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FREEING EMPLOYEE CHOICE:  
THE CASE FOR SECRECY IN UNION  
ORGANIZING AND VOTING

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Professor Benjamin Sachs, with his article *Enabling Employee Choice*, has injected new analytical rigor into the decades-long debate over the law governing union representation contests.<sup>1</sup> His nuanced analysis of what is wrong both with current law and with the leading reform proposal is likely to set the terms for future scholarly analysis and for serious public debate over the role of law in union organizing. It will do so regardless of the fate of labor law reform in the current Congress. But that is a good place to start.

I. ONCE MORE INTO THE BREACH:  
ANOTHER DEBATE OVER LABOR LAW REFORM

For friends of organized labor, 2009 was to be the year of labor law reform. A union-backed bill, the Employee Free Choice Act<sup>2</sup> (EFCA), had both a strong supporter in the White House and apparently solid majorities in both houses of Congress; with sixty Democratic votes in the Senate, even the inevitable filibuster looked surmountable.

As of this writing, however, it has not yet happened. Students in my fall 2009 Labor Law class once again studied a National Labor Relations Act<sup>3</sup> (NLRA), most of whose text is celebrating its seventy-fifth anniversary this year. Obviously, the workforce, the workplaces, the labor market, the labor movement, and the economy have all changed dramatically in the last half-century. Yet the federal statute that governs private sector labor relations has remained almost untouched since the 1950s.

The political resistance that EFCA has met is hardly surprising. For many decades, any legislation that might strengthen organized labor and reverse its long slide toward irrelevance has been vehemently opposed by the business community and by nearly all congressional Republicans. The proponents of reform have been unable to muster the supermajorities required to overcome the inevitable filibusters and

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<sup>1</sup> See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

<sup>2</sup> Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

<sup>3</sup> 29 U.S.C. §§ 151–169 (2006).

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vetoed. Given the chronic gridlock over labor law reform, the particular misgivings offered by the few Senators who might cross party lines one way or the other are almost beside the point. The words are different, but the song remains the same.

But one major component of EFCA — the “card check” provision — has provoked more than its fair share of misgivings, not only among labor’s adversaries and the few Senate moderates who may determine its fate, but also among some of organized labor’s friends. Former Senator George McGovern, for example, caused a stir in July 2008 with a *Wall Street Journal* op-ed piece opposing EFCA’s requirement that employers recognize a union designated by a majority of employees, not in a secret ballot election, but by their signature on union authorization cards solicited face-to-face by union supporters.<sup>4</sup>

Whatever the fate of EFCA, the controversy over card check will not go away, as unions seeking to organize the unorganized have increasingly turned away from the NLRB’s formal election regime and toward organizing and seeking recognition on the basis of authorization cards. Under current law, they have been relying on “voluntary recognition agreements,” by which employers agree in advance to restrict or abstain from campaigning against union representation and to recognize the union on a card-based majority. It appears that most new union members in recent years have been organized under these voluntary recognition agreements, with their comparatively low-decibel campaigns and less formal, card-based selection process, rather than by secret ballots.<sup>5</sup> So Sachs’s intervention is both timely and of lasting importance.

## II. REMAPPING THE TERRAIN OF UNION ORGANIZING: ALTERING THE STICKY NONUNION DEFAULT

The uphill battle for union representation is familiar, albeit contested, territory. Unions and employers continually joust over the prevalence and impact of employer coercion — both that which is recognized as such by NLRB law and is thus illegal, and that which, for many union-friendly observers, is endemic to the employment relationship and yet lawful. The union view, shared by many in the academy, is that anti-union discharges, threats, and other unlawful forms of employer coercion are common in these campaigns; that many lawful anti-union tactics are bound to intimidate employees who are economically dependent and terminable at will; and that the contest is sharply

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<sup>4</sup> George McGovern, Op-Ed., *My Party Should Respect Secret Union Ballots*, WALL ST. J., Aug. 8, 2008, at A13.

<sup>5</sup> See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

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tilted against unions by employers' control of the workplace and their right to banish union organizers while orchestrating an intense anti-union campaign on work time. These are the beliefs that underlie several decades' worth of unsuccessful union-friendly proposals for reform of the law governing the representation process.

Sachs reexamines this terrain through a powerful new theoretical lens. He is not the first to recognize that union organizing can be seen as an effort to alter the "default" status of no union representation. But he has developed that insight, and illuminated the problem of union representation contests, by drawing on a rich scholarly literature on defaults and default-altering rules in statutory interpretation and corporate governance. There he finds support for the following reconstruction — greatly simplified here — of the problem of realizing employee free choice on the question of union representation.

The NLRA aims to advance employees' free choice regarding union representation, and disclaims any public preference on the matter. Yet the law must set a default one way or the other, and it (more or less necessarily) sets a default of no representation: unless and until a majority of employees in a bargaining unit express a preference for union representation, they remain unrepresented. The problem is that, given the nearly invariable fact of managerial opposition to unionization, it is more difficult for employees to alter the nonunion default, and choose union representation, than it would be for them to alter a hypothetical union default. That creates a serious risk that the nonunion default will stick even when it does not reflect actual employee preferences. There are two ways for the law to deal with this sort of problem: One is to pick the default from which it is easier to depart. Given the political and practical impediments to a default of union representation, however, Sachs explores an alternative strategy of devising an "asymmetry-correcting altering rule,"<sup>6</sup> — that is, a process that makes it easier to alter the nonunion default.<sup>7</sup>

The "altering rule" under existing law is the arduous NLRB election process, including what is typically an intense anti-union campaign by the employer. In effect, current law couples a sticky nonunion default with a highly demanding altering rule. One needs no fancy formulas to realize that this combination is likely to produce a "representation gap," or a rate of unionization well below what employees would genuinely prefer. EFCA supporters make roughly the same argument, albeit with different language, about the need for reform: current rules do so little to curb aggressive employer opposition, and make it so hard for employees to choose union representa-

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<sup>6</sup> Sachs, *supra* note 1, at 673 (internal quotation marks omitted).

<sup>7</sup> See *id.* at 673–79.

tion, that they leave many employees who want union representation without it. What is needed, in Sachs's terms, is an "altering rule" that corrects for the stickiness of the nonunion default.

Sachs explains the stickiness of the nonunion default by drawing on a voluminous literature on employer resistance to unionization and its impact on employees' freedom to unionize. He sharpens the conventional account by showing how employee efforts to unionize in the face of employer resistance confront a series of "market failures." Familiar collective action problems follow from the "public good" nature of union representation, the benefits of which accrue to all workers, not just those who bear the costs of organizing. The fact that the benefits of representation come in the future, and often over a long time, exacerbates the problem: the workers who bear the substantial short-term costs of organizing in the face of employer resistance can capture only a fraction of the benefits of representation; and even those benefits tend to be overdiscounted because they occur in the future.<sup>8</sup>

The evidence on the nature and impact of employers' anti-union campaigns appears to do double duty in Sachs's account: it helps to explain both the stickiness of the nonunion default and the difficulty of current law's "altering rule."<sup>9</sup> That makes it somewhat unclear whether his solution — a new altering rule that largely preempts employers' anti-union campaigns — corrects for asymmetry or eliminates it. It would be conceptually cleaner — and consistent with the evidence — to explain the stickiness of the nonunion default solely on the basis of employees' background knowledge and beliefs about employer opposition to unions rather than the active anti-union campaign that ensues when the employer becomes aware of union activity (for the latter is largely a product of the current law's altering rule). Given what employees surely know about employer opposition to unions, it is at least somewhat harder for employees to overturn a nonunion default than it would be to overturn a union default even if they were able to do so before the employer learned of their effort.

There is one related complication that Sachs largely sidesteps: employee preferences regarding union representation are not independent of employer attitudes, nor could they be; they are rationally, and to a significant degree, "adaptive" preferences.<sup>10</sup> Both the costs and benefits of unionization are shaped by employers' preferences — not only resistance to the formation of a union, but also willingness to deal con-

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<sup>8</sup> See *id.* at 681–83.

<sup>9</sup> See *id.* at 685–97.

<sup>10</sup> Sachs acknowledges the problem of adaptive preferences, but he understates it. See *id.* at 686 n.127. An employer may signal not only that unionization "is unavailable as a practical matter," *id.*, but also that unionization will bring limited gains or even losses as a result of the employer's aggressive bargaining posture and the limited legal constraints on such bargaining tactics.

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structively with a union (or not) if the employees do organize. (The law's imposition of a duty to bargain in good faith does something, but not much, to nudge anti-union employers toward constructive engagement.<sup>11</sup>) The benefits of unionization will be significantly reduced, delayed, or even obliterated if the employer is determined to exploit the ample opportunities the law affords to avoid reaching an agreement, to withhold meaningful concessions in collective bargaining, or to break a strike by permanently replacing striking employees. Rational employee preferences regarding unionization will reflect expectations about both employers' future bargaining behavior and what the law will or will not do about it.<sup>12</sup>

The adaptive nature of employee preferences — together with the wide scope current law affords employers that resist meaningful collective bargaining — greatly complicates any effort to promote employee free choice. Would we promote free choice by shielding employees from the knowledge that employers have as much legal latitude as they have, or that they are as determined as they may be, to resist concessions and take harsh countermeasures against employees in the bargaining process? Present law confronts this dilemma in regulating what employers can say about unionization and its consequences: If the law permits employers to do certain things, must it not therefore be lawful for employers to communicate to employees both what the law permits and what they intend to do (even if that induces employees to conclude that they are unlikely to gain much from unionizing)? Or might such a statement be simply a threat dressed up in legal garb? Sachs's proposed structural solution to promoting employee free choice confronts this dilemma as well, as we will see below.

These few questions aside, Sachs's diagnosis of what is wrong with current law adds depth and sophistication to the standard case for labor law reform. For those who were previously unpersuaded of the need for reform, and who genuinely support employees' freedom of choice, his argument might succeed where others have failed. (Whether any of the pivotal participants in the debate over labor law reform fit that description is another question.)

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<sup>11</sup> Sachs notes some limitations of the duty to bargain in refuting the argument that employers have a right to intervene in the representation contest. *See id.* at 701–04.

<sup>12</sup> To complicate things further, the contingencies to which employees' preferences will rationally adapt consist of both lawful bargaining tactics and unlawful tactics that the law does not effectively remedy. *See* Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

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### III. THE CASE FOR SECRECY IN UNION ORGANIZING AND EMPLOYEE DECISIONMAKING

Things become more complicated once we turn from the why to the how of reform. At first blush, Sachs's analysis suggests a straightforward argument for card check recognition: it would substitute an altering rule that is intended to — and demonstrably does — make it easier for employees to depart from the nonunion default and express a preference for union representation. But here Sachs parts ways with the proponents of card check, and therein makes his most novel contribution to the debate over the law governing union representation.

Sachs argues that card check eases the path to unionization in two very different ways, only one of which is legitimate and consistent with the overarching goal of satisfying employees' preferences. First, card check recognition largely removes employers from the organizing process — without imposing any new restrictions on what they can do or say to their employees — by allowing much of the organizing to take place, and many of the employees to make their decisions, before the employer becomes aware of the union's campaign. Second, card check changes the mechanism by which individuals express their preferences from a secret ballot to an open signing of a card, often solicited by and in the presence of a union organizer or supporter.

In other words, card check works both by *ensuring* a measure of secrecy (of the organizing process) vis-à-vis the employer and by *eliminating* secrecy (of the employees' decisions) vis-à-vis the union and its supporters.<sup>13</sup> Both opponents and proponents of card check have assumed that these two features of card check are inseparable; but Sachs splits them and comes down in favor of secrecy on both counts. Crucially, he splits them not only analytically, but also in practice, devising mechanisms to secure both the secrecy of the union campaign from employers and the secrecy of employees' actual votes from all parties.<sup>14</sup> Sachs's proposal for "Card Check 2.0" is a novel and important contribution to the debate over labor law reform, and it deserves close attention from policymakers. But our attention here will focus on the justification for the proposal.

First, Sachs defends the relative secrecy of the card check organizing process from the employer, marshalling new and familiar arguments against the notion that employers have either a right to influence employees' representation decisions or a useful role to play, on balance, in informing those decisions. He concludes that the risk that threats and fear of reprisals will distort employee preferences out-

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<sup>13</sup> Of course, card check does not guarantee secrecy; an anti-union employee can alert the employer to an ongoing card check campaign.

<sup>14</sup> See Sachs, *supra* note 1, at 718–27.

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weighs the modest informational benefits of the employer's public campaign.<sup>15</sup>

The knotty problem of adaptive preferences returns here. Some of the information that employees are unlikely to get without an employer campaign, and that might rationally influence their decisions, concerns the latitude the law affords to employers determined to avoid serious concessions, and the employer's own determination on that score: for example, the employer might explain that "the law does not require us to reach any agreement," or that "in the event of a strike, the law allows us to permanently replace strikers." Employers campaigning against the union have to watch their words carefully lest they slip into what the Board might deem an unlawful threat. But if card check works as intended, and avoids triggering an employer campaign, employees are unlikely to learn the cold hard truth about either the opportunities the labor laws afford to recalcitrant employers or their employer's determination to exploit those opportunities. If one sees this information as inherently threatening, then its loss may be a net gain for employee free choice. Of course, it reflects rather poorly on the labor laws to conclude that information about the lawful consequences of unionization is tantamount to a threat.

Indeed. The underlying problem is not really what employees know, nor what employers are allowed to say, about the consequences of unionization; the problem lies in what those consequences *are* under current law. The NLRA purports to require employers to bargain in good faith, yet it does little to ensure good faith or to remedy bad faith.<sup>16</sup> But the shortcomings of the law and remedies governing collective bargaining is a large problem that Sachs can hardly be expected to tackle here. He is on firm ground in concluding that the overall impact of the employer campaign is more likely to distort than to inform employees' decisions about unionization, and that the secrecy of the pro-union campaign is a legitimate asymmetry-correcting feature of card check.

When it comes to the open decisionmaking feature of card check, however, Sachs demurs. Open decisionmaking, he argues, is not "necessary to eliminate managerial intervention in unionization efforts"<sup>17</sup> and "can expose employees to forms of union and coworker interference at the moment of decision."<sup>18</sup> Let us first examine the second claim.

For Sachs, it is not just unlawful *coercion* by union supporters that undermines employees' free choice in an open decision process; that

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<sup>15</sup> See *id.* at 706–12.

<sup>16</sup> See Weiler, *supra* note 12, at 357–61.

<sup>17</sup> Sachs, *supra* note 1, at 713.

<sup>18</sup> *Id.* at 662.

appears to be rare and adequately controlled by existing law. He is also concerned about what we might call “undue influence.” One form of undue influence lies in the persuasive abilities — the “epistemological authority”<sup>19</sup> — of trained union organizers (who are often much better educated than the workers they are organizing) and of “natural leaders” within the workplace.<sup>20</sup> To be sure, democratic processes may be distorted when privileged elites can influence the voting decisions of less educated individuals with distinctly different interests. But it is less clear that union organizers and “natural leaders” within a group of workers pose that sort of threat to autonomous employee decision-making. Then again, Sachs is objecting not to the role of leadership and persuasion in the organizing process, but to its role at the point of decision.

A second concern with open voting is that employees may vote not according to their own preferences but according to what they believe will please others. Sachs points out that employees might seek to please either pro-union coworkers or anti-union managers (to whom the cards will eventually be presented if a majority signs up), and that we cannot be sure which way these “posture-preferences” will cut.<sup>21</sup> In principle that is true, but the unions that have invested heavily in the use and defense of card check appear to believe that the net effect favors those present at the moment of decision.

That suggests a related problem with open decisionmaking about which Sachs is rather circumspect, but which is central to many EFCA critics: open card solicitation allows for active cajoling, or peaceful but persistent efforts, perhaps backed by social pressures, to persuade employees to support a union. The line between coercion and cajoling is blurred by many card check critics, but is crucial. The former is unlawful under section 8 of the NLRA, while energetic and persistent solicitation of union support among coworkers is not only lawful but protected by section 7. After all, neither union organizers nor pro-union employees have the economic power over employees that inflects managers’ and supervisors’ words and actions. Sachs presumably has no quarrel with cajoling by organizers and union supporters; but cajoling at the moment of decision is another matter, in his view, for it potentially distorts the autonomous free choice of employees.

It may be tempting for card check proponents to brush off concerns about undue influence as paternalistic or simply exaggerated. But Sachs has put serious analysis behind a certain uneasiness among some of labor’s supporters toward EFCA’s card check provision. As he

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<sup>19</sup> *Id.* at 716 (internal quotation marks omitted) (citing Lynn M. Sanders, *Against Deliberation*, 25 *POL. THEORY* 347, 349 (1997)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (internal quotation marks omitted).



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points out, card check's open decisionmaking feature not only is a lightning rod for EFCA's opponents, but is rarely defended by proponents.<sup>22</sup> If "under the radar" organizing can be combined with secret voting, as Sachs proposes, then those who would still press for card check as a decisionmaking mechanism will have to mount a different defense than they have done thus far.

Ironically, Sachs himself has offered perhaps the strongest argument for openness with his case for the asymmetric stickiness of the nonunion default. For even if the organizing process is successfully kept secret from the employer, that does not wholly dissipate the tacit pressure on employees not to defy the employer by choosing union representation, nor does it eliminate the employer's physical control over the workplace. Even without an active anti-union campaign by the employer, employees know that the employer opposes unionization *and* controls the business, the workplace, the employees' jobs, and working conditions whether the union wins or loses. That employee knowledge and that employer control fortify the nonunion default, and make it at least somewhat more difficult to overturn the nonunion default than it would be to overturn a union default; that is all it takes to justify an "asymmetry-correcting altering rule" in Sachs's account.

The openness of card check, and the noncoercive cajoling and persuasion that it enables, arguably fits the bill: it allows union supporters to actively counter the tacit pressure in favor of the nonunion status quo. There is at least an argument to be made that the net effect of allowing union supporters to use peaceful face-to-face persuasion, peer pressure, and cajoling at the very moment of decision might be a less skewed decisionmaking process. But that is an argument that Sachs implicitly rejects. The risk of "undue influence" from union proponents at the point of decision, even if it does not rise to the level of coercion, poses an independent threat to employee free choice that is not justified by the opposing and perhaps unavoidable pressure that employer opposition puts on employees even absent an employer campaign. Sachs aims to minimize "undue influence" from all sources, not to counter undue employer influence with undue union influence.

What is at stake in this argument is not only the fate of mandatory card check legislation, but also the legal status of voluntary recognition agreements under which unions have conducted much of their organizing in recent decades. The agreements feature both "neutrality" pro-

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<sup>22</sup> See *id.* at 713. EFCA supporters do dispute the claim that card check invites union coercion. They argue that there is little evidence of union coercion in the long history of the Board's reliance on union-solicited authorization cards; that union supporters lack the economic power that backs up employer threats; and that union coercion is adequately deterred by the risk of a card majority being voided. See *id.* at 669 n.46. But they rarely defend the legitimacy of the noncoercive peer pressure that openness makes possible. See *id.* at 713.

visions, by which employers agree to give up some or all of the potent anti-union tactics allowed under the labor laws, and often (though not always) card check provisions, by which employers agree to recognize a union based on a card majority without a formal election. Opponents of unionization — some employees and some employers seeking to repudiate their agreements, but mainly ideological anti-union organizations — oppose both features of voluntary recognition agreements.

On the one hand, Sachs provides added intellectual ballast in support of the “neutrality” provisions of these voluntary recognition agreements with his case that employees do not need the information conveyed by an active anti-union campaign. They need it even less when the employer is not actively opposed to unionization.<sup>23</sup> Employer “neutrality” in the organizing process arguably dissolves, and does not merely correct for, the asymmetric stickiness of the nonunion default.

On the other hand, those who oppose voluntary card check recognition will surely cite Sachs’s critique of open decisionmaking. Sachs does not explore the implications of his argument for voluntary card check here. But the logic of his case for secret voting appears to be independent of the employer’s posture toward unionization. If secrecy is needed to protect employees from the undue influence of union supporters where employers oppose the union, and is “even more critical in the case of pro-union employers,”<sup>24</sup> it is hard to see how secrecy would be unnecessary where employers are in between, having agreed to abstain from active opposition to the union.<sup>25</sup> His argument for decisionmaking secrecy at least casts doubt on the legitimacy of traditional card check under voluntary recognition agreements, and may militate in favor of incorporating either secret ballot elections (administered privately or under the NLRB’s consent procedures) or some variant of “Card Check 2.0” into these agreements.

Whatever his argument may imply for voluntary recognition agreements, Sachs has offered an important reconceptualization of the union representation process and a major innovation in its regulation. The opponents of labor law reform have had a field day attacking EFCA’s substitution of card check for secret ballots and painting its union proponents as undemocratic. Organized labor needs the public,

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<sup>23</sup> See *id.* at 693 n.160. Indeed, an employer’s agreeing to neutrality itself conveys valuable information about the prospect of constructive engagement in the event that the union gains majority support. To the extent employees’ preferences are “adaptive,” they are likely to perceive greater benefits to union representation where their employer is willing to deal with a union rather than committed to resisting it.

<sup>24</sup> *Id.*

<sup>25</sup> Sachs does point out some features of the voluntary recognition setting that might abate concerns about undue union influence; for example, heavy-handed card solicitation tactics may be less likely when an employer has pledged neutrality. See *id.* at 696 n.172, 717 n.277.

and the public has come to virtually equate secret ballot elections with democracy. Sachs has offered a way to defuse the overriding threat to employee free choice that is posed by aggressive employer resistance while retaining the real and symbolic virtues of secret ballot voting.