters of employers hire such consultants when faced with a organizing effort.¹² The growth of this industry is both a marker of employers' commitment to preventing unions and a measure of the extent to which employers' campaigns have become standardized, as consultants have developed cookie-cutter strategies that are applied across industries. Indeed, there is a remarkable degree of consistency in the advice given by disparate consultants and across three decades. Almost all advisors issue virtually identical recommendations regarding both the general tactics and the specific themes of employer campaigns, to the extent that one often finds the same phrases repeated in model employer speeches developed by different consultants at different points in time.

Because they are both so standardized and so widely used, the strategic plans of anti-union advisors provide the single most important basis for understanding the tactics that define a typical employer campaign. Some of the preeminent anti-union texts date from the 1970s or 1980s. However, the strategies they recommend are nearly identical with those of more recent publications, and they continue to serve as guides for management practice; for this reason they remain very useful guides to understanding employer strategies in NLRB elections. For this report, I have drawn on a range of union-avoidance consultants, but have focused most heavily on a few of the most prominent architects of this strategy. For over 30 years, one of the leading sources of union avoidance advice has been the New York law firm of Jackson Lewis.¹³ In addition to advising clients, the firm hosts seminars designed to train employers in union-avoidance techniques. The firm's two principals co-authored one of the first management-side campaign manuals, *Winning NLRB Elections: Management's Strategy and Preventive Programs*; I have drawn heavily on two updated versions of this volume.¹⁴ On preemptive strategies for avoiding elections, one of the most comprehensive volumes is John Kilgour's *Preventive Labor Relations*, published by the American Management Association. One of the foremost union-avoidance consultants for the past three decades has been attorney Alfred DeMaria, who has advised hundreds of employers while publishing *How Management Wins Union Organizing Campaigns* and *The Supervisor's Handbook on Maintaining Non-Union Status*¹⁵ and editing a monthly newsletter for employers, the *Management Report for Nonunion Organizations*. A more recent source is Gene Levine's 2005 *Complete Union Avoidance Manual*. While less prominent than DeMaria or the Jackson Lewis firm, Levine runs a successful seminar series and has advised a long list of prominent clients, including General Electric, Ford, GM, Hewlett Packard, Lucent Technologies, and Yale University.¹⁶ Among employer organizations, the National Association of Manufacturers has published the most extensive series of union-avoidance guidelines, including *Remaining Union-Free: A Supervisor's Guide*; *Keep the Card Count Down*; and a series of pamphlets developed by the Association's educational arm, the Council for a Union-Free Environment.¹⁷ There has only been one book written by an anti-union consultant recounting the tricks of the trade: Martin Levitt's 1993 *Confessions of a Union Buster*. While Levitt primarily reports on his personal campaign experience, there is good reason to believe his account is representative of the field. Levitt worked with a series of prominent firms that descended from the original architects of anti-union campaign strategy.¹⁸ In 2001 the U.S. Labor Department noted that Levitt's account of employer tactics was "consistent with prior statements by other consultants."¹⁹ All of these accounts figure prominently in the analysis that follows.

While no single one of these sources is definitive on its own, when brought together they paint an extremely consistent picture of the standard themes, strategies, and tactics that define contemporary NLRB elections in the United States. Indeed, the degree to which such disparate sources agree in their description of campaign dynamics is remarkable. It is this composite picture — based on the convergence of data and description, of workers' and managers' testimony — which I have used to judge the democratic and undemocratic aspects of election campaigns in American workplaces.

What follows is a description of typical election practices before, during, and following a workplace election as supervised by the NLRB.

Before the Organizing Campaign

Employers' Foremost Goal: No Elections at All

In debates over proposed reforms to federal labor law, business organizations frequently oppose alternatives to the NLRB election process (such as majority sign-up, alternatively known as “card check” recognition) on the grounds that anything but a Board-supervised, secret ballot election undermines the core imperative of labor relations: the fundamental right of workers to a free and uncoerced vote on the question of whether or not to unionize.²⁰

In reality, however, the overriding goal of management strategists is not to assure workers the right to an election — secret ballot or otherwise. It is, instead, to prevent workers from ever having an opportunity to make this choice at all. The near-universal mantra of management consultants is “You can’t lose an election that never takes place.”²¹ Or, as attorneys from the noted Jackson Lewis firm advises, “winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!”²² Anti-union consultants devote considerable attention to the art of deterring employees from signing union authorization cards, in order to avoid ever having an election scheduled.²³ “That, dear reader, is the goal of this manual,” explains one 2005 management tome — “to help you avoid an election.”²⁴ Indeed, the most celebrated anti-union consultants brag not only about how many elections they have defeated, but how many they have prevented from ever taking place.²⁵

Thus, an accurate understanding of NLRB elections must begin by looking at dynamics that take place long before an official campaign might be thought to begin, that is, long before any petition for election is filed. In addition, the fact that management so often works so hard to deny employees an opportunity to vote on unionization should inform our understanding of management-side campaign tactics during the course of the official election campaign itself.

Manipulating the Electorate

In a regular political election, the boundaries of electoral districts and lists of eligible voters are established long before the campaign begins, in a process that is independent of either candidate. By contrast, the scope of workers who are eligible to vote in any NLRB election is subject to debate during the campaign process itself. By law, the union must file a petition for an election among a specific “bargaining unit” — a group of employees who share a common interest by working for the same employer in the same set of occupations. However, the employer may contest the definition of the bargaining unit, arguing that certain employees should be excluded because they do a different type of work; or, conversely, that employees not originally included in the union’s proposed bargaining unit (and presumed to be anti-union) should be added.

In elections for public office, candidates do not attempt to manipulate the vote by changing the borders of election districts — because it’s simply impossible. The one exception to this rule comes when state legislatures redraw voting districts. In cases where redistricting appears driven by a clear partisan agenda — such as the highly contentious redistricting plan adopted by Texas in 2002 — these efforts bring widespread accusations of gaming the system. In NLRB elections, however, every single vote is open to such manipulation, and it is standard practice for employers to exploit this opportunity. “The effective use of the bargaining unit,” advises one consultant, is “the most potent yet little appreciated instrument of preventive labor relations.”²⁶

Moreover, management has disproportionate control over the power to gerrymander elections. The NLRB's determination of whether a certain group of employees shares sufficient "community of interest" to be lumped together as one electorate turns on the extent to which employees have similar job duties, occupational titles, wage and benefit policies, and common supervision and physical work space, among other factors. As one consultant points out, "all the factors influencing community of interest are under the direct control of the employer."²⁷

With this in mind, management has adopted a host of strategies for gaming the bargaining unit in order to frustrate workers' organizing efforts. Often, managers seek to inflate the size of the bargaining unit to a level that is too large, or too geographically dispersed to be organized. Self-confessed union-buster Marty Levitt, for example, recounted an incident in which workers at one Ohio coal pit sought to create a union. Levitt insisted that their bargaining unit be expanded to include an additional mine located in Kentucky, plus several trucking firms, quarries and a fuel company that were owned by the same parent company.²⁸ Thus, workers were forced to suddenly start organizing a large number of employees who lived many miles away and had no connection with the original mine; this change by itself killed the organizing drive. In more extreme but not uncommon cases, management stacks the bargaining unit by hiring known anti-union employees at the last minute.²⁹ Finally, management has wide discretion over how much supervisory authority to grant various employees; by investing slightly increased authority in a class of individuals, management can easily remove them from the bargaining unit.³⁰ One consultant, boasted of getting all the nurses in a hospital declared "supervisors" and thus ineligible to vote in an NLRB election. "That's how we won it," he explained. "Otherwise, if you went by the election there was no question [the union] had 90 percent of the people signed up."³¹ In all these ways, management enjoys broad prerogative to shape the electorate to its liking.³²

Creating Ground Rules to Kill an Election Before It Gets Started

Because management functions both as an interested party and as the government of a workplace, employers have wide-ranging powers to establish campaign ground rules that serve their partisan interest. Consultants' recommendations include proposals that employers maintain a separate, fenced parking lot for employees, in order to prevent union organizers from leafleting cars or talking to workers; banning delivery drivers from entering the work area or using normal employee bathrooms, and banning employees from taking lunch or coffee breaks on the loading docks, in order to separate unionized drivers from unorganized employees; creating multiple lunch rooms, water fountains, bathrooms, time clocks and exits in order to prevent too many employees from talking to each other; and instituting staggered lunch hours, break times, and starting and quitting hours in order to stop employees from organizing mass meetings.³³

Anti-Union Campaigning Starts with One's First Day of Work

While union organizers are only able to systematically contact potential voters when they get the list of employee names and addresses from the employer — usually just a few weeks before the election — it is common practice for employers to initiate anti-union campaign communications from the first day new workers are hired. Indeed, consultants regularly advise employers to write anti-union principles into the employee handbook and include them in orientation sessions on the first day new hires are on the job. Attorney Al DeMaria's *Management Report for Nonunion Organizations*, for example, suggests that incoming workers be reminded that their new employer intends "to do everything possible to maintain our company's union-free status."³⁴

By including an anti-union message in new employees' orientation, managers are seeking to press their agenda in a moment in which employees are particularly impressionable. As one consultant notes, "there is probably no time when the employee is as receptive to communication from management as during the initial day or two on the job."³⁵ Declarations made on the first day of work tend to impart a

definitive impression of what type of workplace one is entering — in this case, a workplace where unions are unwelcome. This in turn gives new employees a feeling that, by taking the job, they have agreed to work in a place that is committed to remaining non-union. The hiring process is a moment in which employees feel particularly indebted and eager to please. While employers cannot require a pledge to eschew union creation as a condition of hiring, by building such forceful statements of commitment into the orientation, employers may inculcate feelings of guilt or obligation on the part of new hires. These new employees might naturally feel that, having been clearly told what they were getting into, it would be an act of ingratitude or bad faith to later organize against the managers who hired them. As Hughes explains:

Research in the area of communication and persuasion has ... shown that new employees during their orientation program ... form lasting impressions. When an individual understands that it is a union-free company and that the majority of the employees want it to stay that way, we have ... established a concept in that individual's mind that will generally be lasting.³⁶

In addition, of course, orientation is a moment when employers may impress their views on new hires before they have access to any alternative viewpoints. As prominent consultant John Sheridan stressed, orientation is an opportunity for “indoctrinating” new employees “into your philosophy, your program ... before any union or malcontents can get their hands on that employee.”³⁷

An employee's first weeks on the job may similarly be used as a period for anti-union indoctrination. An American Management Association tome suggests assigning new employees a mentor who is both a respected member of the work unit and solidly anti-union; the mentor's responsibility is to guide the new hire's thinking about joining a union while teaching him or her the ropes of the job.³⁸ The same volume recommends placing new hires in a “general labor pool” for their first few weeks on the job, in order to keep them isolated from union activists during this formative period of initial employment, and in order to make a final determination of their union sympathies. Employees who turn out to be supportive of creating a union can then be assigned to departments less susceptible to job actions; those that are strongly anti-union may be assigned to units with union supporters in order to “dilute the union's strength.”³⁹ Finally, the author suggests that, if union organizing activity is detected, “one approach ... is to transfer the personnel involved to other duties and locations in order to break up the union's organization.”⁴⁰ While the discriminatory assignment or transfer of union supporters is illegal, it is virtually impossible to police. If a private corporation assigned mentors and organized department staffing plans on the basis of isolating supporters of one political party and subjecting the others to partisan political indoctrination, this would be widely denounced as an anti-democratic abuse of power. But in the workplace, employers are functionally free to pursue such heavy-handed tactics at will.

Employer Strategies for Making Elections Impossible

Rather than promoting the workers' right to decide on forming a union through an election, virtually every management advisor focuses on the importance of stopping organizing efforts before a union can collect enough signatures to trigger an election. Supervisors should not spend time looking for union buttons or bumper stickers, one advisor warns; by the time these are visible, it will be too late. “Much more valuable is the early sign, the overheard comment, the slip of the tongue, or the pattern of unusual activity and attitude that suggests that something is taking place.”⁴¹ Other attorneys urge supervisors to be suspicious if “employees meet and talk in out-of-the-way places and separate upon their supervisor's approach.”⁴² Even new social bonds are suspect; under the heading of “Signs of Union Activity You Should Watch For and Report,” Levine warns that “employees receiving new or unusual attention from other employees” may be a dangerous omen.⁴³

Once any sign of organizing is detected, employers initiate a determined campaign to prevent workers from petitioning for an election.⁴⁴ “Upon detection of union activity,” one recent manual advises management, “your immediate and primary thrust should be to mount a counter-campaign that focuses on convincing employees not to sign union cards — to keep the union from getting the 30

percent show of interest” required for an NLRB election.⁴⁵ Above all, employers rely on supervisors to convince their immediate subordinates to avoid signing cards that could lead to an election.⁴⁶ Levine’s 2005 manual outlines additional elements of a “Don’t Sign a Card” campaign, including letters sent to employees’ homes; mandatory small- and medium-group meetings with supervisors; anti-union posters and bulletin board notices; mandatory anti-union multi-media presentations; and mandatory anti-union video screenings for employees and their supervisors.⁴⁷ One organizer describes a particularly aggressive employer response to the first signs of organizing:

Supervisors ... were already calling workers at home on Saturday morning, instructing employees not to speak with union organizers who had begun home visits on Friday afternoon. On Monday morning at 7:00 am the plant manager began captive-audience meetings, fifteen of which were held, where supervisors warned employees that the corporation might shut the plant down if it were unionized.⁴⁸

This is the aggressive front line of every anti-union manual. In workplaces across the country, management uses its lopsided power not only to influence workers’ choice regarding organizing, but first and foremost to prevent them from having any such choice whatsoever.

Conduct of the Election Campaign

Most workplace election campaigns start with upwards of two-thirds of employees having signed cards supporting unionization.⁴⁹ When examining the election process, the central question is how during the course of the campaign, such strong pro-union majorities are so often reduced to bare majorities or to outright defeat.

Unequal Access to Voter Lists

Given the union's inability to communicate with voters in the workplace, the campaign of union supporters rests critically on obtaining an accurate list of employee contacts in order to communicate with them outside of work hours. Unfortunately, the combination of weak law and aggressive employers makes it difficult for unions to get such information in a complete or timely manner. Employers go to great lengths to prevent employees from accessing Christmas card lists, staff telephone directories, or similar lists.⁵⁰ By law, employers are not required to provide the union a contact list until seven days after the NLRB has ordered an election. This enables employers to run an intensive campaign for weeks or months before the union is able to make its first contact with most workers. The standard campaign timetable of Jackson Lewis attorneys, for instance, includes two letters mailed to employees' homes, anti-union messages posted on bulletin boards and handed out in the workplace, and a mandatory anti-union meeting for all employees — all before the company has provided the union with a list of eligible voters.⁵¹ Moreover, since employers are not required to turn over a list until the NLRB has ordered an election, any procedural objections to the terms of the election delay the Board's ruling and with it the requirement for list-sharing. Since virtually any objection — no matter how groundless — will cause the NLRB to delay proceedings and hold a hearing on the issue, it is simple for any employer that wants more time to campaign while the union is silenced to file any one of a number of objections. Even if an employer is sure to lose its objection, it is equally sure to win additional weeks in which to campaign without effective opposition. In the mid-1990s, the federal Commission on the Future of Worker-Management Relations found that, while NLRB election campaigns averaged 50 days, the union was typically provided a list of employees only 10-20 days before the vote.⁵²

When a company does provide the union its list, it is only obliged to provide the names and addresses of employees — no phone numbers, email addresses, or zip codes.⁵³ Moreover, even when the company omits some number of names from the list, or provides incorrect addresses, this is not necessarily grounds for an election to be overturned.⁵⁴ Finally, before a list is released to the union, employers typically send a letter to all employees warning them of an impending "invasion of privacy" by union organizers knocking on their doors.⁵⁵ Taken together, the typical list is provided in a manner similar to that reported by Levitt:

I provided the minimum information legally required while withholding enough details to frustrate union officers in their hunt for employees. I never included first names, for example, only the first initial. I listed the employee's house number and street, as required, but always was sure to leave out apartment numbers and street designations such as Street, Avenue, Drive, or Place. I never included zip codes. Such a skeletal list guaranteed that some employees would not be found and that the union would take an inordinately long time finding others. To top off the sabotage, I sent a letter to every employee on the list before releasing their names to the union. In the letter ... I informed employees that we had given out personal information on

them to the union as required by law and assured them that we would never have given out such information otherwise. The letter went on to warn the workers to expect harassing phone calls and visits from union officials at their homes. Management apologized, of course, for the trouble the union drive was causing the good workers The union-organizing process was contaminated from the beginning.⁵⁶

If we imagine similar standards being applied to a Congressional campaign, it would be virtually impossible for a challenger to ever win election. Such discriminatory use of voter rolls is illegal in every state in the country; the fact that an election that began this way might end with a secret ballot would in no way make us think it was a fair contest — or that it fit within the American tradition of democracy.

Lack of Regulation Over Campaign Finance

Part of the essential framework for ensuring fairness in elections to public office is campaign finance law that, while not requiring all candidates to operate with the exact same amount of money, aims at creating a roughly balanced playing field between competing parties. In NLRB elections, however, there are no restrictions whatsoever on campaign financing; thus wealthy employers are free to translate their financial superiority into another lopsided campaign advantage. Unions are entirely funded out of the dues money of members, so while they may choose to concentrate resources on a particularly important campaign, they are generally unable to match the budgets and staff time that management devotes to opposing unions. One consultant advises employers that many organizing efforts can be killed simply by outspending the workers.⁵⁷

Due to lax federal reporting requirements, there is no conclusive data on the amount of money employers spend to defeat union creation.⁵⁸ Over the years, however, there have been a series of measures, stemming from partial evidence or particular campaign experience. Taken together, these estimates provide a rough estimate of employer campaign expenditures. Employer spending on outside consultants is estimated to be \$600–1,600 per employee (see Appendix, Table 1). Spending on consultants and attorneys together is estimated to be \$2,500–3,700 per employee.⁵⁹ These figures do not include the cost of anti-union letters, leaflets, posters, videos, buttons, t-shirts or other paraphernalia; the time of senior management devoted to planning the campaign; the time of supervisors spent communicating with, monitoring or reporting back on their subordinates; nor the time of employees in mandatory anti-union meetings, whether with individual supervisors or in larger groups. These estimates likewise exclude most of the expenses of attorneys and consultants apart from their hourly fees. If this full range of expenses were taken into account, the per-employee expenditure of anti-union employers would likely be significantly higher than the estimates provided here. Indeed, there are many accounts of employers spending huge amounts of money on anti-union campaigns.⁶⁰ In 2004, for instance, one South Carolina manufacturer reported having spent \$2.7 million in legal fees alone as part of its effort to forestall organizing among its 500 employees.⁶¹ When employers pour this level of resources into a campaign, it is impossible for the result to be a fair or competitive election.

Monopolizing the Media

In the American democratic system, the use of mass media is governed by two principles. First, all sides must have equal access to all forms of media. Secondly, government resources are not political resources; that is, the party that is in office cannot use the powers of government to dominate the airwaves. Indeed, the phenomenon of ruling parties monopolizing the media while denying their competitors equal access is one of the most common reasons for which our government condemns elections abroad. Yet this is exactly the type of regime that confronts voters in NLRB elections across America.

American democracy — from the Founders to the present — is premised on the principle that voters must have maximum access to information from both sides of a campaign. By contrast, the fundamental

strategy of anti-union employers, which has come to frame nearly all NLRB elections, is to severely restrict union communication in order to stage a highly controlled “debate” in which, for the most part, only one voice is heard. The fundamental aim of workplace rules during an election, as one consultant notes, is “to reduce the union’s access to the employees, the employees’ access to the union, and the flow of union information within the workplace.”⁶²

The universal advice of anti-union consultants and lawyers begins with two rules that set the stage for the election. First, union organizers are prohibited from ever entering the workplace — or even publicly-used but company-owned spaces such as parking lots — at any time, for any reason.⁶³ Second, pro-union employees are banned from talking about the union while they are on work time, and are banned from distributing pro-union information except when they are both on break time and in a break room.⁶⁴ This means that there can be no pro-union discussions whatsoever, except when both parties to the discussion are on break at the same time. Unsurprisingly, such a rule renders union conversations virtually extinct. As management attorney DeMaria notes:

[U]nions are at a severe disadvantage in the communications battle. Home visitations are expensive and time-consuming, meetings are sparsely attended because they take place on the employee’s own time, and union organizers can rarely ensure that all voters will even receive the union flyers that organizers hand out. On the other hand, management has the employee under its control for eight hours a day.⁶⁵

Because union communication is so tightly restricted in the workplace, the primary means of talking about organizing is visiting workers in their homes. Yet incomplete address lists, scheduling problems and logistical barriers combine to make this an ineffective substitute for workplace conversation. Indeed, recent data shows that in a typical union campaign, less than half the employees have even a single home conversation with a union representative during the course of the entire election season.⁶⁶

By contrast, employers rely on their domination of workplace media to launch intensive communications campaigns, relying on management’s dual role as the “government” of the firm and an interested party in the election campaign. Among the most common management tactics are the use of posters hung up around the workplace; bulletin board notices; anti-union flyers stuffed into employees’ pay envelopes; forced viewing of anti-union videos; and the mass provision of “Vote No” t-shirts, buttons, hats, sweatshirts, and bumper stickers.⁶⁷

The Jackson Lewis attorneys’ union avoidance volume, for instance, offers a communication plan for an “Illustrative Election Campaign”⁶⁸ (see Appendix, Figure A). During the four weeks leading up to the election, they recommend nine letters mailed to employees’ homes; four notices on bulletin boards; six leaflets handed out to employees at the workplace; three anti-union speeches with mandatory attendance for all employees; one demonstration of how to vote; and five days of small group meetings in which supervisors tell their subordinates why a union would be bad.⁶⁹ With the exception of the letters mailed to employees’ homes — which unions may or may not be able to duplicate, depending on the quality of contact information available — every one of these communication strategies represents a medium that is monopolized by management and unavailable to the union or pro-union employees.

In recent years, management strategists have ever more sophisticated tactics for denying any avenue of communication to pro-union employees. One forum where these efforts can be seen is the use of workplace bulletin boards. By law, companies must have a consistent policy regarding the posting of non-work-related notices; they cannot single out union postings to be banned while allowing all other types of notice. However, consultants have designed clever means for undermining this law. Employers often adopt a policy prohibiting anyone but management from posting notices on bulletin boards; bulletin boards thus become a site for regular anti-union posters, with no possibility of pro-union response. However, since bulletin boards are often used for charity fundraisers or employee for-sale items, an employer who does not carefully police their use may end up setting a precedent that requires allowing pro-union notices to be posted. To foreclose this possibility, consultants have recently crafted more

detailed policies that, while uniformly applied, have the effect of screening out pro-union postings while allowing almost everything else.⁷⁰ Levine's 2005 manual, for instance, recommends the following policy:

Non-Company related material must be approved and dated by the Human Resources Manager
.... Material must not block or crowd company materials. *General guidelines for approval include:*
Church or community announcements, etc., advertisements to buy or sell personal items.⁷¹

Thus, virtually every dimension of the workplace — the walls, bulletin boards, group meetings, leaflet distribution, and conversation in work areas — becomes a forum for constant anti-union campaigning, but in which pro-union information is prohibited.

It is noteworthy that some of the favored techniques of management campaigns are specifically banned in elections for public office. For instance, many states have laws prohibiting employers from inserting political flyers into employees' payroll envelopes; this is considered an illegitimate use of the economic power of employers in order to intimidate voters into supporting one candidate or another. But this same technique is wholly legal, and widely practiced, in union campaigns.⁷² Indeed, many employers go so far as to break employees' pay into two separate checks, one representing the amount they would presumably pay in union dues, in order to dramatize the notion that the costs of unionization outweigh its benefits.⁷³ In this case, the boundary between management as the "government" of a company and management as an interested party in the election has been completely erased. If a Republican president used the power of his office to have the IRS send out tax bills showing how much individuals owed and how much more they would owe under a Democratic proposal, this would be immediately condemned as an illegal use of public resources for partisan benefit. Yet the use of company resources and authority for partisan anti-union campaigning is at the core of employer strategies.

Among the most important sorts of media available to management but not to pro-union employees is the forced viewing of campaign videos. As DeMaria explains:

The pro-company message must be communicated quickly and consistently. Employees must be educated, but not alienated or bored. Video presentations are uniquely suited to achieve these results ... [and] will result in the employee remembering much more of the company's message The color photography, captions, music, and graphics in video exhibitions almost always create a more durable impression than speeches by company officials.⁷⁴

Thus, these meetings not only reflect management's unparalleled ability to compel attendance, but also make use of a uniquely powerful medium that is not available to the union.⁷⁵ Again, if the Bush 2004 campaign could have forced every voter in America to watch the *Swift Boat Veterans' For Truth* video, with no opportunity for response by the other side — or if the Democrats could have forced everyone to watch *Fahrenheit 9/11* — they might well have seized the opportunity. But none of us would call this democracy.

Management's control over the physical worksite gives it an additional advantage in dominating the campaign atmosphere. In any election, the sense of momentum and the desire of voters to be on the winning side play a powerful role in campaign dynamics. In an environment so completely dominated by one side, anti-union employers can easily create an intimidating impression of near-universal support. Thus, Levitt's standard procedure for the 10 days leading up to the election included:

the 'Vote No' saturation carnival. I had 'Vote No' hats, buttons, and T-shirts printed up. Supervisors and foremen were ordered to wear their 'Vote No' vestments every day and to give away T-shirts and trinkets to any workers who asked for them. Almost everyone ended up wearing something; whether it was out of conviction or fear didn't matter. What mattered was that the 'Vote No' message was everywhere. It hung on the walls, it danced atop people's heads, it rode upon their chests ... It seemed impossible that anyone would feel free to talk against management in that chummy environment. It seemed impossible that union proponents would have any momentum or any support or any hope left.⁷⁶

Similarly, during one election campaign at a garment manufacturer, organizers report that:

Walls of the factories were covered with newspaper articles, blown up to five feet by three feet, about plant closings. A twelve-foot-by-three-foot banner proclaimed 'Wear the union label — UNEMPLOYED.' Sets of two identical pairs of pants were hung around the factories, and supervisors explained that the only difference was that one pair was made [locally] for five dollars per hour and the other was made in Mexico for three dollars per day.⁷⁷

In all these ways, management's ability to create a near-total media monopoly within the workplace turns NLRB elections into something more like the staged pageants of one-party rulers rather than anything we would recognize as American democracy.

Forced Anti-Union Meetings

The least free media in NLRB elections is the mandatory anti-union meeting. In such gatherings, all employees are forced to come together to hear anti-union campaign propaganda. Employers defend such events as a necessary ingredient in protecting their free speech rights. But these meetings represent anything but free speech, for two reasons. First, in the American democratic system, the right to freedom of speech includes within it the freedom to not listen to political speech.⁷⁸ This principle is so obvious to most Americans that we don't even think of it as a "principle" that needs articulating. The First Amendment aims at creating what is sometimes termed a "marketplace of ideas" — a free exchange of opinions in which citizens seek to convince each other of the best policies to support. Central to this notion is the fact that other voters may choose to listen, fall asleep, ignore speech, or walk away at any time. It is based on a model of decision-making in which the power of coercion is replaced by the power of conviction and communication — others will listen to one's view to the extent that it is compelling, and the consensus of public opinion that emerges will be based on a weighing of ideas, not an exercise of power. A "dialogue" in which voters are forced to listen to one side's campaign communication bears no relationship to the free speech endorsed by the Founders.

Second, free speech is meaningless if it does not include equal time for opposing views. In mandatory anti-union meetings, however, not only is there no equal time for response, but pro-union employees may be banned from the meetings, or may be required to attend on condition that they not speak up or ask any questions; those that violate such an order can legally be fired on the spot. The very ideal that lies at the heart of Jeffersonian democracy — free-ranging public debate — is rigorously avoided by employers. *Management Report for Nonunion Organizations*, counsels that "debating the union is never a good idea for the employer."⁷⁹ Thus, the very principle that lies at the heart of the Founders' conception of democratic process has become anathema to employers.

It is inconceivable that such a practice could be allowed in elections for public office. If the Democrats, for instance, compelled all voters in a given district to attend Democratic campaign rallies, with no right of reply for Republicans, where Republican voters who spoke their minds would find themselves unemployed, we would regard this as one of the most flagrant imaginable violations of democratic process. Indeed, this is one of the classic behaviors for which we regularly condemn elections abroad: when ruling parties force voters to attend partisan campaign rallies, we recognize it immediately as an abuse of power and a perversion of the free debate that is integral to democratic elections. Even if such a vote ended in a secret ballot, no American would be confused about this being a sham process rather than a truly a "free and fair" election.

Given that such tactics are legal under federal labor law, it is not surprising that employers turn to them with such gusto.⁸⁰ The most recent data show that, in NLRB election campaigns, 90 percent of employers force their employees to attend anti-union campaign rallies; employers hold an average of 10 such mandatory meetings during the course of a typical campaign (see Appendix, Table 2).

Disparagement and Isolation of Union Activists

The most critical role in organizing efforts is not played by outside organizers, but by the leading pro-union activists among the company's employees. These are the people who are most central to building the workers' organization. Furthermore, they are often presumed to be the likely elected leaders of any union that emerges from an election; their personal conduct and moral stature is one of the measures that employees weigh when deciding to support or oppose the union. In addition, of course, their treatment at the hands of management is one of the key measures watched by other workers in order to assess the safety or danger of their own participation in union activities.

Unsurprisingly, management often goes to considerable lengths to disparage and isolate these workplace leaders. In many cases, management may rearrange work assignments and add more intensive supervision in order to physically isolate activists and prevent them from communicating with coworkers.⁸¹ Such policies can take an exacting toll on activists, as is evident in one worker's testimony to a federal commission:

I was a ten year employee of Jordan Marsh, in Peabody, up until this day after Thanksgiving, on which I was fired ... I truly believe, solely because I was a union organizer within the store. I was a dedicated employee, for ten years, for that company ... I cannot impress upon you what an organizer, what an employee who is just fighting for their rights in a campaign, goes through this day and age. I wouldn't have believe[d] it, myself. I have been followed, on my day off, to restaurants, by security guards with walkie-talkies. I had an employee, a management person, assigned to work with me eight hours a day, five days a week, who was told he was there solely to work on me, to change my ideas about unions. I was timed going to the bathroom. I could go nowhere in my workplace without being followed Unless you have lived through it, you couldn't know what it feels like.⁸²

A textile plant employee similarly reports that during a campaign in her workplace:

I was not allowed off my little section that I worked in. When I'd go to the bathroom, the Supervisor would follow me. Anywheres I went, I was being followed. I'd go take my break; they'd cut me down to two 10-minute breaks and a 15-minute break. I was checked. I'd go through the mill. I'd always been a happy-go person, I could speak and I — you know, be friendly with people. But I got, as time — I'd have to hold my head down when I walked, because I didn't know what I was going to see.... And then, the stress got so bad that I did have a heart attack. But when I came back, they didn't let up on me. They continued even worse than what they were doing in the beginning. And my supervisor made the remark that he didn't know how I had been taking what I was taking without walking out the door or dropping over dead. That was what they was waiting for, is for me to drop over dead ... And it was all because that we stood up for what we believed in, for what we thought was right, and for what we thought other people wanted. The people wanted the union there ...⁸³

Beyond the organizational isolation of union leaders, management often seeks to create a climate in which activists are publicly marked as undesirable. One employer, for instance, referred to employees who solicited coworkers to sign union cards as "the enemy within."⁸⁴ Another employer, speaking to a mandatory mass meeting, asked employees to think twice about their pro-union coworkers. "Do they believe in what you believe in? Do they have the same morals and work ethic that you do? Do you really like these individuals?"⁸⁵ At HarperCollins Publishing, the CEO held a mandatory meeting in which he announced that he considered the organizing campaign "war," and declared pro-union employees to be "disloyal."⁸⁶ Beyond smearing the reputations of these employees, such rhetoric also instills fear in other employees about being seen talking with the "enemy." This point was underlined by an employer who told employees in a mandatory meeting that "I sincerely believe that the union here could spell trouble in great big capital letters. I think the best way to avoid trouble is to stay away from the troublemakers — mainly, the union organizers."⁸⁷

Standard Campaign Themes

Within this lopsided campaign environment, employers' messages focus on a few key themes. Indeed, there is a remarkable degree of consistency in the themes of employer campaigns across all industries and over the past 30 years. Over and over again, employers focus on a few key messages: organizing is futile, and will not cause the company to improve conditions; unions lead to strikes, and in strikes workers can be permanently replaced; unions take workers' dues and provide no benefit in return; and if workers engage in collective bargaining, they may end up with lower wages and worse benefits than they began with.⁸⁸ On examination, many of these themes are highly deceptive. Yet in an atmosphere in which pro-union employees have little effective right of reply, these messages may be devastatingly effective. In campaigns for public office, candidates are allowed wide leeway to make exaggerated campaign statements — but only because these statements take place in a context of free speech and equal access to media, which permits each side to challenge or correct the claims of its opponent. Indeed, this give and take is essential to the American notion of how voters are intended to make choices in electoral campaigns. It was Thomas Jefferson who declared that "reason and free inquiry are the only effectual agents against error."⁸⁹ In NLRB elections, employers are free to make the most aggressive, exaggerated, or even factually untrue statements — repeated daily, in multiple media, and conveyed by one's personal supervisor — in a setting where the other side of the debate has been virtually silenced. In this context, it may be unsurprising that so many campaigns start with two-thirds of employees signing statements of support for unionization, and end with a majority voting against it.

'We'll never change': Union formation is futile

Above all else, management's message to workers is that forming unions is futile: the company's wages are already the best it can afford; it will refuse to increase them no matter what workers demand; contract negotiations may result in wage cuts rather than raises; the workers' only recourse will be to strike; and the result of a strike will be extreme hardship followed by permanent unemployment. The specter of futility is one of the foremost causes of non-participation in electoral politics; the primary reason that millions of Americans don't vote in elections for Congress or President is the belief that their vote won't change anything in their daily lives. But in workplace elections, the futility issue is even more powerful. When workers vote to create a union, they are not simply deciding that they personally support the idea of unions. They are deciding whether or not they believe that they and their coworkers can do something, as a group, to effectively force management to provide better working conditions than they would of their own free will. If a union cannot produce some improvement beyond what management would do on its own, there is no point in voting for it.

This creates a campaign dynamic which is unique to NLRB elections: a variety of actions that are not explicitly campaign-related are, in fact, designed to influence workers' perception of the promise or futility of organizing. When management does something as seemingly mundane as transferring employees from one department to another, breaking up a formerly cohesive group of union supporters, this act carries an added meaning as a demonstration of management omnipotence and employees' impotence.

The critical need for employees to believe in their own power is all the more true when anti-union employers convey the message that, if the employees do vote to create a union, management will resist negotiating a beneficial contract with every means at its disposal. By law, while companies are prohibited from telling their workers that organization is futile, they are permitted to make virtually any type of statement that conveys the same meaning without using those exact words.⁹⁰ One company — in an effort that *Management Report for Nonunion Organizations* recommends as "an excellent campaign tactic" — went so far as to force workers to attend a mass meeting at which the company staged a skit showing that negotiations would come to no good. As the play proceeded:

The union negotiator asked for improvements in benefits. The company negotiator turned down each request. He also rejected a union wage proposal, and countered with a management proposal to

pay minimum wage. The union representative then pounded on the table and called the management proposal ridiculous, but he was unable to obtain agreement to anything more than a 50-cent annual increase, instead of the 50-cent hourly increase the union negotiator wanted. The mock negotiations had the union representative saying that it was the best he could do.⁹¹

Many employers go further still: not only predicting the uselessness of negotiations, but declaring their personal opposition to honoring the result of a vote to unionize. One company's owner, for instance, concluded his final campaign speech by telling workers that "if we defeat this union, then we can get on with it. If the union wins, well, then as far as I'm concerned, the battle has probably just begun."⁹² Another promised that if a union were voted in, he would "fight this to the very end, and that could take years."⁹³ In such a situation, workers who vote to organize are signing up for a long-term conflict which they will face every day when they come to work.

Management's strategy is to stress the theme of futility as clearly and as often as possible throughout the campaign. Among the primary messages that consultant Gene Levine's *Guide to Union Avoidance* instructs supervisors to deliver to the workers they oversee, for instance, is the declaration that "Employees have nothing to gain from union creation and have a lot to lose."⁹⁴ Supervisors are told to:

Inform the employees that you and the Company have the same right to discharge an employee as before and membership in a union does not protect an employee from discharge Inform the employees that no union can obtain more from the Company than any individual employee can obtain from the Company without a union. Inform the employees that the Company is not required to automatically sign a contract or agree to any benefits that are not to its best interest. Inform the employees that the Company is not required to continue its present benefits if a union gets in ... After the union gets in, it can be less than they now receive or it can be more.⁹⁵

Levine's message combines deceptive half-truths with outright falsehoods.⁹⁶ But delivered in a context where questions are prohibited, it may have a powerful impact on prospective voters.

The theme of futility runs through management communications from the very earliest stages of organizing to the last day of voting. DeMaria recommends a model "Speech to Employees at the First Sign of Union Activity" which includes the admonition that:

it's important for you ... to understand how there is no guarantee that you will be one penny better off with a union Unions have never been able to stop companies from opening a plant overseas A union cannot guarantee that a year from now you will be working here.⁹⁷

At the end of the campaign, DeMaria's newsletter recommends a remarkably similar theme for a model speech to be delivered by the CEO the evening before the election:

I would like to see the union totally defeated [If it wins, t]he union ... would have the right to come in and say 'we want the employees to have an increase.' ... But I would have the right to say 'what I now pay and what I now give is the best that I can afford' ... What happens if there is no agreement? It's a free country. The union has a right to tell you to go out on strike. I also have a right to run my business. I've told you that before. Make no mistake. You know me. We did not start this company to see it controlled by a union. If there is a strike, we will service our customers with new drivers. No union is going to run my business ... I have the right to hire permanent replacements and if the strike is over, I do not have to fire the replacements to make way for strikers to return.⁹⁸

This proposed speech is remarkable for the brazenness with which its central message misleads. If a company truly cannot afford improvements, it must open its financial books to the union to demonstrate its inability to meet the union's demands. There is no known case of a union voting to strike over demands which an employer has already shown to be unrealizable. Even without an employer going

so far as to open its books, there will not be a strike without employees voting to do so. In reality, union employees enjoy an average compensation level that is nearly 30 percent higher than their non-union counterparts in the same occupations and industries.⁹⁹ While this fact does not guarantee that any particular employer can afford higher wages, it suggests that there are many employers that are not now paying the “best that they can afford,” and that — under the pressure of worker action — can indeed improve compensation levels while remaining competitive. In this sense, the message that organization only leads to an inevitably futile strike is both false and misplaced. If there is a place for such statements, it would be at the end point of contract negotiations, when workers are deciding whether or not to strike over outstanding demands. To issue such predictions before a union has even been established is clearly a scare tactic. And yet, for workers whose vote to form a union is partly based on their expectation of success or failure, such a naked declaration of resistance can be powerfully effective.

Threat of strikes and layoffs

The common conclusion to management’s assertion that creating a union is futile is a prediction that, after negotiations lead nowhere, the union will inevitably, stupidly, and callously force its new members out on a destructive strike.¹⁰⁰ For employees who have no previous experience with unions, the specter of a strike is understandably troubling. This is particularly so because the strike message is inevitably paired with a heavy-handed suggestion that strikers will lose their jobs.¹⁰¹ DeMaria, for instance, instructs supervisors to “inform the employees that the company has the legal right to ... permanently replace any employee who goes on strike It’s the law that employees forfeit their right to return to work when they strike.”¹⁰²

What no management campaign explains, however, is that forming a union, in and of itself, cannot possibly cause a strike. Strikes occur when contract negotiations break down. Before getting to that point, workers will have formulated a set of contract proposals, listened to management’s declarations regarding what it can afford, and decided on a final demand. Only if the workers insist on demands that management refuses to meet could there possibly be a strike. Management communications intentionally omit these facts, suggesting instead that a union itself leads to strikes. “Where There Are Unions ... There Are Strikes,” proclaims one model flyer.¹⁰³ At times, employer statements represent out-and-out falsehoods, such as the executive who told employees that “if the company said no to union demands,

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the only recourse, the only weapon that the union has is to call a strike."¹⁰⁴ The same consultants who craft these arguments elsewhere protest the wide variety of non-strike strategies unions use to convince employers to sign contracts — publicity campaigns, political support, litigation, boycotts, and other forms of pressure that workers may exert without resorting to a strike. To suggest that striking is the only way workers can get management to improve conditions is to intentionally mislead employees regarding both the strategic strengths of unions and the likelihood of a strike. The combination of such heavy-handed misinformation with media restrictions that deny the union an effective right of reply create an environment in which true democratic debate and decision-making is impossible.

Beneath all these campaign messages, the employer's campaign is ultimately supported by employees' fear of losing their jobs. It is illegal for employers to directly threaten workers with being fired in retaliation for supporting unions. However, as Marty Levitt recalls, getting around this technicality is easy. After explaining the limits of the law to supervisors:

I would tell them how to bend and even break those limits '[You] cannot threaten employees,' I warned, 'but we're going to show you how you can deliver threats without doing anything unlawful.'¹⁰⁵

In a typical election, employees are gathered in front of their CEO and told that, if they vote to form a union, one likely possibility is that the company will be driven out of business and they will all lose their jobs. By law, employers cannot "threaten" to fire people for supporting a union, but they are perfectly free to "predict" that organizing will result in layoffs.¹⁰⁶ One management consultant explained that:

You can't come out and threaten we are going out of business. But a threat is permissible providing you give a factual basis for it ... We usually say assuming the union refuses certain needs we have to remain competitive and assuming that our competition will have no restrictions on it, we believe we will not be able to maintain the orders we now have and will go out of business.¹⁰⁷

What normal person can hear these words and not worry for their own security? What employee could be told, as recommended by one attorney, that a union "could hamper the employees' personal relations with the company," or that "an employee's job might be affected by having a union and [remember] that the employee's family [is] dependent on his paycheck," and not understand these as warnings about one's personal fate?¹⁰⁸

In fact, all such statements must be regarded as pure threats rather than predictions, for one simple reason: voting to form a union does not in itself impose any new conditions whatsoever on a business. Any change in wages, benefits or working conditions can come only as a result of contract negotiations — and then only if the employer agrees to the employees' proposals. In this sense, it is important to note the fundamental contradictions that mark management anti-union messages. On one hand, employers stress the futility of organizing, insisting that unions have no power to make the company agree to anything it doesn't like.¹⁰⁹ On the other hand, the same employers often suggest that the mere existence of a union in the workplace would so dramatically change the firm's financial policies — presumably through forcing exorbitant increases in wages and benefits — as to drive the company out of business.

Indeed, recent evidence confirms that such "predictions" are, almost always, intended as threats. Kate Bronfenbrenner's study of NLRB elections showed that 51 percent of employers tell workers that a union is likely to lead to layoffs. However, in those firms where workers voted to unionize despite their employer's dire predictions, only one percent of companies actually closed down even part of its operations.¹¹⁰ Thus, regardless of what language is used, such statements almost always function as threats rather than predictions.

Unions exploit workers' dues money

The final standard employer message is that unions care nothing for employees, but are only interested in forcing them to pay dues so that fat-cat officials can pursue lives of corrupt decadence. A typical version of this argument is voiced by the National Association of Manufacturers in its *Remaining Union-Free: A Supervisor's Guide*:

Why do unions want to organize a company? ... The answers are simple. A union is a business. Instead of selling a product, it sells a service. When a company is unionized, all employees who become members of the union are immediately subject to initiation fees, dues and assessments ... Unions are in business to make money.¹¹¹

Employers relentlessly stress that union organizers are sneaky and duplicitous; they will profess to be altruistically devoted to the needs of employees, but all of this is a ruse to get their hands on dues deductions. *Management Report for Nonunion Organizations* recommends that if employees ask supervisors whether workers are required to let union organizers into their homes, supervisors should explain that "a union representative has no more right to enter your house than any other paid salesman."¹¹² Elsewhere, the same newsletter suggests a "sample campaign flyer" that features piles of money over the legend "THIS IS WHAT YOU LOOK LIKE TO AFSCME."¹¹³

The dues message stands in direct contradiction to management's warnings regarding strikes and layoffs. If a union were primarily interested in extracting dues money from workers, it would never risk a strike, nor pursue economic demands likely to result in layoffs, because no one pays dues when they're on strike or out of work. Both these courses of action would thus be anathema to a union intent on maximizing dues revenue.

If managers voiced such duplicitous arguments in a Jeffersonian context — with open debate and opportunity for rebuttal — they would be easily unmasked, and would likely sway few voters. However, the one-party state that the NLRB has sanctioned within the workplace produces a vote based not on the will of an educated electorate, but on deliberate misinformation.

At times, employers go to the extremes of deception in emphasizing the dues theme, as in a speech to employees recommended by DeMaria stating that, based on the most recent annual financial report of the union in question:

Not one penny of money collected in dues from hardworking people like you went to pay benefits or wages for any of its members. All of the money was spent for salaries to its own officers, organizers, and employees; lawyers and accountants; rent; automobiles; gas; expenses of organizing; paying people to stand outside plants handing out propaganda; office equipment ... In a financial report I read, the government asked how much money Local 1500 spent 'on behalf of individual members.' The answer? Zero!¹¹⁴

In fact, while unions may provide individual members with emergency assistance in cases such as family medical crises, they are prohibited by law from simply distributing cash to individuals.¹¹⁵ Indeed, handing out dues money to favored individuals would be a hallmark of corruption. Instead, dues are spent "on behalf of" the members in exactly the ways this report lists — paying organizers to negotiate contracts and lawyers to represent workers in arbitrations, hiring researchers to calculate the finances of bargaining proposals and secretaries to produce member newsletters, etc. The speech he proposes is not an innocent mistake. It is an intentional, insidious effort to mislead employees regarding the moral stature of the union they consider joining.

The hypocrisy of management communications

What sense is one to make of the messages that dominate employer campaign communications? Employers defend their aggressive participation in workers' decision-making process on the grounds

that, without them, employees would be deprived of vital information regarding the downside of organizing a union. Several facts call this logic into question. Most importantly, surveys of American workers who do have unions find high rates of satisfaction with their choice. The federal Dunlop Commission reported that fully 90 percent of union members would vote to retain their union; 70 percent rated their experience with their particular union as either “good” or “very good.”¹¹⁶ These workers have more experience with the realities of union experience than any union-resistant manager. That their experience is so at odds with the dire predictions of anti-union campaigners suggests that the claim that unions don’t care about workers and just want their dues are dramatic exaggerations. They cannot be defended as simply delivering needed information to voters. They appear to function, rather, as disinformation and scaremongering.

Timing Is Everything: Delay, Depression, and the Fear of Unending Conflict as Management Campaign Strategies

One of the integral aspects of any political campaign is control over the campaign’s timing. Every candidate for public office seeks what George H.W. Bush called “The Big Mo,” and carefully plots campaign events in order to have his or her support peak in the days leading up to the vote.¹¹⁷ One of the ground rules in elections for public office — so commonsensical that we don’t even think of it as a “ground rule” — is that Election Day is fixed by law and cannot be manipulated by either candidate.

In NLRB elections, pro- and anti-union campaigners likewise seek to time their efforts in order to build to a peak of support just before the election. NLRB election dates, however, are subject to repeated delays. Both sides have the right to file objections that result in electoral delays. In practice, however, it is generally in the union’s interest to have speedy elections, and in management’s interest to delay. As Levitt explains:

delay steals momentum from a union-organizing drive, which is greatly dependent on the emotional energy of its leaders and the sense of urgency among workers.¹¹⁸

Employer anti-union strategies largely depend on wearing workers down through a prolonged campaign of fear, intimidation, and tension that serve both to scare workers away from union support and to convince them that management is omnipotent and organization therefore futile.¹¹⁹ Generally, when the election is first called by workers petitioning the NLRB, two-thirds or more of eligible employees have signed statements of support for the union. In an article entitled “Time Is On Your Side,” the Jackson Lewis firm’s newsletter advises employers that pre-election legal proceedings should be considered “an opportunity for the heat of the union’s message to chill prior to the election.”¹²⁰

For employers, every day of delay is a day in which anti-union managers are free to campaign eight hours a day with every worker, while union supporters are restricted to brief lunchtime conversations. Since employers are not required to turn over a list of employee names and addresses until all procedural disputes have been settled and all appeals exhausted, even groundless legal challenges that are clearly doomed to failure buy management an extended period in which most employees are shut off from conversations with union representatives.¹²¹ Unsurprisingly, the evidence suggests that the odds of a pro-union vote decline the longer an election is delayed.

The NLRB process provides employers with multiple opportunities for delay. Common management strategy is simply to refuse to agree on anything related to the election process. “The company may dispute the jurisdiction of the NLRB, that the union is a labor organization, or that the proposed bargaining unit is appropriate,” explains one consultant.¹²² Under federal law, the NLRB is required to hold a hearing whenever any challenge is raised to any aspect of the election — no matter how trivial or ill-founded. To argue that a given union is not a “labor organization,” for instance — when the same union has already been recognized in scores of other elections — may appear to be patently disingenuous.

Nevertheless, the NLRB is powerless to ignore it.¹²³ Kilgour notes that even losing motions may provide valuable opportunities for delay — citing the example of a firm that, after stating objections to a proposed voting unit, sent a needed manager out of the country for five months as a successful “stalling tactic.”¹²⁴ In some cases, some employers have been known to intentionally break the law simply in order to create NLRB litigation that will delay the election.¹²⁵

Moreover, determined employers often pursue even trivial charges through multiple layers of appeal. The NLRB encourages employers and unions to agree on a “consent” election — meaning that whatever procedural disagreements may arise will be subject to quick resolution by the regional NLRB director. In the early 1960s, nearly half of all NLRB elections were conducted on this basis. But as management has become more aggressive, consent elections have nearly disappeared from the American workplace. By the late 1970s, only 7.3 percent of NLRB elections were consent elections; by 2004 the percentage had fallen to 1.2 percent.¹²⁶ From a management point of view, agreeing to consent elections is akin to unilateral disarmament. “Even though a ‘consent’ election may be ‘quicker’ it has the same results as a shot in the head,” one consultant explained to Congress. “[Employers should] always go to a hearing ... it always works in your favor.”¹²⁷

Management’s power to delay elections carries a further significance in that the very act of contemplating union formation is an act of workers’ pinning their hopes on the ability to come together in order to change management’s behavior. A quick election makes change seem possible, whereas a long-delayed vote serves as an object lesson in the weakness of collective action. Thus, the very fact of delay may change the way people vote. Marty Levitt worked with one of the pioneering management attorneys of the 1970s, whose “specialty was delay tactics, for he understood that management would always win a war of attrition.”¹²⁸ Levitt explains that:

[this attorney’s] centerpiece technique, now a common strategy among management lawyers, was to challenge everything. He tried to take every challenge to a full hearing, then prolonged each hearing as much as he could. Finally he appealed every unfavorable decision Almost invariably [he] refused to work out agreements with the union on such issues ... out-of-court agreements on matters of fact are meant to save court time and speed the legal process. But such legal congeniality would short-circuit [his] strategy. He knew that if he could make the union fight drag on long enough, workers would lose faith, lose interest, lose hope.¹²⁹

Management delay tactics are particularly damaging when coupled with an atmosphere of fear and conflict in the workplace. For many workers, the tension of a prolonged NLRB election becomes unbearable. When management is aggressively committed to preventing organizing — filling the workplace with confrontational banners, flooding it with constant newsletters, forcing workers into a barrage of tense anti-union meetings, and subjecting individuals to repeated one-on-one harangues from their immediate supervisors — the workplace becomes a scene of daily conflict. The longer such an atmosphere continues, the more workers become convinced that organizing, means living in an atmosphere of constant battle. This is particularly the case when employers announce that they will continue to resist union formation in every way possible, even if workers vote to organize. Under such conditions, many workers end up voting ‘no’ not because they wouldn’t like a union, but simply because they want the tension to be over, and they no longer believe that any union would have the ability to curb management.

This dynamic was illustrated in a survey of communications workers who had recently gone through NLRB election campaigns.¹³⁰ At one workplace, the company’s human resources director called employee activists “union slime,” a worker sporting a union button was cursed by his supervisor, and another who refused to put on an anti-union button was forced to clean up the basement. After a period of such tactics, the company’s manager complained to employees that the plant was suffering because of the “high tension” caused by the union campaign. On the eve of the election, the general manager’s message to employees was “You can vote for this union and make me negotiate against the union, or you can vote against this union and help me shape [the company] into a team.”¹³¹

For many employees, the specter of an indefinite continuation of such tension is untenable. The majority of employees in this survey were not strongly pro- or anti-union. When asked “the best reason not to join any employee organization,” only five percent worried about union dues. By far the most common reason given was that a union would “create conflict at work.”¹³² These employees had not become anti-union; on the contrary, a majority still believed they’d be better off with a union. However, they didn’t believe a union could succeed against such vociferous management opposition, and they worried for their own jobs; 42.3 percent of respondents stated that the primary reason their coworkers didn’t support unionization was the fear of management retaliation.¹³³

Thus, the power of management to reschedule election day — a power never granted to any candidate for public office in the American political system — has become a power to prolong a period of fear, intimidation, and profoundly undemocratic one-sided campaigning.

The Critical and Intimidating Role of Supervisors

One of the principles of the American political system is that words carry different meaning depending on who delivers them. Homeowners can declare that they don’t want Republicans in their house, but an employer can’t make the same declaration about the workplace. A neighbor can solicit any friend she likes, at any time, for a Political Action Committee, but an employer is largely prohibited from doing likewise with employees. Indeed, an employee may predict to coworkers that if a certain candidate wins, they’ll all lose their jobs, but in many states, a company is banned from making the same statement to its employees. Our tradition recognizes that relations of power and dependence may turn otherwise innocent statements into tools of coercion.

Under federal regulations, employers are prohibited from urging rank-and-file employees to vote for a particular candidate or party.¹³⁴ In an election for Congress or the Presidency, employers are banned from using any of the media discussed above — bulletin boards, leaflets, or mass meetings — to advocate that employees support a particular party. It is a violation of federal law for employers to have supervisors carry a partisan message to those they oversee. Federal law reflects an understanding that dates back to the Founders — that employees are naturally fearful of offending those they depend on, and therefore that free and fair elections require a blanket ban on employers advocating partisan positions to those whose economic lives they control.

In NLRB elections, standard employer strategy is based on maximizing the very thing that federal statute seeks to prevent: the use of economic power over voters to influence what should be decisions of conscience. While employer organizations frequently stress the importance of providing employee voters with anti-union information, the messenger seems to matter more than the message. There is no known union campaign, for instance, in which anti-union information was provided to workers solely by anti-union employees, independent of the employer. If the purpose is simply to guarantee access to all sides of a debate, leaflets and house visits from such employee opponents would be sufficient. What such a strategy would lack, obviously, is the element of fear — the subtle hint of potential retaliation — that is inherent in employer speech. If a message depends so heavily on its messenger or doesn’t work unless delivered by someone with coercive power over the listener it becomes suspect. Such statements are not, in fact, political arguments — they do not constitute impersonal appeals to reason or logic — but rather are acts of coercion masquerading as political speech.

Free speech for managers?

At the heart of employer anti-union campaigns are one-on-one conversations between supervisors and their subordinates. Yet in these conversations, neither the speaker nor the listener are free to voice their conscience. Employers defend the legitimacy of supervisor campaigning on the basis of companies’ free speech rights.¹³⁵ Supervisors, however, do not actually enjoy free speech at all; their speech is entirely dictated from above. By law, supervisors can be fired if they refuse to play their assigned role

in an anti-union campaign.¹³⁶ Indeed, it is perfectly legal for a company to track the union proclivities of employees and fire those supervisors who fail to convince their underlings to back the company's position.¹³⁷ Thus, the principle of "employer free speech" masks a reality of systematically coerced speech. At times, this contradiction is painfully apparent in the convoluted logic of consultants, as when Levine counsels that:

As a supervisor, you are free to make any statement so long as the statement is not coercive ... Your employees want to know what you think about unions. Your company wants you to tell them your opinion about the union that you are opposed to it. You have the right to give your opinion to your employees that you do not think a union would be good.¹³⁸

Here, "freedom" is defined exactly by its opposite; supervisors are "free" to mouth exactly the scripts they are given, and nothing more. To the extent that supervisors are participants in workplace debates over the merits over organizing, this again marks a fundamental perversion of the ideals of American democracy. From the Founders to the present, the bedrock idea of American democracy is a self-governing people that make political choices through a process of free and open deliberation. To have one group of participants in those deliberations (indeed, the single most influential group, with by far the most far-ranging speech rights) acting under a systematic ban on free expression makes this campaign something utterly foreign to the Founders' concept of democracy.

Employer Intimidation and the Mockery of the Secret Ballot

Throughout the union avoidance literature, there is broad agreement that supervisors represent the single most effective channel for turning workers against organizing.¹³⁹ For voters, their supervisor is the person with the most direct control over a host of critical decisions — hiring and firing, raises and promotion, more or fewer hours, better or worse job duties, and greater or lesser flexibility in dealing with unforeseen events such as sick children.¹⁴⁰ When managers warn that forming a union could affect employees' "personal relations" with the company, it is this realm of discretionary authority that runs through workers' minds.¹⁴¹

Employer strategy for NLRB elections centers on a ceaseless, in-your-face campaign of supervisors pressing anti-union rhetoric on their direct subordinates. During the course of the campaign, supervisors serve as "precinct captains" for the employer. They are generally assigned no more than 10-20 employees, and charged with talking to each of these subordinates at least several times per week, and often daily.¹⁴²

While the primary role of supervisors is to influence the votes of their subordinates, supervisor one-on-one meetings are also designed to force a reaction from employees, enabling management to get an accurate and continuously updated read on both the overall vote count and the identity of union supporters. Several consultants have written anti-union manuals geared specifically to the role of supervisors.¹⁴³ Typically, supervisors report to an outside consultant who drafts leaflets and provides scripts. In a typical week, supervisors will be given two or three leaflets to hand out to each individual under their direction. These encounters are designed to be extremely intense; several consultants stress the importance of "eyeball-to-eyeball conversations between supervisors and employees."¹⁴⁴ Managers are trained in how to talk about each leaflet and how to carefully observe and interpret the words, nuances, and body language of employees' response.¹⁴⁵ "Supervisors should not ask employees what they think about the management literature ... as this would constitute unlawful interrogation," explains DeMaria's *Management Report for Nonunion Organizations*. Instead, they should "make positive statements such as 'I thought that flyer on the high cost of union dues really brought home just how costly it can be in dollars and cents to be in a union,'" and then watch for employee reactions.¹⁴⁶

With each leaflet, supervisors report back to senior management on each employee's reaction, carefully grading and ranking the response of each.¹⁴⁷ While ranking systems differ from consultant to consultant, even the broadest of monitoring systems ranks workers in one of three categories — solidly

pro-union, solidly opposed, or undecided. In more sophisticated campaigns, the ranking system may capture finer-grained distinctions in employee attitudes. Levitt, for instance, recalls that:

We kept charts on every employee, identifying each with one of five marks: a plus sign in a circle if he was staunchly anti-union; a plain plus sign if he leaned toward management; a minus sign in a circle for a strong union supporter; a simple minus sign if he was pro-union; a question mark for unknowns.¹⁴⁸

In this sense, the standard conduct of management campaigns undermines the very notion of a secret ballot. On election day, the physical ballot still takes place behind a curtain, but the real protection that curtain provides is increasingly marginal. The purpose of a secret ballot is to safeguard individual workers against retaliation based on their political views. However, if management has already learned where each individual employee stands before the vote takes place, the secrecy of the ballot has become eviscerated.

How is it possible for management to know workers' feelings with such exactitude? It is, after all, illegal for employers to interrogate employees as to their stance on union formation. The answer to this seeming mystery lies in a battery of tactics designed to evade the law and pierce the veil of the secret ballot. Management's intelligence-gathering often begins with sophisticated attitude surveys designed to identify a psychological "proclivity" toward union activism.¹⁴⁹ In other cases, management spies on employee conversations or recruits sympathetic employees to report on who says what in union meetings.¹⁵⁰ When management provides 'Vote-No' buttons, hats, t-shirts or bumper stickers, this too provides a means of gauging workers' views simply by watching who uses them and who avoids them.¹⁵¹

Above all, management's ability to subvert the secret ballot is based on the relentlessly intrusive one-on-one confrontations between supervisors and their subordinates. As described, these repeated confrontations draw on the power of the supervisor-employee relationship in order to force voters to reveal their political intentions. Voters on the receiving end of such questioning do not have the legal right to say "I don't want to talk about it now." There may be individuals who — day after day, week after week — are able to hide their true feelings from their supervisors. For these individuals, the secret ballot retains its function.¹⁵² For the overwhelming majority of people who are not so skilled at deception, management has succeeded in rendering the "secret ballot" meaningless, since their vote was known long before they stepped into the polling booth. Indeed, management's vote-counting is often eerily accurate. Levitt recalls that he would commonly initiate a pool among managers and foremen, in which each supervisor would predict the number of anti-union votes, with a \$100 prize for the closest guess. "It was amazing," he reports. "In pool after pool the supervisors were astonishingly accurate."¹⁵³ But to the extent that such tactics are effective, the technically secret ballot has ceased to provide any meaningful protection to voters subject to the intense scrutiny of those who control their work lives.

Election Day

One might think that, even if the whole campaign leading up to an NLRB election is slanted toward management, at least election day itself must run the same as a normal election. After all, the act of voting itself seems straightforward — one enters a private booth, marks a ballot, and an impartial authority oversees the process and counts the votes. How much room for manipulation could there be? Unfortunately, the answer turns out to be much more than one might expect.

First, the very timing of the vote itself may be the result of political manipulation. When the NLRB first convenes a hearing to set the election ground rules, one of the issues that the two sides negotiate is the date of the election. Generally, management has the superior leverage in these discussions; since the union is anxious for a quick election, union representatives often give in on other aspects of the process. Management consultants urge their clients to schedule the vote for payday whenever possible, so that workers will be grateful toward their employer and so the employer can have the last word of the campaign by distributing ‘Vote No’ flyers with employee paychecks. Likewise, management typically seeks to hold the vote early in the morning, so that employers can host an anti-union dinner the night before, and union supporters will have no opportunity to rebut that message.¹⁵⁴ And always, Fridays are better than Mondays if you want happy rather than disgruntled voters. Thus, the schedule of the election itself may be a product of management strategy — a partisan advantage that is, of course, never permitted in elections for public office.

The events of election day itself likewise unfold largely according to management strategy. Physical control over the workplace affords management control over the campaign environment while voting is ongoing. The actual room in which workers cast their ballots is off-limits to campaigning. However, voters walk to the polls past rooms, hallways, posters, and bulletin boards dominated by anti-union campaign propaganda. On election day, like all other days, anti-union supervisors may walk around the company, having mandatory one-on-one conversations with every voter; neither union representatives nor pro-union employees have the right to do likewise. Indeed, the Jackson Lewis attorneys urge employers to take care even regarding the union observers who by law must be allowed to monitor the balloting; they recommend that employers plan out a route for them, from the front door to the voting room, that will minimize exposure to employees, and make sure that they are escorted by a management representative in order to prevent them from engaging in the same type of conversations supervisors will be having all day.¹⁵⁵ Furthermore, controlling the polling site allows management to stage events that influence the environment in which voters cast ballots. In one case, for instance, an employer who had previously never used of security guards, but who had campaigned on the notion that organizing would lead to violence, hired an armed guard (complete with guard dog) to patrol its property during election day — thus dramatizing the level of conflict and retribution that might result from a ‘yes’ vote.¹⁵⁶

In addition, anti-union consultants and attorneys generally hold that a large turnout favors the anti-union side, and use control over the balloting site to guarantee partisan turnout. It is believed that union supporters are, by nature, more motivated to vote. If, as Cohen and Hurd’s survey suggests, there is a large body of fence-sitters who above all want to avoid conflict, it is likely that many of these employees would naturally avoid voting at all if given the chance. If they do vote, however, many are likely to vote ‘no’ simply because they have been convinced that management is implacable, that the union can’t win real improvements, and that a ‘yes’ vote is a vote for continued conflict. Under these assumptions, management works hard to turn out the vote.¹⁵⁷ The fact that management can target slackers with repeated reminders to vote — under conditions where refusing to vote will be understood as an act of

displeasing one's supervisor — is recognized by management advisors as a crucial advantage.¹⁵⁸ Indeed, Jackson Lewis attorneys go so far as to advise employers that “a check of absentees should be made on the morning of the election, and transportation offered them.”¹⁵⁹

The Jackson Lewis advice points to the unique power of controlling the polling site. The ability to get an immediate list of employees who have not come in to work, and arrange to ferry them in to vote, is a power that only management has; pro-union employees have no equal right of access to election day attendance sheets. By law, it is illegal for supervisors to keep lists of who has and has not voted; however, managers generally can track this information with no need for a written list. The Sodexo union avoidance manual, for instance, includes an edict that on election day, “every supervisor should make sure that every employee is encouraged to vote.”¹⁶⁰ The ability to monitor and follow up on voters with such exactitude is, again, a power that management has but union supporters do not. And, again, it is a power that no party would be permitted in a regular election. No polling place would ever be situated in Democratic or Republican headquarters; no party would ever be allowed unilateral access to the list of who had shown up to the voting place, nor unilateral ability to send partisan representatives to personally escort those who hadn't yet voted; nor, finally, could the turnout push come from a party that had both a highly partisan position and control over voters' financial future.

The advantages employers gain from controlling the polling site are reflected in their opposition to policy changes that would institute off-site voting. Under the National Mediation Board — the federal agency overseeing elections for the railway and airline industries — all elections are conducted by “mail ballot;” currently this means employees vote through their choice of touch-tone telephone or internet website. The process is both efficient and secure; with over 1,500 elections run under this system, there has not been a single allegation of voter fraud or coercion.¹⁶¹ Indeed, the system follows the vote-by-mail system that has been adopted for elections to public office in the state of Oregon, where elections have been found to be at least as clean as those conducted under previous voting systems.¹⁶² Furthermore, elections by mail ballot are significantly cheaper to run than on-site elections; in an age of repeated cuts in the NLRB budget, one might think this would increase the agency's incentive to adopt off-site voting. But employers are strongly opposed to changing the system, and to-date the NLRB has refused to reconsider its insistence on workplace balloting.¹⁶³

Employers are straightforward in their reasons for opposing voting alternatives. “Sophisticated employers know well that mail ballots are ‘bad news’ for employers,” notes one national law firm, explaining that “in mail ballot elections, employers have a much more difficult time controlling timing of campaign strategy.”¹⁶⁴ DeMaria's *Management Report*, in an article titled “Reasons Employers Should Resist Mail Ballots,” explains not only that it is harder to turn out anti-union voters when the election is off-site, but also that mail balloting diminishes management control over the emotional atmosphere on election day. Mail ballots generally include a more extended voting period — sometimes up to 30 days — and employers are prohibited from forcing workers to attend mass anti-union meetings during this entire period, rather than simply the final 24 hours leading up to an on-site ballot. The newsletter explains that:

The whole idea of the 25-hour presentation is to bring the campaign to an emotional pitch, so that employees walk out of the final employer presentation revved up to vote for the company based upon the ‘last word.’ Mail balloting destroys this dynamic, because employees can vote several weeks later after the impact of the employer's final presentation has worn off.¹⁶⁵

If either Democrats or Republicans insisted that voting take place in their headquarters, and that all voters be forced to attend a partisan rally 25 hours before casting their ballots, with no equal opportunity for response for their opponents, none of us would be fooled into thinking this a democratic election. If they went even further — insisting that such unilateral prerogative was a critical ingredient of free speech and democratic process — it would be hard not to view this as the most cynical and shameless dissembling. Yet this logic rules workplaces across the country.

Inadequacy and Weak Enforcement of the Law

Beyond the extraordinary advantages provided employers under labor law, NLRB elections stand in marked contrast to those for public office in the incidence of outright illegal activity. From its beginnings, the world of anti-union campaigns has been rife with illegal activity of almost every kind.¹⁶⁶ As early as the mid-1950s, Congressional investigators uncovered an extensive pattern of illegal behavior among the nation's foremost management advisors on labor issues, including bribery and coercion of employees, spying on and harassing union supporters, offering rewards to anti-union employees, and threatening those who were pro-union.¹⁶⁷ Levitt followed the same path two decades later; as part of his routine strategy, he "set to work establishing a network of rank-and-file employees who would serve as spies, informants, and saboteurs."¹⁶⁸

Levitt describes how illegal activity was built into the normal practice of employer campaigns:

My team and I routinely pried into workers' police records, personnel files, credit histories, medical records, and family lives in search of a weakness that we could use to discredit union activists To fell the sturdiest union supporters ... I frequently launched rumors that the targeted worker was gay or was cheating on his wife If even the nasty stories failed to muzzle an effective union proponent, [we] might get the worker fired.¹⁶⁹

Indeed, virtually every step of the campaign process, as described by Levitt and other management strategists, has been marred by illegal practices — including packing the bargaining unit with last-minute anti-union hires; lying to employees about the confidentiality of personal interviews; falsifying payroll memos in order to provide illegal wage increases; vandalizing company cars and blaming it on the union; tapping the union organizer's phone; and paying employees to vote against union formation.¹⁷⁰ Such tactics shouldn't be imagined as confined to the long-ago past or the province of "rogue" consultants. In 2004, a South Carolina manufacturer sued Jackson Lewis for advising illegal tactics in "a relentless and unlawful campaign to oust the union" that included spying on workers, firing union activists, organizing a bogus "employee" anti-union committee, writing supposedly employee-authored flyers calling union activists "trailer trash" and "dog woman," and supplying cash-filled envelopes to anti-union employees.¹⁷¹ What was unusual about this case is not the tactics employed, but simply that the internal tension between the company and its attorneys led to a public record of management's tactics. "Jackson Lewis is a key player in the union avoidance industry," noted former NLRB General Counsel Fred Feinstein, and "this kind of aggressive anti-union campaign is not unusual."¹⁷²

Over the period of 2000-05, there were an average of over 19,000 charges filed per year alleging employer violations of federal labor law; of these, 40 percent — or 8,500 cases per year — presented sufficiently strong evidence that the NLRB either issued a complaint or oversaw an informal settlement between the parties (see Appendix, Table 3). NLRB complaints are the equivalent of criminal indictments, and both complaints and settlements represent cases in which the NLRB judges a charge to have merit.¹⁷³ While both unions and employers violate the law, the vast majority of charges stem from employer behavior. In 2004, for example, 88.5 percent of all complaints issued by the NLRB, and over 90 percent of all cases tried in hearings of the full Board, addressed illegal behavior by employers.¹⁷⁴

Illegal Firing, Suspension, and Punishment of Union Supporters

The most egregious form of illegal behavior is the firing, suspension, or demotion of employees in retaliation for union activity. On average, over the past 10 years, nearly 29,000 workers per year received backpay as a result of alleged illegal employer behavior.¹⁷⁵ This number includes those who were fired,

demoted, suspended, denied promotions, or in other ways were subject to economic retaliation. The NLRB's data does not distinguish between offenses committed in the course of an election campaign and those committed in the context of an established bargaining relationship. It is therefore impossible to know exactly how many of these reprisals are related to elections. In the late 1970s, the NLRB General Counsel estimated that 90 percent of all such cases stemmed from election campaigns.¹⁷⁶ However, later analysis by more conservative scholars contends that this figure is exaggerated, and estimates that only 50 percent of such cases occur during elections.¹⁷⁷

By any measure, the incidence of illegal economic retaliation against union supporters is dramatic. To adopt the most conservative methodology, we might assume that acts of economic retaliation are spread across not only union supporters, but all voters. Furthermore, since many employer campaigns successfully stop union drives before they even reach an election, we might assume that acts of retaliation are spread across all workplaces where a petition for election was filed — whether or not it ultimately led to a vote. While the NLRB only provides data on the number of eligible voters in workplaces that actually had an election, it is possible to extrapolate this number to take account of all companies where petitions were filed.¹⁷⁸ The result, for 2004, is shown in Table 3 (see Appendix). Even assuming that only half of all acts of retaliation occurred during an election campaign, and assuming that this retaliation was spread evenly across the more than 250,000 potential voters in companies where petitions were filed that year, this most conservative methodology suggests that one out of every 17 eligible voters was fired or otherwise financially penalized for supporting unions. By normal political standards, this figure is astounding. If federal elections followed the same practice as workplace elections, we would have seen 7.5 million Americans demoted, suspended, or fired from their jobs for supporting the wrong candidate in 2002 elections to federal office.

If we use more realistic assumptions, the incidence of retaliation is even greater. In 2004, there were 160,000 voters in workplaces that held NLRB elections; just over 70,000 of these voted to form a union.¹⁷⁹ If we assume that management retaliation was focused on 'yes' voters, the data would suggest that one out of every six union supporters was economically punished for expressing his or her political beliefs. In fact, it is likely that many of the 70,000 union voters were quiet supporters, and that the core of union activists who attracted the wrath of management was considerably smaller. If only half those who voted pro-union actually dared to wear a union button or t-shirt, sign a petition or speak out in a meeting, and if management retaliation was concentrated on this smaller group — as seems most logical — then the data would indicate that one out of three actively pro-union employees suffered economic retribution.

One way to make sense of the NLRB data is to compare the incidence of illegal activity under the National Labor Relations Act with that in elections to federal office (see Appendix, Table 4 for such a comparison). Again, making the conservative assumption that only half of all illegal activity takes place in the context of election campaigns, and assuming that only 40 percent of unfair labor practice charges are meritorious, this indicates that there were nearly 4,000 cases of employers breaking the law in the context of workplace elections.¹⁸⁰ If we compare this number of cases with the total number of eligible voters — again using the most conservative assumptions — we find that employers broke the law once for every 64 voters. This is a much less extreme number than the rate of backpay awards. Nevertheless, it is a remarkable figure when compared with federal electoral standards. In the 2001-02 election cycle (the last two-year cycle for which complete data is available), there were a total of 565 Federal Election Commission violations. With 128 million registered voters, this means there was one violation for every 226,000 voters. If we take violations-per-voter as a measure of the "dirtiness" of elections, this means that workplace elections are more than 3,500 times dirtier than federal elections. While this figure may seem hyperbolic, it is in fact based on a series of calculations that, at every turn, applies the most conservative possible assumptions.¹⁸¹

The NLRB data may be shocking to those unfamiliar with organizing campaigns, but they come as no surprise to union organizers or management attorneys. Indeed, there is good reason to believe the NLRB data actually understates the true extent of illegal firings. Under the NLRB's evidentiary rules, it

is extremely difficult to prove that a given worker was fired in response to union activity. Since virtually every campaign features regular one-on-one conversations between supervisors and employees, it is easy for managers to convey threats with no witnesses present. In such situations — where a case involves the word of one worker against that of his or her supervisor — the NLRB's policy is that the case will be prosecuted only if the union affirmatively proves that the credibility of the employee in question is superior to that of her supervisor. In cases where it is impossible to tell who is telling the truth, the charges are dropped as a matter of practice.¹⁸² Thus, we would expect the NLRB to document illegal firings only in cases where management is clumsy enough to issue threats in a particularly overt manner. In addition, since it is legal for employees to be fired for any non-discriminatory reason, it is fairly easy for managers to identify some ancillary cause as the official reason for a termination, denying that it was motivated by anti-union strategy. Thus, one survey of anti-union attorneys concluded that it was “common for union activists to be fired since it was generally easy for the attorney and employer to find a reason (e.g. tardiness, insubordination) for firing activists that the NLRB would uphold as lawful.”¹⁸³ For these reasons, union organizers have become reluctant to file charges even when they believe employees have been illegally fired.¹⁸⁴

Numerous pundits muse over why the labor movement has been shrinking so steadily for the past several decades. To understand the most fundamental answer to this question one need look no further than the experience of workers in thousands of companies such as Surgical Appliance, Inc., of Cincinnati, where employees petitioned for an election with the NLRB. Shortly after the petition was filed, eight employees stood at the plant gate, passing out leaflets to coworkers. Within one hour, all eight were either fired or had their hours cut. Undaunted, other employees took their place leafleting the following morning — and the same thing happened to them, and to the next wave workers as well, until, over a period of several days, 26 union supporters had been laid off. Six months later, the company agreed on a settlement with the NLRB, and paid a total of \$70,000 in backpay. The workers thus won their case, but they failed to win an election and the company remained non-union.¹⁸⁵ This type of behavior — political dissidents threatened with unemployment, and used as an example to terrorize others into submission — is something we would expect from totalitarian regimes. Yet this is a common practice in workplaces across the country.

A Toothless Law: Absence of Penalties Encourages Lawbreaking

Any law is only as good as its enforcement. For this reason, violations of state and federal electoral law are punishable by fines, imprisonment, and denial of commercial licenses, among other penalties. Reform advocates may complain that FEC penalties are not stiff enough, or not enforced with sufficient rigor. The protections provided by the current system may be appreciated, however, if we imagine what American politics would be like if there were no punitive sanctions whatsoever for those who broke the law. If the only response to illegal campaign contributions, for instance, was that the candidate was required to return money to the donor — with no possibility of prison, fines or any other punishment — the system would be immeasurably more corrupt. Powerful donors would break the law over and over again, knowing that if they were caught they would face no real penalty, and indeed that even after being caught they would remain free to try the same strategy again with no fear of sanctions even if they were found to have violated the law repeatedly. With no teeth behind the law, the democratic nature of elections would be fundamentally corrupted. Instead of expressing the will of the people, elections would reflect the law of the political jungle: politicians would be bought and sold; voters would be bribed and bullied; media would be monopolized or blacked out. We might still have votes, but we would not have democracy; elections under these conditions would function as a cynical joke, serving to provide a gloss of legitimacy to those who held power illegitimately.

This is unfortunately a perfectly accurate description of the state of law governing NLRB elections. When an employee is fired for union activism, he or she must first engage in a difficult and lengthy process to prove that her termination was due to anti-union discrimination. One federal commission estimated that going through all the steps of appeal in such a case takes an average of three years to complete; during

all this time, the employee remains fired, with no protection or compensation from her employer.¹⁸⁶ Even if an employee successfully pursues this process and ultimately wins her case in federal court, there is no possibility under the law for the court to impose any sort of fine, prison term, or punishment whatsoever on the employer. Instead, the sole remedy possible under the NLRA is payment of back wages. Specifically, an employer who is found guilty in such a case is liable to pay the back wages of the terminated worker, offset by whatever money the employee earned in any other job he or she landed in the meantime. For employees who live paycheck to paycheck, the first thing one does after being fired is look for a new job. Furthermore, the NLRB requires employees to actively search for a replacement job — those who don't may be denied backpay even if they win their case. If someone is lucky enough to find another job that pays the same amount as the position they were fired from, their employer doesn't need to pay them a cent. If they get a job that pays less than their former position, or they go through a period of unemployment before finding a new position, the employer is merely required to make up the difference.

Thus, even the most egregious offenses result in employers being liable for only a fraction of the wages lost by illegally fired employees. Moreover, this partial restitution is the absolute maximum penalty allowed under law. In the entire canon of employment law — perhaps in American civil law as a whole — this is the only area of law that contains a statutory ban on any possibility of punitive action. With such a toothless law, it is little wonder that employers so frequently decide that it is worthwhile to fire a few activists in order to scare hundreds of employees into abandoning the thought of unionization.¹⁸⁷

The NLRB's backpay remedy is premised on "making whole" fired employees. In fact, the law does not make employees whole, even on a discounted basis. The law does not provide a remedy for the wide range of catastrophes that may occur when companies illegally fire employees who are supporting families living paycheck-to-paycheck — including, for instance, losing one's car or home, or incurring catastrophic healthcare costs. One case in point is the experience of Vico Products employees in Michigan.¹⁸⁸ In 1997, Vico employees voted to organize a union affiliated with the United Auto Workers. During the course of the campaign, the company committed a number of illegal acts, including direct threats of layoffs in response to unionization. Shortly after the election, the company moved part of its operations from Michigan to Kentucky, summarily laying off 33 workers without a word of negotiation with the new union. Four years later, the NLRB ruled that Vico had acted illegally and required the company to move its machinery back to Michigan and offer to reinstate those it had fired. The company appealed, but in 2003 a federal court upheld the NLRB's finding. Thus, the workers got a measure of justice, but six years after the fact. It is impossible to know how many of these employees lost their homes or cars in the meantime, were unable to care for elderly parents or to maintain children in college, were forced to uproot their families and move out of state, suffered depression, despair or tension-related illnesses, were bankrupted by unaffordable health care costs, or endured any one of a host of other afflictions that commonly confront the unemployed. Despite "winning" their case, there is no way that any of these costs can be "made whole" under labor law.

The NLRB's brand of justice is highly skewed on both ends. For employees, being fired carries a risk of potentially catastrophic costs that will never be made up; thus, they have good reason to be very afraid when hearing even subtle threats from their employers. For companies, on the other hand, the penalties are so slight that they fail to instill real respect for the law. As a simple economic calculation, it is almost always rational for employers to incur the modest costs for firing activists in order to crush a broader organizing movement. As DeMaria explains:

Let's suppose during [the] early period of card signing you discharge a prime mover, and the NLRB finds that you did it on a discriminatory basis. What are the remedies? Reinstatement, backpay ... and you gotta post a notice saying, We've been bad boys and girls, we won't do it again Some companies will just say, 'Hey, where's the check?'¹⁸⁹

Under these conditions, it is not surprising that so few workers win union recognition through NLRB elections. The surprise is that any group of employees manages to stand up to this level of fear and lawlessness to insist on creating a union.

Stop — or I'll Say "Stop" Again!

There are many ways that employers may break the law apart from firing activists — including threatening layoffs, spying on or interrogating employees, and promising benefits for “no” voters. But none of these other illegal acts carry any possibility of monetary damages — not even the modest compensation required for those illegally fired. Instead, the Board’s remedy for employers found guilty of breaking these electoral laws is simply to require companies to post a notice declaring that what they did was illegal and promising not to do it again. If they do repeat the behavior, they simply face the same remedy a second time: posting another notice acknowledging the law and pledging this time that they really won’t do it again. This pattern can repeat itself without limit. But no matter how often it repeats, there is no possibility under the law for the NLRB to enforce fines or any other sort of punishment against repeat offenders.

In extreme cases, the NLRB may order an election to be rerun if it believes that illegal actions were so widespread as to change the outcome of a vote; but the Board’s policy is that the charging party faces a “heavy” burden to prove that illegal acts affected the outcome, and that without such proof election results will not be “lightly set aside.”¹⁹⁰ Yet even when the Board orders a second election, there is no guarantee that the rerun vote will not be marred by the same behavior that invalidated the first round. In one case, an election was overturned after the employer was found guilty of illegal threats, coercion, discrimination against union activists, videotaping workers talking to organizers, following employees into bathrooms, and monitoring employee phone calls. A second election was scheduled for 15 months after the first, and the employer was required to post notices acknowledging the law and pledging to respect it in the future. Yet even while these posters hung on the company’s walls, the employer repeated some of the exact behaviors it was pledging to rectify. The NLRB cancelled the second election and charged the employer with more than 100 separate violations of the law. Yet all these workers could look forward to was more signs posted, more promises voiced, and yet another delayed and rescheduled election.¹⁹¹

The NLRB has the legal authority to go beyond rerunning elections and enforce a bargaining order, requiring an employer to recognize a union on the spot and immediately commence negotiations. However, such orders are extremely rare; in the past five years — a period that included over 12,000 NLRB elections — it has issued only nine such orders.¹⁹² Thus, with very few exceptions, the worst-case scenario faced by an unscrupulous employer is a rerun of the vote under the same conditions. The incentive for employers has been clearly spelled out in a seminar hosted by Fred Long, president of the West Coast Industrial Relations Association:

What happens if you violate the law? The probability is you will never get caught. If you do get caught, the worst thing that can happen to you is you get a second election and the employer wins 96 percent of second elections. So the odds are with you.¹⁹³

Long’s advice has been borne out repeatedly over the past three decades.¹⁹⁴ In one manufacturing plant, the employer’s campaign included asking employees to wear ‘Vote No’ buttons, claiming that creating a union would inevitably lead to a strike, and wrapping up plant equipment, placing it in the parking lot, and stamping it for shipment to Mexico.¹⁹⁵ The NLRB’s remedy was to rerun the election; unsurprisingly, the union lost the second time as well. A similarly disturbing case is that of Domsey Trading Corporation of Brooklyn, NY, which buys and exports used clothing, and had a workforce that was mostly Haitian and Latino. Of the company’s 243 workers, 76 percent signed union cards. A 27-year veteran employee went in to tell the boss’ son that the union was there to see him and ask for recognition. Within 15 minutes, that employee was fired. According to Hurd and Uehlein, “that afternoon, the employer’s attorney told the union’s attorney that he was not worried, because even if the employer had to reinstate the discharged worker, the backpay liability would not amount to much.” Soon, two more workers were fired, and 90 percent of the employees walked out to protest the firings. Over a seven-month strike, the owner’s son placed a “voodoo table” in front of the pickets with bananas, calling to picketers “this is for you monkeys to eat.” He and others called women picketers “whores,” called all

picketers “lazy” and “stupid niggers,” and said they were being sprayed with water to wash off their smells. Over a three-year period, the NLRB found the employer guilty of numerous unfair labor practices. But the practices didn’t stop. Ultimately an election was ordered, but the vote by then — with only a third of the original union supporters still working then — was 170-120 not to organize.¹⁹⁶

The remedy of rerun elections may be analogous to a jury that hears a dramatic and compelling criminal confession and then is instructed by the judge to ignore what they have heard. Once employees have seen how aggressively their employer opposes unionization — once they have seen coworkers spied on, monitored, threatened, and fired, and once they themselves have felt the fear of opposing management in any public manner, there is no way to erase these fears from one’s mind simply by scheduling a new vote. Employees are aware that the law does not truly protect them against retribution by their employer. Furthermore, they have just lived through the experience of seeing a majority of their coworkers be intimidated into abandoning their support for organizing; therefore they would logically take no solace in the notion that they will be protected by the strength in numbers of fellow employees. NLRB doctrine calls for elections to be held under “laboratory conditions.” But there is no way to establish “laboratory conditions” after such an experience.

The impossibility of reestablishing a level political playing field in the wake of an effective anti-union campaign is evident in two recent cases, drawn from opposite coasts of the country. In California, employees at the largest warehouse for Rite Aid drug stores began organizing a union with the International Longshore and Warehouse Union in the spring of 2006. Over the next several months, employees who were outspoken in support of unionization were fired, suspended, spied on, and forced into multiple mandatory meetings — both in groups and in one-on-one sessions with their personal supervisors — to be told why it was so important to keep the union out. After a 10-month investigation, the NLRB concluded that there was probable cause to prosecute Rite Aid on 49 separate counts of violating federal labor law, including illegally firing and disciplining union supporters; defaming union supporters; threatening employees with retaliation for supporting unionization; and illegally funding a supposedly ‘employee’ anti-union committee.¹⁹⁷ Facing the prospect of a trial, the drugstore chain agreed to settle the case by hiring back fired employees, paying back wages, and promising not to break the law in the future.¹⁹⁸ California State Senator Gil Cedillo declared Rite Aid a “textbook example” of the need for labor law reform. “Union supporters at [the company’s] Lancaster distribution center,” he protested, “have endured insults and interrogations, threats and terminations, simply for trying to exercise their legal rights.”¹⁹⁹ Yet, upon settling these charges, the company immediately called for the union to agree to an NLRB election rather than agreeing to recognition based on signed statements by a majority of workers. In a letter mailed to workers’ homes, the company suggested that the NLRB was the proper way to resolve disputes, insisting that “we support your right to finally cast your secret ballots in an election to decide the issue of possible unionization.”²⁰⁰

In a similar case on the East Coast, Yale-New Haven Hospital spent nine years opposing employee efforts to form a union. In 2006, when the city government indicated it would withhold approval for the hospital’s expansion plans unless it committed to a fair election procedure for its employees, the hospital signed an agreement with the Service Employees International Union that, among other things, prohibited supervisors from holding mandatory anti-union meetings, disparaging the union or its organizers, making false or misleading statements, and engaging in any other act of intimidation or coercion.²⁰¹ However, as the vote drew near — and after the hospital had received the city’s approval for its expansion plans — hospital administrators systematically violated this agreement, training a corps of 300 supervisors in anti-union rhetoric and holding more than 50 forced-attendance meetings at which employees were variously told the union was mafia-related and threatened with a loss of wages or worsening of job conditions if they voted to form a union. In December 2006, the arbitrator selected jointly by the hospital and union ruled that the hospital had committed numerous violations of both its election agreement and federal law. State Senator Martin Looney termed the hospital’s behavior “the worst form of cynicism and bad faith imaginable,” and Connecticut Attorney General Richard Blumenthal pointed to the arbitrator’s report as “solid, verified, irrefutable evidence of lawbreaking.”²⁰² Even Yale University president Rick Levin — himself a notorious opponent of unionization — declared

himself “dismayed by the recent actions of the hospital that violated the letter and spirit of its agreement.”²⁰³

In the wake of such heavy-handed threats, the union called off the scheduled vote, and it was unclear how workers might ever be able to exercise a free choice in the matter. New Haven Mayor John DeStefano announced that he was “incredibly disappointed in the management of the hospital,” and suggested that “they have poisoned the water as to whether there can ever be a free and fair election because of their intimidation and coercion.”²⁰⁴ Union supporters hoped that the arbitrator might require the hospital to recognize the union on the basis of signed statements by a majority of employees. But the hospital’s position at this point was to call for an NLRB election. “We have always believed,” the hospital declared, “that our employees deserve the right to decide for themselves the issue of union representation in a secret ballot election.”²⁰⁵

Leaving aside the disingenuousness of trumpeting one’s commitment to employees’ democratic rights after working so thoroughly to intimidate union supporters, it is simply impossible to conduct anything resembling a “free and fair” election in the atmosphere created by such repression. Once supervisors communicate to their subordinates that they are implacably opposed to unionization; that supporting a union may result in termination, demotion or other retaliation; that creating a union may lead to layoffs and will likely result in an atmosphere of permanent tension, confrontation, and surveillance in the workplace — it is impossible to take this message back. Employees are naturally highly sensitive to even the non-verbal communication of their managers. Even if an election were rerun under conditions of the strictest neutrality, far surpassing NLRB guidelines — say, mandating that management say nothing at all about the subject for the duration of the election campaign — employees cannot erase the knowledge of the virulence with which unionization is opposed by those who control virtually every aspect of their work lives.

It is no surprise that employees remain intimidated — and therefore unlikely to vote for creating a union — after an election marred by threats and reprisals. But it indicates how badly rerun elections fail as a remedy for illegalities, and how systematically workers have been denied access to a truly democratic process.

In this sense, even an improved remedy for illegally fired workers misses something essential. Backpay remedies, at their best, may compensate the individuals who were terminated. But the NLRA does not merely provide rights to individual workers. It establishes a collective right — for employees to decide as a group how and whether they want to represent themselves in negotiating with their employer. The firing or intimidation of union activists does not merely affect these individuals; it poisons the election atmosphere as a whole, and undermines the right of the bargaining unit as a whole to freely choose collective bargaining. While labor law fails to adequately compensate the victims of illegal firings, it even more dramatically fails to address the group rights of employees to a free and fair choice of collective self-representation. This is why state and federal electoral laws include the penalties of fines and imprisonment: they aim not merely to compensate specific individuals who may have been harmed by illegal acts, but to preserve the right of the citizenry as a whole to a free election by using punishment as a deterrent to future illegal behavior. Without any such deterrent, NLRB elections are hopelessly, systematically open to corruption at the whim of employers who have every incentive to ignore the law.

A Well-Documented Problem

Unlike political elections, there has been relatively little scholarly attention focused on National Labor Relations Board elections. The NLRB only collects information on legal procedures — petitions, votes, hearings, and charges of illegal activity. But while these pieces of information are important, they represent the tip of the iceberg of understanding how NLRB election campaigns are run. The vast majority of the issues that go into defining the democratic or undemocratic nature of a campaign — access to voters and media, freedom of speech, control of campaign activities, intimidation or coercion of voters — are not subject to any type of reporting or tracking. Unsurprisingly, employer associations release little if any data on management campaign practices. Thus, the most comprehensive studies rely primarily on the reports of union organizers and employees themselves — taken together with what government data is available — in order to construct a picture of how campaigns are run.

Fortunately, a number of such studies have been published over the past decade, all of which adhere to rigorous social scientific methods. Taken together, these studies represent the best available evidence for documenting typical campaign practices. While each of the studies focuses on a particular sample and is therefore not completely representative of elections as a whole, each sample's analysis is based on rigorous methods.²⁰⁶ More strikingly, the results of the samples — drawn from different sets of elections in different times and places — are remarkably similar. The fact that the findings reinforce each other so dramatically, coupled with the fact that the results mirror the advice of management consultants and lawyers and the experience of workers as reported in employee surveys, provides strong reason to trust the picture painted by these results.

As summarized in Table 2, these studies paint a troubling picture of election conduct (see Appendix). Well over two-thirds of private employers hire an outside anti-union consultant when workers seek to organize.²⁰⁷ Bronfenbrenner's 1994 study found that an additional 15 percent of employers retained outside attorneys to help shape management campaign strategy; thus, the data suggest that well over 85 percent of employers run campaigns along the lines described in this study.²⁰⁸ The tactics favored by employers are exactly those suggested by the consultants whose work has been discussed earlier in this report. Between 80-90 percent of companies forced employees to attend mass anti-union meetings, with an average of 5-10 forced meetings per NLRB election. Between 70-75 percent of employers distributed leaflets in the workplace. Between 75-98 percent of employers had supervisors conduct one-on-one anti-union meetings with their subordinates. Between 25-30 percent of all employers fired union activists during the course of the election campaign, with an average of three employees fired in each case; the great majority of those fired had not been reinstated as of election day. One-third of employers were charged with violating labor law. Yet, according to union organizers, the incidence of illegal employer activity was even higher. Organizers report that between one-third and one-half of employers illegally helped create or support a bogus "Vote No" committee and offered special perks or bribes to anti-union activists; and half issued threats to close all or part of their operations in response to organizing. The discrepancy between the extent of illegal activity reported by organizers and the number of complaints issued by the NLRB may be read in different ways: either that organizers are exaggerating employer hostility, or that the difficulty of proving charges before the NLRB allows employers to evade prosecution. Yet no matter how one interprets or discounts that part of the data, the results remain shocking.

Conclusion

For nearly three decades, opinion polls have consistently shown that roughly one-third of non-union workers wish they had a union in their workplace.²⁰⁹ If creating a union simply followed the will of workers, an additional 40 million Americans would have union representation.²¹⁰

The reasons American workers give for wanting unions are unsurprising. The single most extensive set of worker surveys is conducted by the Wilson Center, which has conducted polls in hundreds of workplaces where unions were considering launching organizing drives. Since the unions' purpose was to evaluate the worthiness of investing time and resources in a given company, the polls' objective was to obtain the most accurate possible read of workers' attitudes. There is no evidence or suggestion that the data has been skewed in any way. Over a period of 14 years, the Wilson Center conducted in-depth interviews with 150,000 employees.²¹¹ Their findings show that "the most important factor in the desire of nonunion workers for representation is a wide and persistent gap between what they genuinely feel they deserve and what they actually receive for their labor."²¹² Another set of researchers sought a more detailed definition of that "gap" by asking workers to identify the issues over which they thought it was "very important" to have "a lot" of influence, and then probing the number of employees who believed they did, in fact, have "a lot" of influence over these issues. The difference between desired and actual control was identified as the "influence gap," and it was most pronounced for the issues one might predict, most importantly wages and benefits.²¹³ Beyond simple economics, these workers wanted more control over a host of structural issues in the workplace: 67 percent of employees thought they had too little protection against being fired arbitrarily; 64 percent wanted more control over the use of part-time or temporary employees to replace full-time workers; and 63 percent wanted more control over layoffs and plant closings.²¹⁴ In this sense, non-union workers have correctly identified the type of issues over which unions have historically proven most effective at influencing employment conditions. Employers opposing union formation often claim that union supporters are misled, and that employers bear the burden of enlightening them regarding the downside of organizing. However, these poll results suggest that workers have an accurate sense of what a union might do. This intuition is borne out in polls of union members themselves, 90 percent of whom state that they would vote for union formation if they had it all to do over again.²¹⁵ Thus, it appears that workers have an accurate understanding of what unions do, and many millions of them would like to create such a process in their own workplaces.

While 40 million non-union workers say they wish they had a union, less than 100,000 per year establish unions through the NLRB election process.²¹⁶ What accounts for this astounding gap between popular will and political reality, in what is supposed to be a democratic system? The answer lies in the full range of techniques employers use to dissuade, discourage, and frighten employees away from actively supporting — tactics that even non-union employees are well aware of. In one poll, 69 percent of American adults stated their belief that "corporations sometimes harass and fire employees who support unions."²¹⁷ Another survey found that 79 percent of adult Americans believed it was likely "that non-union workers will get fired if they try to organize a union." Among non-union respondents, 41 percent believed that "it is likely that I will lose my job if I tried to form a union."²¹⁸

These poll results reflect the reality of widespread retaliation against union supporters. But they also point to the remarkable level of fear that employers have installed in nonunion workers handicaps workers' desire to represent themselves through a union. The Wilson Center reports that, in their extensive survey experience, workers' desire to organize is based on perceived mistreatment coupled with "a belief in the union's ability to win improved conditions."²¹⁹ Here, management's hardball

opposition translates not only into individual workers' fears of retaliation, but a perception that any union will be powerless to control the boss, and therefore will be irrelevant. Among workers surveyed before any union organizing campaign had begun, 42 percent expected that their management would "make an all-out effort" to stop employees from creating a union.²²⁰ When the Wilson Center asked workers who had recently been through an election to name "the most important reason people voted against union representation," the most common response was management pressure, including fear of job loss.²²¹

When labor law was first established, it held out the promise of introducing democratic principles into the workplace. But the reality of workplace governance as experienced by America's workers bears little resemblance to this democratic vision. Instead, America's employees are subject to a regime of bribes, bullying, threats, terminations, delays, enforced propaganda, and political gag orders that we would not accept for the citizens of any foreign nation. The fact that this is happening in our own country makes the need for democratic reform all the more urgent.

Appendix

Table 1
Estimated Employer Spending on Anti-Union Campaigns,
Per Employee
 (all figures in \$2004)

Source	Year	Amount
<i>Consultants Only</i>		
Levitt	1970	\$686
Bureau of National Affairs	1976	\$1,660
Levitt	1992	\$863
<i>Attorneys Only</i>		
Kaufman & Sephan	1995	\$1,240
<i>Consultants & Attorneys</i>		
Levine	1982	\$2,447
Levitt	1990	\$3,753

Sources:

Bureau of National Affairs, *Labor Relations Consultants: Issues, Trends and Controversies*, BNA Special Report, 1985.

Bruce Kaufman and Paula Stephan, "The Role of Management Attorneys in Union Organizing Campaigns," *Journal of Labor Research* 16.4 (1995).

Gene Levine, *Complete Union Avoidance* (Delray Beach, FL: Gene Levine Associates, 2005).

Martin Jay Levitt, *Confessions of a Union Buster* (New York: Crown Publishers, 1993).

Table 2
Tactics Used in Employer Anti-Union Campaigns

	Bronfenbrenner (1994)	Rundle (1998)	Bronfenbrenner (2000)	Theodore (2005)
Hired management consultant	71%	87%	75%	
Held forced-attendance meetings	82%	93%	92%	87%
<i>number of meetings</i>	5.5	10	11.41	
Mailed letters to homes	79%		70%	
<i>number of letters</i>	4.5		6.51	
Distributed leaflets in workplace	70%		75%	75%
<i>number of leaflets</i>	6.0		13.37	
Supervisor 1-on-1's	79%	76%	78%	98%
Promised improvements	56%		48%	59%
Granted unscheduled raises	30%	24%	20%	
Fired union supporters	30%	28%	25%	30%
<i>number fired</i>		2.7	4.09	3.60
<i>% with fired workers not reinstated by election day</i>	18%	27%	22%	
Bribes/Special favors		42%	34%	51%
Aided anti-union committee	42%	50%	31%	
Used anti-union videos			55%	
ULP charges filed against employer	36%		33%	
<i>complaint issued on at least some charges</i>	19%		21%	
Threatened full or partial closing			51%	49%

Sources:

Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform," in Friedman, et al (eds.), *Restoring the Promise of American Labor Law* (Ithaca, NY: Cornell University Press, 1994) 75-89.

Kate Bronfenbrenner, *Uneasy Terrain*, U.S. Trade Deficit Review Commission, 2000.

James Rundle, "Winning Hearts and Minds in the Era of Employee Involvement Programs," in Bronfenbrenner, et al. (eds.), *Organizing to Win: New Research on Union Strategies*, (Ithaca, NY: Cornell University Press, 1998) 213-231.

Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, American Rights at Work, 2005.

Table 3
Employer Unfair Labor Practice Charges and Outcomes, 2000-2005

	Total Number	2000-05 Share	Annual Average
Total Charges Filed	114,142	100.0%	19,024
Complaints Issued	12,100	10.6%	2,017
Withdrawals, Adjusted	38,121	33.4%	6,354
Withdrawals, Not Adjusted	36,755	32.2%	6,126
Dismissals, Adjusted	829	0.7%	138
Dismissals, Not Adjusted	27,854	24.4%	4,642
Compliance with Informal Settlement	9,022	7.9%	1,504
Without Full Compliance w/Informal Settlement	60	0.1%	10
Compliance with Formal Settlement	55	0.0%	9
Compliance with Board Decision	904	0.8%	151
Without Full Compliance with Board Decision	122	0.1%	20
Compliance with Court Judgment	298	0.3%	50
Without Full Compliance with Court Judgment	85	0.1%	14
Sum of Meritorious Cases	51,050	40.5%	8,508

Source:

Unpublished data provided to the author by the National Labor Relations Board.

Meritorious cases are those in which complaints were issued or that resulted in adjustment with the charges withdrawn or dismissed.

Table 4
Comparison of Federal Election Commission and
National Labor Relations Board Violations

	Elections for Federal Office	Workplace Elections	Ratio of Federal to Workplace Voters per Violation
Eligible Voters	128,154,000	254,905	
Electoral Law Violations	565	3,989	
Voters per Violation	226,821	64	3,550
Economic Retaliation		15,392	
Voters per Economic Retaliation		17	

Sources:

Eligible Voters for Elections for Federal Office are for 2002, as reported by the U.S. Census Bureau, "Reported Voting and Registration By Sex and Single Years of Age."

Eligible Voters for Workplace Elections is a projection based on actual total of eligible voters reported in NLRB FY2004 Annual Report. This number has been projected to include all potential employees in workplaces in which election petitions were filed; since 40 percent of petitions never lead to elections, this number is considerably larger than the actual number of voters in NLRB elections.

Electoral Law Violations for Elections for Federal Office are totals for 2001-02 election cycle, the most recent cycle for which full data is available. Violations are reported in FEC, *Enforcement Profile*, 20 Sept. 2003.

Electoral Law Violations for Workplace Elections are the total number of employer Unfair Labor Practices, assuming that half of ULPs occur in an election context, and that 40% of ULPs are meritorious.

Economic Retaliation represents the number of employees illegally fired, demoted, suspended, or otherwise discriminated against in ways that resulted in backpay awards, and assumes that half of such awards stem from election contexts.

Figure A
Anti-Union Campaign Schedule for Four Weeks Preceding Election

	Monday	Tuesday	Wednesday	Thursday	Friday
Four Weeks to Go	Receipt of NLRB Decision; Supervisory Meeting	Speech to All Employees	Home Mailing	Handout; Home Mailing	Excelsior List Submitted; NLRB Conference; Bulletin Board Notice
Three Weeks to Go	Home Mailing	Bulletin Board Notice	Home Mailing	Handout	Handout
Two Weeks to Go	Bulletin Board Notice; Small Group Meetings; Home Mailing	Handout; Small Group Meetings	Small Group Meetings; Home Mailing	Small Group Meetings	Small Group Meetings; Home Mailing
Election Week	Bulletin Board Notice; Handout	Speech to All Employees; Home Mailing	Voting Demonstration & Sample Ballot Handout; Home Mailing	Dinner & Speech to All Employees	Election Day

Source:

Robert Lewis and William Krupman, *Winning NLRB Elections: Management's Strategy and Preventive Programs*, 2nd ed., (New York: Practising Law Institute, 1979).

References

¹ In *Telonic Instruments*, 173 NLRB 588 (1969), the NLRB established the principle that there is “nothing in *Excelsior* which would require the rule stated therein to be mechanically applied.” The next year, in *Lobster House*, 186 NLRB 148 (1970), the NLRB further declared that “Generally, the Board will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith.” Thus, there is no hard and fast rule as to how complete a list must be to be judged compliant. In *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), the NLRB decided that the omission of nine percent of the bargaining unit from the employer’s list was not sufficient grounds to overturn the election. The most recent policy, articulated in *Woodman’s Food Markets*, 332 NLRB 48 (2000), bases compliance on a number of factors, including the percentage of workers excluded, the margin of victory or defeat in the election, and the employer’s good faith.

² Steven Norwood, *Strikebreaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America* (Chapel Hill: University of North Carolina Press, 2002) 247.

³ *Sixty-Ninth Annual Report of the National Labor Relations Board, for the Fiscal Year ended September 30, 2004*. (Washington: NLRB, 2005) 10. Page 9 of this report shows that nearly 40 percent of the charges of employer illegality were found by NLRB investigators to have merit.

⁴ See discussion following in this article on illegal firing, suspension, and demotion of union supporters; also see Appendix, Table 4.

⁵ *Sixty-Ninth Annual Report of the National Labor Relations Board*, Appendix Table A, 209-210. Backpay was distributed to 30,784 individuals in FY 2004. Using the conservative methodology developed by Robert Lalonde (Robert LaLonde and Bernard Meltzer, “Hard Times for Unions: Another Look at the Significance of Employer Illegals,” *University of Chicago Law Review*, Summer 1991: 953-1014) I estimate that 50 percent of these cases occurred in the context of organizing and election campaigns.

⁶ *Sixty-Ninth Annual Report of the National Labor Relations Board*, Table 11, shows that FY04 saw 2,240 NLRB-sponsored elections covering 159,806 eligible voters. However, the same year saw a total of 3,573 petitions for election filed. Since illegal firings or suspensions may have taken place during organizing drives that were stopped short of election, I have projected a higher number of potential eligible voters, based on the ratio of petitions filed to elections held, and have used the higher number of eligible voters as an outside estimate for the ratio of eligible voters to illegal firings.

⁷ Federal Election Commission, *Enforcement Profile*. (Washington: FEC, n.d.).

⁸ For instance, National Right to Work Foundation president Mark Mix has asserted that “The NLRA has established straightforward elections as the ‘gold standard’ in determining whether employees want a union.” Mark Mix, “Why Not Liberate the American Worker,” *The Wall Street Journal*, 31 Dec. 2005.

⁹ Quote is from letter from Marna Borgstrom to SEIU representative Lawrence Fox, 16 Apr. 2007, provided to the author by Yale-New Haven Hospital. The arbitrator’s decision is found in *Yale-New Haven Hospital and New England Health Care Employees, District 1199, SEIU*, Index No. 054, 13 Dec. 2006. For further background on this issue, see Casey Miner, “How to Bust a Union: Yale-New Haven Hospital’s handbook for worker intimidation,” *New Haven Advocate*, 15 Mar. 2007.

¹⁰ James Rundle, “Winning Hearts and Minds in the Era of Employee Involvement Programs,” in Bronfenbrenner, et al. eds., *Organizing to Win: New Research on Union Strategies*, (Ithaca, NY: Cornell University Press, 1998) 213-231; Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns* (Washington: American Rights at Work, 2005)

¹¹ Statement of Modern Management Methods principle Herb Melnick in testimony before Congress, 1979, reported in Robert Smith, *From Blackjacks to Briefcases: A History of Commercialized Strikebreaking and Unionbusting in the United States* (Athens, OH: Ohio University Press, 2003) 102.

¹² Martin Jay Levitt, *Confessions of a Union Buster* (New York: Crown Publishers, 1993) 5, 72; Rundle 1998; Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union*

Organizing, U.S. Trade Deficit Review Commission (Washington: 2000). The figures on use of consultants do not include those employers who rely on in-house union-avoidance specialists — either in the legal or HR department — that employ the same techniques as independent consultants.

¹³ The firm is also one of the most experienced in the country, having participated in over 3,000 NLRB elections (Louis Jackson and Robert Lewis, *Winning NLRB Elections: Avoiding Unionization Through Preventive Employee Relations Programs*, 4th ed (Chicago: CCH, 1997) v.

¹⁴ Jackson Lewis, *Winning NLRB Elections: Management's Strategy and Preventive Programs* (New York Practising Law Institute, 1972); Robert Lewis and William Krupman, *Winning NLRB Elections: Management's Strategy and Preventive Programs*, 2nd ed. (New York: Practising Law Institute, 1979); Jackson and Lewis, *Winning NLRB Elections*, 4th ed. (1997).

¹⁵ Alfred T. DeMaria, *How Management Wins Union Organizing Campaigns* (New Jersey: Prentice-Hall, 1980); Alfred T. DeMaria, *How Management Wins Union Organizing Campaigns*, Revised ed. (New York: Executive Enterprises, Inc., 1986).

¹⁶ Client list for Gene Levine Associates available at <www.genelevine.com/clientele.htm>.

¹⁷ National Association of Manufacturers and Council for a Union-Free Environment, *Remaining Union-Free: A Supervisor's Guide* (Washington: NAM and CUE, 2004); *Keep the Card Count Down* (Washington: NAM and CUE, 1985). CUE was formed as an educational subsidiary of NAM but has been an independent organization since 1994.

¹⁸ The field of anti-union consulting is widely acknowledged to have been pioneered in the 1940s by former NLRB member Nathan Shefferman. Among Shefferman's most talented protégés was Jack Sheridan, who eventually formed his own firm. Levitt worked for Sheridan, and later for a breakaway firm created by three of Sheridan's top consultants, who constituted themselves as Modern Management Methods. MMM became one of the most prominent anti-union firms in the late 1970s, running nearly 700 counter-organizing campaigns in one three-year period. For a discussion of this history, see Levitt 37-53, 149-151.

¹⁹ U.S. Department of Labor, Office of Labor-Management Standards, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Notice," *Federal Register*, 66.8 (2001).

²⁰ For instance, U.S. Chamber of Commerce representative Charles Cohen has argued that a system of union recognition based on majority sign-up "would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election." Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, U.S. Senate, Statement of the U.S. Chamber of Commerce by Charles Cohen, 108th Cong., 2nd Sess. (Washington: GPO, 16 July 2004).

²¹ The Burke Group, "Union Free Advantage," accessed 11 Aug. 2005 <<http://www.tbglabor.com/services>>.

²² Jackson, Lewis 87. In 2005, the Jackson Lewis website advertised a seminar on "How To Stay Union-Free In the 21st Century," which included a session entitled "Pre-Petition: How to Lawfully and Effectively Shut Down Organizing Once It Starts," accessed 7 July 2005 <www.eeiconferences.com/unionagenda>.

²³ For instance, notorious New York attorney Alfred DeMaria insists that "employers should be prepared to nip union-card signing in the bud." "From the Editor: Speech to Employees at the First Sign of Union Activity," *Management Report for Nonunion Organizations* 27.3 (2004): 4. The newsletter edited by DeMaria regularly includes articles offering advice for how management can prevent a union collecting the 30 percent of cards necessary to trigger an election.

²⁴ Gene Levine, *Complete Union Avoidance* (Delray Beach, FL: Gene Levine Associates, 2005) 2; Similarly, John Kilgour *Preventive Labor Relations* (New York: American Management Association, 1981) 3, notes that "the union organizing drive Is something to be prevented if at all possible," and Kilgour 289 jokes that "there is no ready-made prescription for the best day and time to conduct a representation election (except perhaps 'never')."

²⁵ For example, The Burke Group, "Union Free Advantage," accessed 11 Aug. 2005 <<http://www.tbglabor.com/services>>, boasts on its web page that its has been "successful in helping business avoid union petitions more than 70 times by working a counter campaign before a petition is filed." As far back as 1984, anti-union consultants Human Resources and Profits Associates, Inc., boasted in its promotional materials of a "99% win rate." Of the firm's 900-plus election campaigns, more than half never actually got to an election because the union was forced to withdraw its petition. The firm's flyer is cited in Smith 105.

²⁶ Kilgour 60. The Burke Group similarly notes that "The unit determination decision often has a critical impact on the result of a union election." The Jackson Lewis seminar (2005) likewise offers a session that covers "how to have the election held in the voting unit you want and not the unit the union wants."

²⁷ Kilgour 71. Emphasis in original.

²⁸ Levitt 13.

²⁹ West Coast Industrial Relations Association, the nation's second largest anti-union firm in the 1970s and 1980s, advised one client to "pack the unit by hiring several permanent part time employees who are certain company votes." Leonard C. Scott, of WCIRA, confidential memorandum to Ted Vieweg, BLK Steel Company, 25 Oct. 1979. Cited in John Logan, "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal* 33:3 (2002): 201.

³⁰ Kilgour 73 notes that "the company has control over how much supervisory authority is to be delegated to ... quasi-supervisory personnel. Thus it can increase or decrease the number of supervisors to be excluded from the bargaining unit within a fairly wide range." Levitt 174 recalled a nursing home campaign in which he used such methods to get all of the employer's Licensed Practical Nurses defined as supervisors and excluded from the bargaining unit, even though in reality "there was little to suggest that LPNs should be considered part of management."

³¹ "Modern Management seminar," Herbert Melnick, 1979, reported in Logan, "Consultants," 201.

³² The combination of gerrymandering and preventing union organizers from setting foot in the workplace leaves potential organizers unable to even accurately guess at the contours of the electorate. Kilgour 43, 190, stresses that "one important reason for restricting the union's access to the workplace is to hinder it from identifying the appropriate bargaining unit," noting that "if a union organizes the employees within what it considers the appropriate unit and the employer can convince the NLRB that that unit is inappropriate, the union's campaign may end then and there." Thus, in some cases management's power may include the ability to *secretly* gerrymander the electorate, leading union organizers and pro-union workers into a campaign that is fundamentally misguided in ways that will not become evident until it is too late.

³³ These suggestions are all from Kilgour 57-58.

³⁴ "Preventive Tactics," *Management Report* 24.6 (2001): 5.

³⁵ Kilgour 114.

³⁶ Charles Hughes, *Making Unions Unnecessary* (New York: John Wiley & Sons, Inc., 1990) 11.

³⁷ Smith 108.

³⁸ Kilgour 116-117.

³⁹ Kilgour 117-118.

⁴⁰ Kilgour 235.

⁴¹ Kilgour 223. Kilgour 215 also recommends the use of employee opinion surveys in order to detect the types of dissatisfaction that may reveal imminent efforts at unionization.

⁴² Lewis and Krupman, *Winning NLRB Elections*, 2nd ed., 89.

⁴³ Levine 21.

⁴⁴ Levine 9 stresses that it is critical for supervisors to be trained and prepared to “[begin] the employer’s campaign as soon as labor activity has been detected.”

⁴⁵ Levine 1.

⁴⁶ A typical example comes from the Sodexho Marriott corporation, whose management anti-union training materials include the instructions that, when employees are considering signing cards, each supervisor should convey to his underlings that “in his opinion the employee does not need a union and accordingly, should not ... even express any interest in the union to the extent of signing ‘interest cards’ or going to meetings.” Sodexho Marriott Services, “Progressive Approach to Labor: Union Avoidance,” *Sodexho Marriott Labor Relations Training*, 1998: 9; originally accessed from Colorado College Fair Labor at www.ccfairlabor.com on 4 June 2004, now on file at American Rights at Work. Levine 9 also recommends supervisors meeting one-on-one with each of their subordinates as a core element of a “Don’t Sign a Card” campaign.

⁴⁷ Levine 9.

⁴⁸ Norwood 240. The company was C.R. Bard of Glens Falls, NY.

⁴⁹ The Dunlop Commission on the Future of Worker-Management Relations, *Fact Finding Report* (1994) 67 notes that the number of signed authorization cards at the time a petition is filed “usually includes close to two-thirds of the workforce.” Lance Compa, *Un fair Advantage*, Human Rights Watch, 2000, puts the figure at between 60-70 percent. Bronfenbrenner, *Uneasy Terrain*, likewise records two-thirds as the average in the elections she studied. Levitt 12 writes about a campaign that started with 80 percent of employees signed on union cards and ended in a vote against unionization.

⁵⁰ Levine 12 warns that management must stop employees even from trying to copy down a list of names from a company’s time cards. Kilgour 58 suggests that “Christmas card lists, call-in lists, and home telephone directories should be discouraged or prohibited.” On page 200 Kilgour warns that “of great aid to the union in conducting a program of home visits is an early and accurate mailing list ... A ready-made list saves the union a great deal of time constructing such information from the memories of union supporters and phone books.”

⁵¹ Lewis and Krupman 180.

⁵² Dunlop Commission, *Report and Recommendations*, 47.

⁵³ For many decades, employers were only required to provide an employee’s first initial and last name. In *Laidlaw Waste Systems*, 321 NLRB 760 (1996), the Board changed its policy to require employees’ full first and last names.

⁵⁴ The NLRB’s current policy is that elections will be overturned based on consideration of a number of factors, including the number and percentage of wrong or missing addresses, the margin of victory or defeat in the election, and the employer’s good faith in assembling the list. See *Woodman’s Food Markets*, 332 NLRB 48 (2000). It is worth noting that, while employer bad faith may be reasonable grounds for overturning an election, good faith should not logically be sufficient to consider the election fair. Even when the employer has acted in good faith — for instance, if the employer itself has incorrect addresses for a number of employees — the result is still that managers may contact these employees every day in the workplace (with or without a correct address), while the union is effectively blocked off from communicating with these individuals.

⁵⁵ Lewis and Krupman 162, suggest that when the employer releases its list, it send a notice to employees letting them know this has happened, and stating that “We did not want to turn over this information, which we have always regarded as confidential. We did so only in response to a written instruction from the NLRB. We regret this invasion of your privacy and any annoyance the union may cause you as a result.”

⁵⁶ Levitt 25. Since 1996, employers have been required to provide full first and last names for employees.

⁵⁷ Kilgour 64, recommends that employers research the finances of the union their workers are seeking to join, noting that “if their resources are limited, they can ill-afford an extended effort.”

⁵⁸ On the absence of reliable data, see U.S. Department of Labor, Office of Labor-Management Standards, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Notice," *Federal Register*, 66.8 (2001). In 1979, a Congressional committee called for more comprehensive reporting of expenditures on anti-union consultants. Indeed, in the Carter administration's last year, the Labor Department opened more than 300 new investigations into management and consultant anti-union activities. However, there were nearly all closed by the incoming Reagan administration, which in its first year called for spending only three percent of the Labor Department's enforcement resources on monitoring the management side of labor reporting requirements (reported in Smith 115-117). In January 2001, the Clinton administration announced new, more stringent reporting requirements for union-avoidance consultants; this policy was quickly undone by the incoming Bush administration. The Dunlop Commission's *Fact Finding Report 72*, notes simply that "firms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at a sizable cost."

⁵⁹ All figures have been adjusted to 2004 dollars using the CPI-U. Levitt 53 reports being billed out at \$250 per day as a starting consultant in 1970, and notes that his firm assigned one consultant for every 100 employees in a client company. I have assumed that an average campaign at this time lasted 50 days, based on the Dunlop Commission's *Fact Finding Report 67*, noting that in the 1970s and 1980s the median time from petition to election was 50 days. I have assumed a modest additional \$1,000 monthly expense for consultants, to cover lodging, food, and transportation (Levitt notes that his \$250/day fee did not include any expenses). Bureau of National Affairs, *Labor Relations Consultants: Issues, Trends, and Controversies* (Washington: BNA, 1985) estimated that in 1976 employers spent \$500 per employee on outside consultants (cited in Kaufman and Stephan 5). Levitt 5 states that "today" consultants bill \$1,000-\$1,500 per day. I used the figure \$1,250 and assumed a 50-day campaign, \$1,000 in monthly additional expenses, and the same 1/100 ratio of consultants to employees, and used 1992 as the year designated by "today." Kaufman and Stephan 5 report that based on their interviews with management attorneys, a "small-medium sized firm with one attorney" spends \$20,000-\$30,000 per campaign; that an "all out campaign" can cost \$100,000; and that a large, multi-facility firm might spend \$1 million on a campaign. I estimated that these figures together grouped around the level of \$1,000 per employee. This is the roughest of the estimates provided here. Levine reproduces an article he authored in the July 1982 issue of *Bobbin Magazine*, titled "Look for the Union Label." The article cites "a study by Michigan State University" which found that a "small" company "might spend over \$1,250 per employee for a typical NLRB election." Levitt 5 estimates that, including both consultants and attorneys, union avoidance had become a "\$1 billion-plus industry." I took the number of employees in bargaining units with elections in 1990 (reported in Dunlop Commission *Fact Finding Report 77*), inflated it to account for all employees in bargaining units with petitions filed (assuming 40 percent of petitions never lead to elections), and divided the \$1 billion by this number.

⁶⁰ Levitt 171 reports that, in one campaign, he was paid \$15,000 per month over a period of 18 months, in order to defeat organizing efforts in one 250-employee nursing home. Levitt 151-52 states when employees sought to organize at Rockwell International, for instance, the defense contractor spent \$1 million in direct anti-union expenses, and up to \$3 million in total expenses.

⁶¹ *Enersys Delaware, Inc., v. Jackson Lewis LLP, et. al.*, Complaint, Civil Action 2004-CP-23, Court of Common Pleas, 13th Jud. Cir., filed 23 Apr. 2004.

⁶² Kilgour 53. Kilgour 54 notes that the greatest danger comes not from outside organizers, but from "the employee already on the payroll who, for one reason or another, is promoting the union from within. This is the most serious form of union presence to the employer."

⁶³ Kilgour 54 goes so far as to recommend access rules for unionized employees of supplier or partner companies, noting that "the threat will be posed by comparisons nonunion employees make with the compensation and conditions of union employees." Kilgour 57 notes that access and solicitation rules are mutually reinforcing. "Anything the company can do to reduce the easy access of the outside union organizer, the unionized employee of another firm, or the inside employee union supporter to nonunion employees will reinforced the effectiveness of a no-solicitation rule." The Sodexho corporation's union avoidance manual urges local managers to adopt early rules banning union access, noting that "the

ability of an employer to restrict a union's access to its premises depends greatly on whether policies have been implemented which prohibit outsiders, including non-employee union organizers, access to the premises ... A rule implemented at the onset of an organizing campaign, while not per se invalid, may be considered suspect;" Sodexo Marriott Services, "Progressive Approach to Labor: Union Avoidance," 13, emphasis in original. The Dunlop Commission, *Report and Recommendations*, 47, commenting on the practice of banning organizers from parking lots, complains that "it runs counter to our democratic traditions to bar advocates of independent union representation from these areas."

⁶⁴ No-distribution and no-solicitation rules are recommended, among other places, by Lewis and Krupman 31 "to restrict literature distribution in working areas, employers should adopt a no-distribution rule. It may state: 'Distribution of advertising material, handbills, or other literature in working areas of this plant is prohibited at any time;'" *Management Report* 24.3 (2001): 8. "A good 'no solicitation/no distribution' rule is essential for controlling union organizing activity on the employer's premises," and in 25.5 (2002): 7, "The right no-solicitation policy can help employers prevent unionization by confining organizing activities only to certain times." In the Sodexo union avoidance manual, "Insist that any solicitation of membership or discussion of union affairs be conducted outside of employee working time.;" Sodexo Marriott Services, "Progressive Approach to Labor: Union Avoidance."

⁶⁵ "From the Editor: The Use of Videos in the Employer Campaign," *Management Report* 28.8 (2005): 3. Likewise, *Management Report* points out that "management has its crucial advantage over the union in its ability to distribute campaign information for employees throughout the workday;" "The Written Campaign and the Importance of Supervisors," *Management Report* 27.10 (2004): 6.

⁶⁶ Rundle 219.

⁶⁷ "Checklist for "Written Communications During an NLRB Election Campaign," *Management Report* 27.11 (2004): 5. It is illegal for management to hand out "Vote No" stickers, buttons or clothing to employees, since employees are considered to be forced into a choice of whether or not to wear the item in question, and this is considered a form of illegal interrogation. However, management is free to make such items available — sitting on a display table in the company break room, for instance — for any employee who chooses to pick one up.

⁶⁸ Lewis and Krupman, Ch. 11.

⁶⁹ The Sodexo union avoidance manual includes a similar communications strategy, including mandatory small group meetings, anti-union speeches and videos, supervisors giving anti-union messages in one-on-one discussions with their subordinates, payroll stuffers, and letters sent to employees' homes. Sodexo Marriott Services, "Progressive Approach to Labor: Union Avoidance," 2.

⁷⁰ Levine 8 notes that the NLRB "usually allows employers the right to allow employee postings **only with** prior management permission. Thus, as a general principle, employers may have prior approval rules for bulletin board notices, but they may use such a rule to disapprove the posting of a union message," emphasis in original.

⁷¹ *Ibid.* Emphasis in original. In Chapter 7 Levine recommends a similar policy for internal email communications. In *Fleming Cos., Inc. v. NLRB*, 173 LRRM 2621 (7th Cir. 2003), the court found that employers were within their rights to maintain a policy that allowed personal notices (such as items for sale) to go on bulletin boards, while banning union information. This case is discussed in "Court rejects Board Rule on Union Access to Employer's Bulletin Boards," *Management Report* 27. 2 (2004): 1.

⁷² "Campaign Workshop," *Management Report* 26.5 (2003): 4, includes a subsection on the "Payroll Stuffer," noting that "one of the many opportunities management has to communicate its opposition to unionization is with payroll stuffers. *Management Report* 27.11 (2004): 5, includes "pay envelope stuffers" under the "Checklist for Written Communications During an NLRB Election Campaign." Sodexo Marriott Services, "Progressive Approach to Labor: Union Avoidance," 2, includes "payroll stuffers" among the types of literature to be distributed to employees. Kilgour 289 actually recommends schedule the election to be on or near a pay day partly so that employers can take advantage of "the inclusion of a pro-company message in the employee's pay envelope."

⁷³ Lewis and Krupman 187 suggest that “some employers prefer to dramatize the cost of union membership by a deduction from the paycheck equivalent to the amount of monthly dues. The deducted amount is placed in a separate envelope and handed out with the paycheck. Appropriate comments may be printed or typed on the envelope, such as ‘This envelope contains \$10.00 of your money, the minimum amount the union would take out of your paycheck every month.’”

⁷⁴ “From the Editor: The Use of Videos in the Employer Campaign,” *Management Report* 28.8 (2005): 3. *Management Report* notes that “the showing of anti-union videotapes has become so prevalent during NLRB campaigns;” “Must Employer Allow Pro-Union Employees to Show Videotapes on Employer TV Screens?” *Management Report* 24.4 (2001): 7.

⁷⁵ Cingraneli, 2004: 13-14, notes that unions can rarely gather a large group of employees together in one place, not only because they cannot compel attendance but because many low-wage workers do not own their own cars, so that attending meetings anyplace but at the workplace itself is difficult.

⁷⁶ Levitt 255. Levitt 30 describes his standard strategy for building momentum toward election day: “I knew that many workers would decide how to vote in the last couple of weeks, so I wanted the words *Vote No* everywhere the men looked. Typically, the way I did that was through such election campaign paraphernalia as T-shirts, hats, buttons, and patches.... The ubiquitous *Vote No* message ... had a powerful psychological effect on the voters.”

⁷⁷ Richard Hurd and Joseph Uehlein, *The Employer Assault on the Legal Right to Organize* (Washington: AFL-CIO, Industrial Union Department, 1994) 63. The NLRB ruled in this case that the employer’s posters did not constitute an illegal threat of layoffs. The union lost the election 275-222, despite a majority of employees having originally signed union authorization cards.

⁷⁸ On this point, see Masson 2004.

⁷⁹ “Question and Answer: Why Not Debate the Union?” *Management Report* 26 8 (2003): 8. DeMaria’s *The Supervisor’s Handbook on Maintaining Non-Union Status* (New York: Executive Enterprises, Inc., 1986) 53-54 likewise urges that managers “avoid debates on the pro’s and con’s of unions in general,” noting the danger that workers may have “unanswerable questions” and advising that “you’re going to end up looking silly if you get into a debate with them. Similarly, Lewis and Krupman 76 explain that “In large group meetings employers usually find it undesirable to answer questions from the floor. Experience shows that it is best to state that questions will be answered through individual conversations following the talk. The employer can thereby avoid the embarrassment of being forced to make an unprepared response to a ‘shop lawyer’s’ provocative, and often union-inspired, questions Occasionally, a union representative will request an opportunity to reply to the employer’s talk or to ‘debate the issues.’ As a general rule such requests should be rejected.”

⁸⁰ It is telling that, outside of labor law, the federal courts have recognized employees’ right to protection against captive audience communications in other aspects of their work lives. For instance, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Suppl. 1486 (M.D. Fla. 1991), the court ruled that sexist speech created a hostile work environment for female employees because they were a captive audience, and therefore the speech must be restricted. Thus, there is precedent for restricting workplace and employer speech under federal law, without unduly restricting employers’ first amendment rights — but while this principle has been enacted in other areas of the employment relationship, it has not been applied to federal labor law. On this point generally, see Masson 2004.

⁸¹ For example, Kilgour 115 notes that “while it is illegal to take any direct action against pro-union employees, it may be desirable to restrict their effectiveness.”

⁸² Statement of Judy Ray, 1 Jan. 1994, in Dunlop Commission, *Fact Finding Report*, Exhibit III-8: 84.

⁸³ Statement of Mrs. Florence Hill, who worked at Highland Yarn Mills in High Point, NC, 1 Jan. 1994, in Dunlop Commission, *Fact Finding Report*, Exhibit III-8: 84.

⁸⁴ The NLRB ruled that this was permissible speech. See “Question and Answer: ‘The Enemy Within,’” *Management Report* 26.5 (2003): 8.

⁸⁵ Quoted in *Management Report* 24.4 (2001): 4.

⁸⁶ Larry Cohen and Richard Hurd, "Fear, Conflict and Union Organizing," Organizing To Win: New Research on Union Strategies, Bronfenbrenner, et al. (Ithaca, NY: Cornell University Press, 1998) 184. This campaign started off with 62 of 83 employees signing a union petition and ended up with a 36-31 vote against the union.

⁸⁷ In *Fern Terrace Lodge*, 297 NLRB 8 (1989), the NLRB found this speech to be permissible language. The case is discussed in "From the Editor: Proper and Improper Communications," *Management Report*. 27.6 (2004): 3.

⁸⁸ In "From the Editor: Learning Lesson (Good and Bad) From a Real-Life Campaign," *Management Report* 24.4 (2001): 3-5, DeMaria describes the "themes commonly used by employers" as including "threat to remove jobs," "disparaging the moral character of union supporters," "inevitability of strikes," and "threat to reduce wages." "Campaign Threat of Plant Closure," *Management Report* 24.4 (2001): 5 notes that "predicting the future of a business if it becomes subject to an obligation to bargain with the union, is a recurring campaign theme."

⁸⁹ Thomas Jefferson, "Notes on Virginia" (1785), reprinted in Kenneth M. Dolbeare, ed., American Political Thought (Chatham, NJ: Chatham House, 1989) 182.

⁹⁰ Since it is illegal, employers generally avoid using the word "futile" when attacking unionization. However, this doesn't stop them from talking about futility as a communication goal in internal communications. The Sodexo corporation's manual for managers, for instance, suggests a list of "potential disadvantages of union membership" for supervisors to convey to their subordinates, including "Futility of Bargaining Process." Sodexo Marriott Services, "Progressive Approach to Labor: Union Avoidance," 1.

⁹¹ "Mock Negotiations: An Excellent Campaign Tactic," *Management Report* 23.2 (2000): 5. In *Palm Garden of North Miami*, 327 NLRB 195 (1999), the NLRB ruled this tactic illegal. However, 6th Circuit Court of Appeals overturned the NLRB and found that the skit was within the employer's legal rights.

⁹² This statement was from the owner of Lundy Packing, in Clinton, NC, cited in Cohen and Hurd 183.

⁹³ Statement is from owner of Home Style Foods in Hamtrac, MI, quoted in Hurd and Uehlein 63. In a memo to employees of Crown Cork and Seal, reproduced in Hurd and Uehlein 65, employees were warned well before the vote that "if there is an election and the [union] win[s], the company would challenge the results.... This means that the company would nullify the need to negotiate with the [union];" Hurd and Uehlein 7 states "If the [union] does not like the company's refusal to negotiate, it would have to file ULP charges — the company would appeal to the NLRB and the court of appeals. This process could take two years or more."

⁹⁴ Levine, "Supervisor's Guide to Union Avoidance," (2005) Ch. 2: 2. Emphasis in original.

⁹⁵ *Ibid* 16.

⁹⁶ Levine's first claim is a direct contradiction of the law. Once employees vote to create a union, even before a first contract is signed, employers are prohibited by law from making any unilateral changes in the terms and conditions of work — including acts of individual discipline. Thus, following a vote to create a union, employers are banned from disciplining or firing individual employees without first negotiating with the union.

⁹⁷ "From the Editor," *Management Report* 27.3 (2004): 3-4.

⁹⁸ "Sample 25-Hour Speech," *Management Report* 27.11 (2004): 6.

⁹⁹ Lawrence Mishel and Matthew Walters, How Unions Help All Workers (Washington: Economic Policy Institute, 2003). Mishel and Walters's analysis is based on a series of studies of the union premium, drawing primarily on data from the Current Population Survey of the U.S. Census Bureau.

¹⁰⁰ "Inevitability of Strikes," *Management Report* 24.4 (2001): 5, notes that "the strike theme is a common one in any union campaign." The segue between futility and strikes can be seen, among other places,

in Levine Ch. 8: 20, in an outline of a campaign strategy titled “The Only Guarantee In the Collective Bargaining Process is Union Dues.” Levine suggests companies explain to their employees that “as you know, during negotiations, wages and benefits may go up but they can also go down depending on how good a negotiator you are;” supervisors are then urged to remind their subordinates that “The truth is that a union has only two things it can guarantee its members — the right to economic strike and making its members pay dues and assessments.”

¹⁰¹ *Management Report* 27.1 (2004): 4, notes that “One of the most effective arguments an employer has against unionization is the possibility that where there is a union there can be a strike, which can have devastating economic consequences for employees.”

¹⁰² “From the Editor: Communicating About the Threat of Strikes in the Event of Unionization,” *Management Report* 25.5 (2002): 3.

¹⁰³ *Management Report* 24.9 (2001): 5.

¹⁰⁴ Cited in *Management Report* 24.4 (2001): 5. This statement is presented in the newsletter as a positive example of effective arguments.

¹⁰⁵ Levitt 17. DeMaria gives similar advice, counseling employers on how to stay within the letter of the law. “A couple of changes of words here,” he explains, “substitution of one word for another word — you would get the absolute same message across, as powerful as it was before, with no risk of an unfair labor practice [charge].” Quoted in Kim Phillips-Fein, “A More Perfect Union Buster,” *Mother Jones*, Sept.-Oct. 1998.

¹⁰⁶ Lewis and Krupman 72 cite *Lord Baltimore Press*, 145 NLRB 888, 44 LRRM 1068 (1964) as the basis for advising clients to frame their warning to employees in the following terms: “If a union imposes uncompetitive conditions on an employer, it can make it almost impossible for the company to secure enough sales to provide full and regular employment.”

¹⁰⁷ “De-Unionization: A Report on a Recent Seminar by Francis T. Coleman,” quoted in Logan (2002): 204.

¹⁰⁸ Both statements are provided by DeMaria in “From the Editor: Proper and Improper Communication,” *Management Report* 27.6 (2004): 3. *Management Report* 27.10 (2004): 6 similarly provides a “Sample Opening Discussion With Employees in NLRB Campaign,” to be delivered to employees by the CEO, that includes the warning that “the subject of whether or not to have a union is a very important one to me. It is also one that affects your future as well as mine and the future of our company.”

¹⁰⁹ For instance, *Management Report* 27.10 (2004): 6 suggests a “Sample Opening Discussion With Employees in NLRB Campaign” that includes the following statement: “You should know now that even if the union were to get in, and I am certain it will not be voted in, it cannot force me to agree to anything that I am unwilling or unable to accept because I cannot afford it.”

¹¹⁰ Bronfenbrenner, *Uneasy Terrain*, 18, 52.

¹¹¹ NAM and CUE, *Remaining Union-Free* (2004) 3.

¹¹² *Management Report* 24.2 (2001): 8.

¹¹³ *Management Report* 26.6, (2003): 7.

¹¹⁴ “From the Editor: Speech to Employees at the First Sign of Union Activity,” *Management Report* 27.3 (2004): 3. A nearly identical argument is made in “Discussing How the Union Spends Its Money,” *Management Report* 28.8 (2005): 7.

¹¹⁵ *Labor and Management Reporting and Disclosure Act*, section 501(a).

¹¹⁶ Dunlop Commission, *Report and Recommendations*, 36.

¹¹⁷ Bush first used this term to characterize his narrow win over Ronald Reagan in the 1980 Iowa Republican party caucuses. Cited in Mark Hatfield, Senate Historical Office, *Vice Presidents of the United States, 1789-1993* (Washington: GPO, 1997) 529-538.

¹¹⁸ Levitt 13. Similarly, Kilgour 192-93, 260, notes that “It is important to the union that its efforts peak at the time of the election. Should the union campaign peak out too early, it will start to lose support due to a loss of interest or because of the management countercampaign Anything the employer can do to throw the union’s timing off will work to the company’s advantage the [most] important way to throw a union’s timing off is for the company to delay the election for as long as is necessary.”

¹¹⁹ Kilgour 259 notes that longer elections help whittle away union support. “Some [loss of union support] may be due to the employees becoming discouraged as the elections is postponed. And some may be due to the replacement of union supporters by more carefully selected nonunion employees as a result of normal turnover.”

¹²⁰ *UnionkNOW*, Sept. 2001, quoted in Logan “The Long, Slow Death of Workplace Democracy at the Chinese Daily News,” (American Rights at Work 2003): 8, fn. 28.

¹²¹ Levitt 175 notes that “It was a bread-and-butter delay tactic to argue that the labor board had no business overseeing union elections at a company for some obscure legal reason. But the stratagem was no less effective for its ordinariness. As long as the NLRB went on debating and deliberating on that issue, the union would not get the Excelsior list, making it hard from them to contact all the potential voters, and no election date would be set. All the while, we would have the run of the place.”

¹²² Kilgour 261.

¹²³ In 2002, for instance, EcoLab argued that the International Association of Machinists and Aerospace Workers (IAMAW) was not a “labor organization,” despite the union’s having been recognized in employer contracts going back more than one hundred years. The NLRB actually held a hearing on this question, ultimately concluding that the IAMAW is, in fact, a labor organization, but delaying the election by one month in order to settle this issue. This case is discussed in Theodore 14.

¹²⁴ Kilgour 193. He stresses that challenging the bargaining unit definition may be useful even when the union ends up getting exactly the unit it proposed. In another case, he cites a bank that dragged out arguments over the bargaining unit definition for 13 months. In the end, “the union won its preferred unit, but by the time the elections were held ... it had long since lost its majority by attrition.”

¹²⁵ Kilgour 270. For this reason, the Dunlop Commission *Report and Recommendations*, 41-42 notes that “many board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage.” And calls for an end to frivolous election challenges as “pivotal to ... improving the representation process.”

¹²⁶ Kilgour 261 reports that consent elections were 46.1% of all NLRB elections in 1962, and 7.3 percent in 1978. NLRB Election Report for October 2004 through March 2005 (Washington: NLRB, 2005) Table 1, reports that there were 1,076 total NLRB elections during this six-month period; 13 of these were consent elections.

¹²⁷ Quoted in *Pressure Hearings* 1, 196, reprinted in Smith 114. Kilgour, 260 likewise states that employers’ “most powerful delaying tactic” is simply refusing to agree on a consent election; “this means that it will take longer for the NLRB to hold the election should the company wish to postpone it until it is better prepared.” Lewis and Krupman 151-152, give the same advice.

¹²⁸ Levitt 58.

¹²⁹ *Ibid.*

¹³⁰ Cohen and Hurd 1998. The study is based on interviews with 320 NCR computer technicians. There had been both a history of anti-union communication from the company, and deunionization within NCR over the previous decades, as well as CWA organizing efforts ongoing. So by the time the campaigns happened in which these workers were interviewed, they’d already been operating in an atmosphere framed by efforts on both sides. Out of 1,500 customer engineers in the nine regions of NCR that had active union-affiliated employee associations, the authors drew a representative sample of 500, of whom 320 completed interviews.

¹³¹ Cohen and Hurd 182. Case is *Teksid Aluminum* in Dickson, TN.

¹³² Cohen and Hurd 190. 39.4 percent gave this response.

¹³³ Cohen and Hurd 191.

¹³⁴ Under the Federal Election Commission Act, corporations are free to campaign to their “restricted class” of employees, comprising managers and supervisors, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party (2 USC 441b(b)(2)(A); 11 CFR 114.3, 114.4). According to the FEC, “express advocacy” can be either an explicit message to vote for or against a given candidate, or a message that doesn’t use such explicit language but that “can only be interpreted by a ‘reasonable person’ as advocating the election or defeat of one or more clearly identified candidates;” Federal Election Commission, Campaign Guide for Corporations and Labor Organizations (Washington: GPO, 2001) 31. If this standard were applied to NLRB elections, employers would not only be banned from urging workers to “Vote No,” but also prohibited from many of the most common campaign themes such as “a union would be bad for our company,” “we are committed to operating union-free,” or “unions lead to many costs and few benefits.”

¹³⁵ For example, Bronfenbrenner, “Uneasy Terrain” 26, quotes from an “Employee Information Bulletin” published by the Daiken Clutch Corporation during an election campaign. The company answered the question of why supervisors were telling workers that unions were bad by asserting that “even the labor law permits constitutional free speech and personal expression by managers and supervisors.”

¹³⁶ The problem of how to deal with pro-union supervisors has long been recognized by management consultants. See, for example, Kilgour 223; and Lewis and Krupman 88. One Chamber of Commerce manual reminds managers that it is “not unlawful for an employer to discipline or terminate a supervisor who refuses to follow the employer’s instructions to oppose unions” (cited in Logan, “Consultants” (2002) 202). Union avoidance guru Charles Hughes suggests that if a supervisor won’t fully commit to the anti-union campaign, upper management should “get him a job with a competitor.” (cited in Logan “Consultants” (2002) 202). Levitt 52 recalls the veteran consultant who mentored him as being particularly ruthless on this score: “when Nick ran a counterorganizing drive, he made sure supervisors went home wondering if they would have a job in the morning.” Levitt 56 recalls confronting a supermarket manager who was secretly sympathetic to the union drive: “Gary, I hear you’re fucking us ... It would sure be a shame if you lost your job at Super Value. You’d be pretty hard-pressed to find another one. Where are you going to go?”

¹³⁷ This area of law is articulated in *Southern Pride Catfish Corp.*, 331 NLRB No. 81 (2000), and discussed in “Campaign Workshop: Discharging Supervisors for Being Poor Campaigners,” *Management Report* 24.8 (2001): 4.

¹³⁸ Levine Ch. 2: 13-14. DeMaria, Supervisor’s Handbook, 43-44, uses a similarly Orwellian formulation in providing supervisors with an outline to “Your Right of Free Speech.” “You have the full right to campaign on behalf of your company,” DeMaria explains. “You have a perfect right to express your opinions about the union that’s trying to organize your plant... **You can and must** tell your employees why a union is not necessary in your plant.” Emphasis in original. DeMaria goes on to advise supervisors that they “are free to talk to [subordinates] about the company, the union, your own opinions and views. You can ask them not to sign authorization cards; you can tell them why you think they should not vote for the union.”

¹³⁹ For example, Levine Ch. 8: 5 writes that “the most effective method for gaining the support of employees is one-on-one, eyeball-to-eyeball conversations between supervisors and employees.” Lewis and Krupman 95 note that “face to face communications between supervisors and employees” are key to management’s efforts. “If instructed properly, trained supervisors can be the most effective means of lawfully influencing employee attitudes.” DeMaria, Supervisor’s Handbook, 37, states that “the most important factor influencing the individual’s choice of ‘Union’ or ‘Non-Union’ is his supervision — how well his supervisor communicates the company’s views during the organizing campaign.” *Management Report* 27.1 (2004): 7, states that “the success of union prevention depends greatly on the ability of supervisors to influence their employees.” Bruce Kaufman and Paula Stephan, “The Role of

Management Attorneys in Union Organizing Campaigns," *Journal of Labor Research* 16.4 (1995): 8, reported that the management attorneys they interviewed believed that "effectively marshalling the cooperation and support of the supervisors was the single most critical ingredient to defeating the union." As one of management attorneys concluded, "without [supervisors'] support, the employer's chance of victory is substantially reduced" (Kaufman and Stephan 4).

¹⁴⁰ Levitt 10 explains why he used supervisors rather than upper management as the "front line" of anti-union campaigns: "the words and the warnings would have to come from people they worked with every day ... from the people they counted on for that good review and that weekly paycheck."

¹⁴¹ DeMaria, "From the Editor: Proper and Improper Communication," *Management Report* 27.6 (2004): 3, notes that it is legal for managers to warn subordinates that a union "could hamper the employees' personal relations with the company."

¹⁴² Logan, "Consultants" (2002) 202 cites Cornfield and Canak (2000) as describing the role of supervisors as "precinct captains," with 10-20 assigned employees and responsibility for daily one-on-one conversations. Norwood 239 reports that an average employee may be confronted with up to 30 anti-union conversations with his or her personal supervisor in the course of a typical campaign.

¹⁴³ See, for instance, DeMaria, Supervisor's Handbook.

¹⁴⁴ Levine Ch. 8: 5.

¹⁴⁵ DeMaria, Supervisor's Handbook 3, explains that supervisors must learn to "properly answer [employees'] questions in ways that do not amount to unfair labor practices and yet keep their persuasive force." Levitt 14 notes that he had letters distributed twice a week in one campaign; 96 in a more intensive campaign he had managers distributed 2-3 letters per week; DeMaria, Supervisor's Handbook, describes a "daily dialogue" on union issues between supervisors and their subordinates. Levitt 191, describes the intensity of this process, sending supervisors into the workplace "complete with the memorized explanations and probing questions and relentless follow-up." Those who oversaw particularly active union supporters were forced into an even heavier schedule of painfully intense confrontations with their subordinates — over and over again, often torturing both supervisor and supervised, until the worker was so stressed and beaten down as to be ineffective. In extreme cases, supervisors who were sympathetic to the union cause — but whose own job security had been made dependent on convincing their underlings to abandon it — begged their subordinates to vote against it in order to save the supervisor's own job. Levitt 24 recalls foremen who would "approach workers and say 'Hey, I know you need this union, but please don't vote for it. If the union wins, that's the end of me. You and me are like brothers, and I just couldn't go on.'"

¹⁴⁶ "The Written Campaign and the Importance of Supervisors," *Management Report* 27.10 (2004): 6-7. Levitt 26 likewise explains that it is too easy for workers to give a noncommittal response to questions like "what do you think" about a given leaflet. Instead, he trained supervisors to ask more pointed questions — such as 'Hey, I didn't know unions could fine their members and take people to trial, did you?' — because these were more likely to force a revealing response from employees.

¹⁴⁷ Levine Ch. 8 states that "supervisors should be able to evaluate the union sympathies of each of their employees as a result of the one-on-one conversations." Levitt 24 describes his practice where "at the end of each week the [management] team met ... to chart out progress [and] tally up the growing number of potential anti-union votes ..."

¹⁴⁸ Levitt 21. Similar accounts are common among other management-side practitioners. One management attorney told Kaufman and Stephan 11, fn. 4, about "a campaign at a large multi-plant utility where eight attorneys/consultants compiled a book with a detailed analysis of the likely voting behavior of each employee in the election unit." Smith 112 recalls a campaign run by the West Coast Industrial Relations Association in which consultants had supervisors compile a list of all employees supporting or sympathetic to unionization. *Management Report* 23.2 (2000): 6, notes that "rather than asking employees directly, which is unlawful, the employer asks supervisors for their opinions on how employees are likely to vote."

¹⁴⁹ Quote is from Levitt 138. Levitt. 141 reports that “I learned how the purportedly anonymous poll could be designed and administered in order to allow the employer to identify, if not the individuals responsible for planting the alleged pro-union sentiments within the work force, then certainly the departments in which the culprits worked.” Levine, Appendix A, likewise provides a model “Confidential Employee Survey” in which workers identify their supervisor by name and then answer over 100 questions, including 18 questions about their specific experience with their supervisor. A variant of attitude surveys are group meetings in which employees are invited to voice their concerns and complaints over working conditions. Kaufman and Stephan 8 report that “the attorney will typically organize individual and group meetings with supervisors and foremen The purpose of the audit is to discover the issues driving the campaign, the extent of the union’s support among the employees, who the activists are...”

¹⁵⁰ It is illegal for management to spy on workers’ union activities or conversations. However, as with other labor law prohibitions, the Board has left many avenues for employers to collect such information within the confines of the law. DeMaria’s Supervisor’s Handbook 43, for instance, includes the warning that “you may not encourage those you supervise to ... reveal who is for or against the union,” and cautions that they should “not imply, even in a joking manner, that you are receiving information about union activities these statements can be viewed by the NLRB as creating the impression of surveillance.” It is telling that while DeMaria offers a number of warnings against creating the impression or evidence of surveillance, his discussion does not include a direct prohibition against surveillance itself, leaving the impression that surveillance may be desirable as long as it cannot be proven; DeMaria, Supervisor’s Handbook, 2, stresses the “extremely important” role of supervisors as “the ‘eyes and ears’ of management.” DeMaria, Supervisor’s Handbook, 42 similarly informs supervisors that while it is illegal to spy on union meetings, they “may continue to visit local bars, pubs, restaurants and other establishments, even if a union meeting is taking place there, as long as you have had a frequent practice of attending these places” in the past. Levitt 181 recalls a campaign in which he “set to work establishing a network of rank-and-file employees who would serve as spies, informants, and saboteurs. Those so-called loyal employees would be called upon to lobby against the union, report on union meetings, hand over union literature to their bosses, tattle on their coworkers, help spread rumors...”

¹⁵¹ It is illegal for supervisors to directly hand such anti-union paraphernalia to employees. Since the act of handing someone a button, for instance, forces them to make an immediate choice to either wear it or not wear it, this is considered a form of illegal interrogation. However, it is fully legal for supervisors to put a pile of buttons on a break room table and track which employees choose to take them.

¹⁵² It is important to note that even in these cases, such individuals may be able to vote their conscience in the privacy of the voting booth, but they will remain fearful of signing petitions, wearing buttons, or engaging in any other normal campaign activity that involves a public show of support for unionization.

¹⁵³ Levitt 29.

¹⁵⁴ While it is illegal for companies to hold mandatory meetings in the last 24 hours before a vote, it is standard practice for employers to invite all workers to a company dinner the night before the vote, at which they engage in last-minute anti-union politicking. Although the dinner is paid for by the company, and employees are urged to attend, attendance is not mandatory, and therefore the NLRB rules that such events are legal even within the final 24-hour period. A sense of why employees may feel compelled to attend these non-mandatory dinners may be gleaned from the text of an invitation suggested by members of the Jackson Lewis firm in Lewis and Krupman 200: “Dear Fellow Employee: You and your spouse are cordially invited to attend a special Employee Dinner Meeting to be held next week on Thursday evening starting at 6:00 pm. Important announcements of special significance to all employees and their families will be made immediately following the dinner. The program will be concluded at 9:00 pm. Tickets are enclosed. Sincerely, ... General Manager.”

¹⁵⁵ Jackson Lewis, et al. 205, explain that “the employer should arrange to escort the union representatives to the conference to avoid any last-minute union campaigning.”

¹⁵⁶ *Quest International*, 338 NLRB 123 (2003), discussed in “Campaign Workshop: Stationing Security Guard and Guard Dogs on Premises During Election,” *Management Report* 26.12 (2003): 4. A regional hearing officer ruled the employer’s behavior illegal, but the full Board overturned this decision on appeal, partly by insisting that it was up to the union to prove that a determinative number of employees changed their votes as a result of the increased security presence.

¹⁵⁷ Until relatively recently, it was common for employers to hold an election-day raffle in which every employee who showed up to vote would be entered in a drawing for company-bought prizes. This was ruled illegal in 2001, but was widely practiced until that time. “Get-Out-the-Vote Raffle is Unlawful,” *Management Report* 24.5 (2001): 8.

¹⁵⁸ Kilgour 291, for instance, concedes that “an election conducted on ‘neutral’ ground would probably reduce the size of the vote in the wrong quarters.” This is so, he surmises, because “union supporters are, almost by definition, more determined or dedicated than company supporters and those who remain uncommitted.” Likewise, *Management Report* 24.5 (2001): 8 notes that “a high turnout on election day generally favors the employer.”

¹⁵⁹ Jackson Lewis, et al. 196. Jackson Lewis notes that it is legal for employer to pay the expenses to transport absentee employees to the polls.

¹⁶⁰ Sodexho Marriott Services, “Progressive Approach to Labor: Union Avoidance,” 9.

¹⁶¹ Dan Hildebrand, representative of CComplete, conversation with the author, 8 Aug. 2005. CComplete is the firm that provides NMB the software, technology and voting systems to run union elections. The NMB’s own acting director of the Office of Legal Affairs, Mary Johnson, explained that NMB had “done a lot of research and feel the system is very secure.” Quoted in “NMB Will Launch Telephone Balloting in Representation Elections Sept. 30,” *Daily Labor Report*, Bureau of National Affairs, 26 Sept. 2002.

¹⁶² Oregon adopted vote-by-mail as the sole and universal form of voting for all elections in 1998. A recent assessment concluded that vote-by-mail systems “result in a more accurate count” than other systems. Paul Gronke, *Ballot Integrity and Voting by Mail: The Oregon Experience*, Early Voting Information Center, Reed College, June 2005, 2. There are now 25 states that place no restrictions on vote-by-mail, aka “absentee” balloting. “Voting by mail,” editorial, *San Diego Union-Tribune*, 2 May 2005.

¹⁶³ Hildebrand, 8 Aug. 2005 interview, reports that his firm conducted a presentation for NLRB staff on the merits of their system, including reviewing the NMB’s experience with it. As of this writing, the NLRB has shown no interest in adopting the NMB system. NLRB current policy is that elections are held on-site unless there is a significant logistical reason for doing otherwise — e.g. if the employees are truck drivers who work on the road spread out over a large area and it is not feasible for them to report to a central location at a designated time. The fact that on-site elections provide an advantage to the employer, or that mail ballots would be cheaper, is not enough in itself to warrant an off-site election under current Board doctrine. See *London’s Farm Dairy*, 323 NLRB 186 (1997); and *San Diego Gas and Electric*, 325 NLRB 218 (1998).

¹⁶⁴ Richard H. Wessels, “NLRB Makes Mail Ballots Easier,” Wessels & Pautsch, P.C., 16 May 2002, accessed 5 Aug. 2002 <www.w-p.com/page.asp?type=articles&id=121>. Employer opposition to mail ballots is also discussed in Levitt 108, 112; and Levine 25-26.

¹⁶⁵ “Reasons Employers Should Resist Mail Ballots,” *Management Report* 23.4 (2000): 4-5.

¹⁶⁶ E.g., Kilgour 2 notes that “the pages of administrative and judicial journals are filled with decisions concerning employers who have broken the law and were caught.” Longtime unionbuster Marty Levitt, who worked with the leading consultants and attorneys of his day, likewise opens his confession with the explanation (Logan, “Confessions,” (2002) 2) that “the only way to bust a union is to lie, distort, manipulate, threaten, and always, always, attack.”

¹⁶⁷ U.S. Senate, “Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,” S. Report No. 1417, 86th Cong., 2nd Sess. (Washington: GPO, 1958). See related

discussion in Levitt 38. Among other documents turned up by Congress was a “Master Plan” provided to the Whirlpool Corporation by the firm of Nathan Shefferman — the preeminent post-WWII labor advisor, whose firm spawned the modern union-busting industry through a series of spinoffs. Shefferman’s plan began with the illegal creation and support of an “employee” anti-union committee: “Find a lawyer and guy who will set up a vote no committee, find leaders and sway them ... get material to turn over to vote no committee...” Quoted in Smith 99. Shefferman had nearly 400 clients in the 1950s, including some of the nation’s largest corporations.

¹⁶⁸ Levitt 181.

¹⁶⁹ Levitt 3.

¹⁷⁰ Fred Long of the West Coast Industrial Relations Association told one seminar that after a union petitioned for an election, “you got at least sixty days to hire a hell of a lot of people you need to.” In the same seminar, Long advised backdating payroll memoranda in order to legitimate illegal wage increases given in the runup to an election. Both statements are reported in Smith 108. Levitt 22 recalls calling employees into personal interviews in which he guaranteed that anything said would remain strictly confidential; “that, of course, was a bold and cruel lie.” In a grocery campaign, Levitt tapped the motel telephone of the union organizer running the campaign (Levitt 56). In a nursing home (Levitt 195), he “dispatched a contingent of commandos to scratch up the cars of high-profile pro-company workers and to make threatening phone calls to others. I [then sent out] a letter from [the CEO] taking the union to task for such barbarous scare tactics.” Smith 114, reports on the campaign at BLK Steel run by the West Coast Industrial Relations Association where employees were paid to vote against the union, promised a pay raise if the union lost, and threatened with loss of benefits if the union won.

¹⁷¹ Steven Greenhouse, “How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case,” *The New York Times*, 14 Dec. 2004: A26.

¹⁷² Ibid.

¹⁷³ Unpublished data provided to the author by the NLRB. Complaints are the NLRB’s equivalent of an indictment, indicating that Board agents have found sufficient evidence of wrongdoing that they are prepared to pursue the case in a trial before a Board-appointed judge.

¹⁷⁴ Sixty-Ninth Annual Report of the National Labor Relations Board 10-11. The Dunlop Commission, *Fact Finding Report*, 70, likewise reported that in 1990, 81 percent of meritorious charges were against employers.

¹⁷⁵ NLRB Annual Reports, various years, Appendix Table 4. The 10-year average for the years 1995-2004 is 23,839.

¹⁷⁶ Subcommittee on the Departments of Labor and Health, Education and Welfare, Committee on Appropriations, U.S. House of Representatives, “Statement of NLRB General Counsel John S. Irving,” 95th Cong., 2nd Sess. (Washington: GPO, 1978) 761, cited in Weiler 1827, fn. 35.

¹⁷⁷ Lalonde and Meltzer 987-990. This analysis focused specifically on illegal terminations, rather than all backpay awards. It seems likely that suspensions, demotions or denied promotions are even more concentrated in election contexts, since where there is an established bargaining relationship these issues are generally arbitrated under the existing contract and therefore are resolved before reaching the Board level.

¹⁷⁸ Roughly 40 percent of petitions never lead to an election. Therefore, I have inflated the number of voters in elections by this ratio in order to yield an estimate of the total number of eligible voters in companies where petitions were filed.

¹⁷⁹ Sixty-Ninth Annual Report of the National Labor Relations Board Tables 13-14.

¹⁸⁰ The number of meritorious charges of labor law violation is smaller than the total number of individuals owed backpay because many charges cover more than one employee.

¹⁸¹ It is, of course, always possible to argue with numbers. It may be asserted that FEC and NLRB violations are not comparable, because the FEC regulates only certain aspects of federal elections,

whereas the NLRB regulates all aspects of workplace elections. There is clearly some merit to this idea — a comprehensive comparison would need to compare ULPs with the combination of all federal, state and local electoral violations in a given election cycle. However, since such data seems unlikely to significantly change the overall ratio of violations per voter, and since many of the acts that would be illegal under state and local law are permitted by the NLRB, I believe that the figures reported here are broadly accurate.

¹⁸² *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). For a more recent discussion of this principle, see *Tomatek, Inc.*, 333 NLRB 156 (2001).

¹⁸³ Kaufman and Stephan 12, *fn.* 14.

¹⁸⁴ On this point see, among others, Kaufman and Stephan 9, 13.

¹⁸⁵ The case of Surgical Appliance is discussed in Hurd and Uehlein 67. On the same page, the authors discuss the case of Sheridan Manor Nursing Home, in Buffalo, NY. After this employer discovered that the union drive was strongest among the licensed practical nursing staff, it fired 16 of its 21 LPNs, and effectively crushed the organizing campaign.

¹⁸⁶ Dunlop Commission, *Fact Finding Report*, 70, explains that “The ‘in kind’ relief of reinstating workers who were illegally fired often takes a long time to effectuate. Before an employer is legally obligated to reinstate a discharged employee, the case goes through a four-stage procedure. The employee’s charge must first be judged meritorious by the Board’s regional office, then by an Administrative Law Judge following a full-scale trial, then by the board itself, and then by a federal appeals court — a process that takes an average of three years to complete.”

¹⁸⁷ Because it takes so long to work through the full process of appeals, and because fired employees are so often left in desperate economic straits, employees often choose to accept a reduced settlement if companies agree to pay more quickly rather than prolong the process. In this case, employers’ ultimate payout is reduced even below the already marginal amount of backpay they would normally owe. Indeed, regional NLRB offices frequently encourage employees to accept such discounted settlement. In part, Board agents encourage employees to settle early out of genuine concern that it will be better for employees to get a smaller settlement in a timely fashion than to wait years for a complete accounting. The result of quicker settlements is that workers receive less than they are due and the cost imposed on lawbreaking employers is even lighter than that warranted by law. In 2004, for example, the NLRB secured backpay settlements for 30,000 workers, totaling \$205 million. There is no way of knowing, however, to what extent this figure was discounted by early settlements taken under pressure of economic distress, or what the true total of unpaid back wages amounted to.

¹⁸⁸ *Vico Products Company, Inc., v. NLRB*, 333 F. 3d 198; 2003 U.S. App. LEXIS 13184 (D.C. Cir. 2003). This case is discussed in “NLRB Imposes Costly Remedy for ULP’s,” *Management Report* 27.5 (2004): 6.

¹⁸⁹ DeMaria presentation to seminar on Maintaining Nonunion Status, quoted in Phillips-Fein.

¹⁹⁰ *Delta Brands, Inc.*, 344 NLRB 10 (2005). In this case, the company handbook included a clearly illegal ban on solicitation within the workplace, and the union lost an election by a 2-vote margin. Despite agreeing the rule was illegal, the Board upheld the election results, ruling that for the outcome to be overturned, the union would have to prove three things: that employees knew about the rule, that it affected their behavior, and that it had a “reasonable tendency to affect the outcome of the elections.” Apart from the general difficulty of meeting this burden of proof, the union may face a particularly uphill effort in getting employees to publicly testify against their employer in the aftermath of a contentious election and union defeat. The case is discussed in “Unlawful Solicitation Rule Not Grounds for Setting Aside Election,” *Management Report* 28.7 (2005): 2. Bronfenbrenner, *Uneasy Terrain*, 30, notes that of all the campaigns in her sample where employers issued threats of layoffs and unions filed charges of labor law violation, only 11 percent resulted in rerun elections. She notes that this remedy was limited to “the most egregious cases ... where the plant closing threats were clear and unambiguous and were coupled with numerous other egregious violations including repeated discharges, surveillance, threats, and harassment of union activists and supporters.”

¹⁹¹ This case is *Dayton Hudson Corporation* of Fairlane, MI, described in Hurd and Uehlein 69.

¹⁹² Data on bargaining orders if from Arthur Rosenfeld, *End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, Memorandum GC 06-02* (Washington: NLRB Office of the General Counsel, 6 Jan. 2006). This report covers the period 1 June 2001 through 31 Dec. 2005. Annual election data is from NLRB FY2003 and FY2004 Annual Reports, and from Gerald Mayer, *Labor Union Recognition Procedures: Use of Secret Ballots and Card Check* (Washington: Congressional Research Service, 23 May 2005).

¹⁹³ Transcript of Tape Recording Made by Joel D. Smith of Presentation of Fred R. Long, SCIRA, at Century Plaza Hotel, Los Angeles, 28 July 1976, reproduced in Logan 207. "Companies Win More Second Elections — But Not Always," *Management Report* 27.11 (2004): 1, likewise advises its readers that "Companies that win the first election are more successful in a second election. One might think that an employer that committed unfair labor practices and had to face the union again in the second election would be less likely to succeed because of its previous unfair labor practices. Yet NLRB statistics show that, overwhelmingly, the party that wins the first election (whether it be the union or the employer) wins the second election handily, often by a greater margin."

¹⁹⁴ Bronfenbrenner, *Uneasy Terrain*, 50, notes that unions won only 23 percent of the elections in her sample that were rerun following charges of illegal employer behavior; however, p. 30, of the campaigns that were rerun following employer threats of layoffs, unions lost 100 percent of the rerun elections.

¹⁹⁵ *ITT Automotive v. NLRB*, 188 F.3d 375 (1999). This case is discussed in "Case Tests Employer's Right to Campaign Aggressively," *Management Report* 23.4 (2000): 6-7. A similar example is *Ogihara America Corp.*, 343 NLRB 91 (2004), where an employee was fired for wearing a t-shirt with a union insignia, the union lost the election, and the Board ordered a rerun. This case is discussed in "Solicitation and T-Shirt Ruled Problematic for Another Employer," *Management Report* 28.3 (2005): 5-6.

¹⁹⁶ This account, including quotes, is from Hurd and Uehlein 69.

¹⁹⁷ *Rite Aid Insider*, newsletter produced by the International Longshore and Warehouse Union, Issue No. 1, May 2007.

¹⁹⁸ *Settlement Agreement: In the Matter of Rite Aid Corporation*, NLRB Region 31 Office, Los Angeles, 22 May 2007; provided to the author by the ILWU.

¹⁹⁹ Quoted in *Rite Aid Insider*.

²⁰⁰ Letter from Rite Aid to employees of the company's Lancaster, California Distribution Center; contents shared with the author by a Rite Aid employee, 29 May 2007.

²⁰¹ *Hospital and Union Representation Election Principles Agreement*, 13 Apr. 2006; copy provided to the author by Yale-New Haven Hospital.

²⁰² Quoted in Melissa Bailey, "An Outraged City Confronts a Hospital's Betrayal," *New Haven Independent*, 14 Dec. 2006.

²⁰³ Quoted in June Torbati, "Union election postponed at Yale-New Haven Hospital," *Yale Daily News*, 14 Dec. 2006.

²⁰⁴ Quoted in Paul Bass, "Union Election Off; Arbitrator Says Hospital Broke Law," *New Haven Independent*, 13 Dec. 2006.

²⁰⁵ "YNHH signs Agreement with National Labor Relations Board," Yale-New Haven Hospital news release, 16 May 2007.

²⁰⁶ Bronfenbrenner and Juravich, "Impact," is based on a random sample of 261 NLRB certification elections that took place between July 1986 and July 1987, all single-unit elections involving more than 50 employees and an AFL-CIO affiliated union. The sample amounts to roughly one-third of all elections in units of this size during the period in question, and is representative across industries, regions, and types of unit. The data on employer tactics is based on surveys of the lead union organizer on each campaign, plus ULP data from the NLRB. Rundle 1998 sent surveys to lead organizers of a random sample of 200

election campaigns drawn from 1994 NLRB elections in units of 50 employees or more. Of these 200, 135 surveys were returned, a 68 percent response rate. Rundle further found 30 cases during this time period and of this unit size in which petitions were withdrawn, but elections later were held. These 30 cases were also surveyed, raising the total number of surveys to 165. Bronfenbrenner, *Uneasy Terrain*, is drawn from a random sample of 600 single-unit NLRB certification elections that took place in 1998-99, all in units with 50 or more employees. Surveys were sent to the lead union organizers for each campaign, and 407 responses were received; the author then matched NLRB and employer financial data to each case. Theodore 2005 is based on all petitions for election filed in workplaces in the Chicago metropolitan area in 2002, in workplaces that had never previously been organized. Surveys were sent to lead union organizers in all 179 petitions in this category, and 62 surveys were received back. The responses represent campaigns that were slightly more likely to have led to an election than the universe of petitions as a whole (76 percent vs. 69 percent) and significantly more likely to have resulted in a union victory (61 percent vs. 45 percent). In addition to the survey, the authors conducted in-depth interviews with 25 lead organizers and 11 employees involved in these campaigns. The three studies that are limited to units of 50 or more employees are, to some extent, a skewed sample; the NLRB FY04 Annual Report shows that the smaller units accounted for 65 percent of all representation elections held that year. However, the same report shows that, of all employees involved in NLRB elections in 2004, only 16 percent were in units of less than 50. Thus, while a study of 50+ units is not representative of all elections, it does capture the experience of the vast majority of American workers involved in union organizing campaigns.

²⁰⁷ Bronfenbrenner and Juravich, "Impact," 80, suggests that these figures may understate the extent of union-busting; since many large employers have developed in-house staff that run similar by-the-book union avoidance campaigns without relying on outside consultants. When the federal government's Dunlop Commission studied this issue, it estimated that 70 percent of employers used consultants, but concluded that, due to the laxness of federal reporting requirements, "there are no accurate statistics on consultant activity" (Dunlop Commission, *Fact Finding Report*, 67).

²⁰⁸ Bronfenbrenner and Juravich, "Impact" 80.

²⁰⁹ Dunlop Commission, *Fact Finding Report*, 75 reports that over the period 1977-91, roughly 30 percent of nonunion workers stated that if an NLRB election were held at their workplace, they would vote "yes." The Commission's own survey (*Fact Finding Report* 39) found that 32 percent of unorganized workers would vote for a union. Cingranelli (2004) 8, reports that a 2002 poll conducted for the AFL-CIO found that half of all non-managerial employees would vote for a union if they had the opportunity. Interestingly, Richard Freeman and Joel Rogers, *What Workers Want* (Ithaca: Cornell University Press, 1999) 59, found that an even higher share of workers supported the substance of unionization if it was not called a "union." A majority of all workers they surveyed said they want an organization in which "either management or employees can raise problems for discussion as opposed to one in which management alone decides the problems that should be discussed; "employees and management have to agree on decisions as opposed to one in which management makes the final decision about issues;" "conflicts are resolved by an outside arbitrator rather than by management;" and "employee representatives are elected or volunteer themselves rather than being chosen by management."

²¹⁰ Based on total employment of 142 million in Sept. 2005, as reported in "The Employment Situation: September 2005," Bureau of Labor Statistics News Release; and 15.5 million union members in 2004, as reported in "Union affiliation of employed wage and salary workers by selected characteristics," 7 Oct. 2005, accessed 11 Oct. 2005 <www.bls.gov/news.release/union2.t01.htm>, and assuming that 30 percent of non-union workers wish they had a union.

²¹¹ Phil Comstock and Maier B. Fox, "Employer Tactics and Labor Law Reform," in Sheldon Freidman, et al. (eds.), *Restoring the Promise of American Labor Law* (Ithaca, NY: Cornell University Press, 1994).

²¹² Comstock and Fox 95.

²¹³ Freeman and Rogers 48-49. The survey, conducted in 1994, was based on a nationally representative sample of 2,408 adults. 83 percent of workers reported that they have less influence over benefits than they want; the corresponding figure regarding wages was 76 percent.

²¹⁴ Freeman and Rogers 130.

²¹⁵ Dunlop Commission, *Report and Recommendations*, 36.

²¹⁶ Sixty-Ninth Annual Report of the National Labor Relations Board 16, shows that 94,565 employees won union recognition in their workplaces in that year.

²¹⁷ 1988 Gallup poll, reported in Dunlop Commission, *Fact Finding Report*, 72.

²¹⁸ 1991 Fingerhut poll, reported in Dunlop Commission, *Fact Finding Report*, 72.

²¹⁹ Comstock and Fox 92.

²²⁰ Comstock and Fox 99.

²²¹ Comstock and Fox 98. Freeman and Rogers 62 likewise found that, among non-union workers who wished they had one, 55 percent believed that “management opposition” was the central reason why they had been unable to organize.

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