Overview

The Employee Free Choice Act (EFCA) inspired contentious debate regarding structural redesigns—primarily “card check” and “rapid elections”—that would enhance employee choice by minimizing managerial influence in the unionization process. Maximizing employee preference and the appropriateness of managerial intervention have long been issues at the heart of the labor law debate. This Article answers both questions through the lens of legal default rules, borrowing from similar concepts in statutory interpretation and corporate law. The author argues that where the legislature cannot say with certainty which default rule will maximize employee satisfaction (collective or individual bargaining), the legislature should choose the default rule from which it is easier to depart. He frames card check and rapid elections as “asymmetry-correcting altering rules”—means of mitigating the impediments that block departure from a nonunion default to a union setting. While both are viable means of correcting the value-maximizing asymmetry, the Article concludes by suggesting two decisional mechanisms that may be even more effective in maximizing employee choice—a new system titled Card Check 2.0.

Legal Default Rules in Statutory Interpretation: The Article first points to the preference-eliciting default theory in statutory interpretation, an academic justification for doctrines such as the rule of lenity. The theory requires courts to choose the interpretation more likely to be corrected by the legislature because it burdens the more politically powerful group. By choosing the interpretation favored by the politically weaker side, the court can invite legislative correction in the event that it chooses wrongly, and thereby maximize political satisfaction.

Legal Default Rules in Contract Law: The Article then considers the reversible default theory in corporate law. When there is uncertainty regarding the most valuable arrangement of a corporate charter, this theory dictates that preference should generally be given to the alternative that is more restrictive of managers. Because management maintains control over the charter amendment process, this restrictive alternative will be reversed if it turns out to be value decreasing, whereas a value-decreasing default that favors managers is more likely to remain in place.

Applying Altering Rules to Employee Choice: Because of a series of collective action problems and market failures that disproportionately affect employees who wish to move from nonunion to union settings, and because of managerial opposition to unionization, the Article shows that it is more difficult for employees to depart from a nonunion default than it would be for employees to depart from a union default.

- Causes of value-maximizing asymmetry in employee choice:
  - “Intrapersonal collective action” problem: short-term costs of unionizing can outweigh long-term unionization gains for workers
  - “Intertemporal market failure” problem: workers that participate in the unionizing campaign rarely enjoy the benefits that their organizing efforts will provide to the incoming workforce
Traditional collective action problems: employers can ban union-related speech and bar outside organizers from firm property
Employer intervention problems: employers often stymie unionization by threatening to shutter the enterprise and discharging employees in retaliation for their unionization efforts

Altering Rules Are Preferable to Improved Enforcement of the Current Scheme and Even to a Union Default Rule: A union default rule and an asymmetry-correcting altering rule will both serve to maximize employee choice. Putting aside the obvious political obstacles preventing a shift to a union default, the Article favors the latter because of a problem created by the natural dynamism of the workforce: each time a union is decertified by a particular workforce, the firm returns to a nonunion default position for all future workforces. An altering rule is also preferable to an ex-post legal sanction for ULPs. The rules suggested here offer structural solutions that can minimize the possibility that enforcement violations occur altogether.

Criticism of Mandatory Card Check and Rapid Elections: The Article finds that the open decisionmaking mechanism of mandatory card check invites outside influence and may ultimately limit employee choice. As evidence, the author looks to the influence, or ‘epistemological authority,’ that paid organizers wield over employee-voters. Organizers, alongside ‘natural leaders’ within the firm, may use this heightened status to influence voters. Sachs also notes that at least some workers will be affected negatively by a public voting choice, regardless of the unionization outcome.

While rapid elections preserve confidentiality, avoiding the concerns above, they may not be swift enough to correct the asymmetry. Hasty NLRB execution of union elections may be unrealistic and employers may catch wind of unionization efforts before a petition is even filed.

Card Check 2.0: Drawing on technology used in union elections in the airline and railway industries, Sachs first offers a model of confidential phone and internet voting in union elections. In these industries, the National Mediation Board supplements mail balloting with toll-free telephone numbers and designated websites. Employees are assigned a unique voter identification number (VIN) and use this code to vote confidentially through their preferred format. This report suggests that a neutral agency (perhaps the NLRB) could administer a similar process. After receiving a union request and the names of the bargaining unit members, the agency would assign VINs and oversee the election, continuously tallying votes until the end of the voting period.

Sachs then looks to contemporary American elections, where continuous in-person and mail ballot voting are increasingly popular. Applied here, once the union reached a certain threshold of support, the agency could establish an offsite polling place that would remain open during the organizing phase of the campaign. In a mail voting variant, the agency could mail ballots directly to workers or provide them to the union for distribution. In both variants, the agency could borrow from state election law rules regarding interference and confidentiality (i.e. prohibiting electioneering near polling places; prohibiting third parties from handling completed absentee ballots) to preserve secrecy and prevent fraud.

As both suggestions minimize managerial intervention in the union organizing process, the Articles concludes that either would redesign the rules of employee decisionmaking consistent with contemporary legal theory on maximizing choice.